GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

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GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

Volume 2

Chapters 1B Through 8B

Prepared Under the Supervision of
The Department of Justice
of the State of North Carolina
by
the Editorial Staff of the Publisher

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Preface

This volume contains the general laws of a permanent nature enacted by the General Assembly through the 2007 Regular Session and 1st Extra Session that are within Chapters 1B through 8B, and brings to date the annotations included therein.

A majority of the Session Laws are made effective upon becoming law, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 60 days after the adjournment of the session" in which passed.

A ready reference index is included at the back of this volume. This index is intended to give the user a quick reference to larger bodies of statutes within this volume only. For detailed research on any subject, both within this volume and the General Statutes as a whole, see the General Index to the General Statutes.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, selected opinions which construe a specific statute are cited in the annotations to that statute. For a copy of an opinion or of its headnotes, write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

This recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any suggestions they may have for improving the General Statutes to the Department, or to LexisNexis, Charlottesville, Virginia.

Roy Cooper
Attorney General

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 2007 Regular Session and 1st Extra Session affecting Chapters 1B through 8B of the General Statutes.

Annotations:

This publication contains annotations taken from decisions of the North Carolina Supreme Court posted on LEXIS through September 21, 2007, decisions of the North Carolina Court of Appeals posted on LEXIS through September 21, 2007, and decisions of the appropriate federal courts posted through September 21, 2007. These cases will be printed in the following reporters:

South Eastern Reporter 2nd Series.
Federal Reporter 3rd Series.
Federal Supplement 2nd Series.
Federal Rules Decisions.
Bankruptcy Reports.
Supreme Court Reporter.

Additionally, annotations have been taken from the following sources:

North Carolina Law Review.
Wake Forest Law Review.
Campbell Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 for the complete User's Guide.

Abbreviations

(The abbreviations below are those found in the General Statutes that refer to prior codes.)

P.R.	Potter's Revisal (1821, 1827)
R.S.	Revised Statutes (1837)
R.C.	Revised Code (1854)
C.C.P.	Code of Civil Procedure (1868)
Code	Code (1883)
Rev.	Revisal of 1905
C.S.	Consolidated Statutes (1919, 1924)

STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

December 2007

I, Roy Cooper, Attorney General of North Carolina, do hereby certify that the foregoing 2007 Replacement Code to the General Statutes of North Carolina was prepared and published by LexisNexis under the supervision of the Department of Justice of the State of North Carolina.

Roy Cooper

Attorney General of North Carolina

Table of Contents

For complete listing of chapters set out in the North Carolina General Statutes, see the Table of Contents included in Volume 1.

VOLUME 2

Chapter 1B. Contribution, G.S. 1B-1 to 1B-8
  Art. 1. Uniform Contribution Among Tort-Feasors Act, G.S. 1B-1 to 1B-6
  Art. 2. Judgment Against Joint Obligors or Joint Tort-Feasors, G.S. 1B-7
  Art. 3. Cross Claims and Joinder of Third Parties for Contribution [Repealed.]
Chapter 1C. Enforcement of Judgments, G.S. 1C-1601 to 1C-1839
  Art. 1 to 15. [Reserved.]
  Art. 16. Exempt Property, G.S. 1C-1601 to 1C-1700
  Art. 17. Uniform Enforcement of Foreign Judgments Act, G.S. 1C-1701 to 1C-1749
  Art. 17A. Enforcement of Foreign Judgments for Noncompensatory Damages [Repealed.]
  Art. 18. North Carolina Foreign Money Judgments Recognition Act, G.S. 1C-1800 to 1C-1819
  Art. 19. The North Carolina Foreign-Money Claims Act, G.S. 1C-1820 to 1C-1839
Chapter 1D. Punitive Damages, G.S. 1D-1 to 1D-50
Chapter 1E. Eastern Band of Cherokee Indians, G.S. 1E-1
  Art. 1. Full Faith and Credit, G.S. 1E-1
Chapter 2. Clerk of Superior Court [Repealed and Transferred.]
Chapter 3. Commissioners of Affidavits and Deeds [Repealed.]
Chapter 4. Common Law, G.S. 4-1
Chapter 5. Contempt [Repealed.]
Chapter 5A. Contempt, G.S. 5A-1 to 5A-34
  Art. 1. Criminal Contempt, G.S. 5A-1 to 5A-20
  Art. 2. Civil Contempt, G.S. 5A-21 to 5A-30
  Art. 3. Contempt by Juveniles, G.S. 5A-31 to 5A-34
Chapter 6. Liability for Court Costs, G.S. 6-1 to 6-65
  Art. 1. Generally, G.S. 6-1 to 6-12
  Art. 2. When State Liable for Costs, G.S. 6-13 to 6-17.1
  Art. 3. Civil Actions and Proceedings, G.S. 6-18 to 6-32
  Art. 4. Costs on Appeal, G.S. 6-33 to 6-35
  Art. 5. Liability of Counties in Criminal Actions, G.S. 6-36 to 6-44
  Art. 6. Liability of Defendant in Criminal Actions, G.S. 6-45 to 6-48
  Art. 7. Liability of Prosecuting Witness for Costs, G.S. 6-49 to 6-50
  Art. 8. Fees of Witnesses, G.S. 6-51 to 6-63
  Art. 9. Criminal Costs Before Justices, Mayors, County or Recorders' Courts [Repealed.]
Chapter 7. Courts [Repealed and Transferred.]
Chapter 7A. Judicial Department, G.S. 7A-1 to 7A-808

Subchapter I. General Court Of Justice

  Art. 1. Judicial Power and Organization, G.S. 7A-1 to 7A-4
  Art. 1A. [Reserved.]

Art. 1B. Age Limits for Service as Justice or Judge, G.S. 7A-4.20 to 7A-4.21

SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE

Art. 2. Appellate Division Organization, G.S. 7A-5 to 7A-9
Art. 3. The Supreme Court, G.S. 7A-10 to 7A-15
Art. 4. Court of Appeals, G.S. 7A-16 to 7A-24
Art. 5. Jurisdiction, G.S. 7A-25 to 7A-39
Art. 6. Retirement of Justices and Judges of the Appellate Division; Retirement Compensation; Recall to Emergency Service; Disability Retirement, G.S. 7A-39.1 to 7A-39.15

SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE

Art. 7. Organization, G.S. 7A-40 to 7A-49.5
Art. 8. Retirement of Judges of the Superior Court; Retirement Compensation for Superior Court Judges; Recall to Emergency Service of Judges of the District and Superior Court; Disability Retirement for Judges of the Superior Court, G.S. 7A-50 to 7A-59
Art. 9. District Attorneys and Judicial Districts, G.S. 7A-60 to 7A-69.1
Art. 10. [Reserved.]
Art. 11. Special Regulations, G.S. 7A-95 to 7A-99
Art. 12. Clerk of Superior Court, G.S. 7A-100 to 7A-129

SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE GENERAL COURT OF JUSTICE

Art. 13. Creation and Organization of the District Court Division, G.S. 7A-130 to 7A-139
Art. 14. District Judges, G.S. 7A-140 to 7A-159
Art. 15. District Prosecutors [Repealed.]
Art. 16. Magistrates, G.S. 7A-170 to 7A-179
Art. 17. Clerical Functions in the District Court, G.S. 7A-180 to 7A-189
Art. 18. District Court Practice and Procedure Generally, G.S. 7A-190 to 7A-209
Art. 19. Small Claim Actions in District Court, G.S. 7A-210 to 7A-239

SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE

Art. 20. Original Civil Jurisdiction of the Trial Divisions, G.S. 7A-240 to 7A-254
Art. 21. Institution, Docketing, and Transferring Civil Causes in the Trial Divisions, G.S. 7A-255 to 7A-269
Art. 22. Jurisdiction of the Trial Divisions in Criminal Actions, G.S. 7A-270 to 7A-276
Art. 22A. Prohibited Orders, G.S. 7A-276.1
Art. 23. Jurisdiction and Procedure Applicable to Children [Repealed.]
Art. 24. Juvenile Services [Repealed.]
Art. 24A. Delinquency Prevention and Youth Services [Repealed.]
Art. 24B. Termination of Parental Rights, G.S. 7A-289.22 to 7A-289.35
Art. 25. Jurisdiction and Procedure in Criminal Appeals from District Courts, G.S. 7A-290
Art. 26. Additional Powers of District Court Judges and Magistrates, G.S. 7A-291 to 7A-299

Subchapter VI. Revenues and Expenses of the Judicial Department

Art. 27. Expenses of the Judicial Department, G.S. 7A-300 to 7A-303
Art. 28. Uniform Costs and Fees in the Trial Divisions, G.S. 7A-304 to 7A-339

Subchapter VII. Administrative Matters

Art. 29. Administrative Office of the Courts, G.S. 7A-340 to 7A-354
Art. 29A. Trial Court Administrators, G.S. 7A-355 to 7A-374
Art. 30. Judicial Standards Commission, G.S. 7A-374.1 to 7A-399
Art. 31. Judicial Council [Repealed.]
Art. 31A. State Judicial Council, G.S. 7A-409 to 7A-409.2
Art. 31B. Declaration of Vacancy, Suspension of Salary, G.S. 7A-410 to 7A-410.1

Subchapter VIII. Conference of District Attorneys

Art. 32. Conference of District Attorneys, G.S. 7A-411 to 7A-414
Art. 33 to 35. [Reserved.]

Subchapter IX. Representation of Indigent Persons

Art. 36. Entitlement of Indigent Persons Generally, G.S. 7A-450 to 7A-464
Art. 37. The Public Defender, G.S. 7A-465 to 7A-474
Art. 37A. Access to Civil Justice Act, G.S. 7A-474.1 to 7A-474.15
Art. 37B. Domestic Violence Victim Assistance Act, G.S. 7A-474.16 to 7A-474.20
Art. 38. Appellate Defender Office [Expired.]
Art. 38A. Appellate Defender Office, G.S. 7A-486 to 7A-488
Art. 39. Guardian Ad Litem Program, G.S. 7A-489 to 7A-493
Art. 39A. Custody and Visitation Mediation Program, G.S. 7A-494 to 7A-497
Art. 39B. Indigent Defense Services Act, G.S. 7A-498 to 7A-499

Subchapter X. North Carolina Courts Commission

Art. 40. North Carolina Courts Commission [Repealed.]
Art. 40A. North Carolina Courts Commission, G.S. 7A-506 to 7A-515

Subchapter XI. North Carolina Juvenile Code

Art. 41. Purpose; Definitions [Repealed.]
Art. 42. Jurisdiction [Repealed.]
Art. 43. Screening of Delinquency and Undisciplined Petitions [Repealed.]
Art. 44. Screening of Abuse and Neglect Complaints [Repealed.]
Art. 45. Venue; Petition; Summons [Repealed.]
Art. 46. Temporary Custody; Secure and Nonsecure Custody; Custody Hearings, G.S. 7A-571 to 7A-583
Art. 47. Basic Rights [Repealed.]
Art. 48. Law-Enforcement Procedures in Delinquency Proceedings [Repealed.]
Art. 49. Transfer to Superior Court [Repealed.]
Art. 50. Discovery [Repealed.]

Art. 51. Hearing Procedures [Repealed.]
Art. 52. Dispositions [Repealed.]
Art. 53. Modification and Enforcement of Dispositional Orders; Appeals [Repealed.]
Art. 54. Juvenile Records and Social Reports [Repealed.]
Art. 55. Interstate Compact on Juveniles [Repealed.]
Art. 56. Emancipation [Repealed.]
Art. 57. Judicial Consent for Emergency Surgical or Medical Treatment [Repealed.]
Art. 58. Juvenile Law Study Commission [Repealed.]
Art. 59. [Repealed.]

SUBCHAPTER XII. ADMINISTRATIVE HEARINGS

Art. 60. Office of Administrative Hearings, G.S. 7A-750 to 7A-769

SUBCHAPTER XIII. SENTENCING SERVICES PROGRAM

Art. 61. Sentencing Services Program, G.S. 7A-770 to 7A-789

SUBCHAPTER XIV. DRUG TREATMENT COURTS

Art. 62. North Carolina Drug Treatment Court Act, G.S. 7A-790 to 7A-804

SUBCHAPTER XV. CONFERENCE OF CLERKS OF SUPERIOR COURT

Art. 63. Conference of Clerks of Superior Court, G.S. 7A-805 to 7A-808
Chapter 7B. Juvenile Code, G.S. 7B-100 to 7B-4002

SUBCHAPTER I. ABUSE, NEGLECT, DEPENDENCY

Art. 1. Purposes; Definitions, G.S. 7B-100 to 7B-101
Art. 2. Jurisdiction, G.S. 7B-200 to 7B-299
Art. 3. Screening of Abuse and Neglect Complaints, G.S. 7B-300 to 7B-319
Art. 3A. Expunction; Responsible Individuals List, G.S. 7B-320 to 7B-399
Art. 4. Venue; Petitions, G.S. 7B-400 to 7B-413
Art. 5. Temporary Custody; Nonsecure Custody; Custody Hearings, G.S. 7B-500 to 7B-508
Art. 6. Basic Rights, G.S. 7B-600 to 7B-603
Art. 7. Discovery, G.S. 7B-700
Art. 8. Hearing Procedures, G.S. 7B-800 to 7B-808
Art. 9. Dispositions, G.S. 7B-900 to 7B-911
Art. 10. Modification and Enforcement of Dispositional Orders; Appeals, G.S. 7B-1000 to 7B-1004
Art. 11. Termination of Parental Rights, G.S. 7B-1100 to 7B-1113
Art. 12. Guardian Ad Litem Program, G.S. 7B-1200 to 7B-1204
Art. 13. Prevention of Abuse and Neglect, G.S. 7B-1300 to 7B-1302
Art. 14. North Carolina Child Fatality Prevention System, G.S. 7B-1400 to 7B-1414

SUBCHAPTER II. UNDISCIPLINED AND DELINQUENT JUVENILES

Art. 15. Purposes; Definitions, G.S. 7B-1500 to 7B-1501
Art. 16. Jurisdiction, G.S. 7B-1600 to 7B-1604

Art. 17. Screening of Delinquency and Undisciplined Complaints, G.S. 7B-1700 to 7B-1707
Art. 18. Venue; Petition; Summons, G.S. 7B-1800 to 7B-1808
Art. 19. Temporary Custody; Secure and Nonsecure Custody; Custody Hearings, G.S. 7B-1900 to 7B-1907
Art. 20. Basic Rights, G.S. 7B-2000 to 7B-2002
Art. 21. Law Enforcement Procedures in Delinquency Proceedings, G.S. 7B-2100 to 7B-2109
Art. 22. Probable Cause Hearing and Transfer Hearing, G.S. 7B-2200 to 7B-2204
Art. 23. Discovery, G.S. 7B-2300 to 7B-2303
Art. 24. Hearing Procedures, G.S. 7B-2400 to 7B-2414
Art. 25. Dispositions, G.S. 7B-2500 to 7B-2517
Art. 26. Modification and Enforcement of Dispositional Orders; Appeals, G.S. 7B-2600 to 7B-2606
Art. 27. Authority over Parents of Juveniles Adjudicated Delinquent or Undisciplined, G.S. 7B-2700 to 7B-2706
Art. 28. Interstate Compact on Juveniles, G.S. 7B-2800 to 7B-2899

Subchapter III. Juvenile Records

Art. 29. Records and Social Reports of Cases of Abuse, Neglect, and Dependency, G.S. 7B-2900 to 7B-2902
Art. 30. Juvenile Records and Social Reports of Delinquency and Undisciplined Cases, G.S. 7B-3000 to 7B-3001
Art. 31. Disclosure of Juvenile Information, G.S. 7B-3100 to 7B-3102
Art. 32. Expunction of Juvenile Records, G.S. 7B-3200 to 7B-3202
Art. 33. Computation of Recidivism Rates [Repealed.]

Subchapter IV. Parental Authority; Emancipation

Art. 34. Parental Authority over Juveniles, G.S. 7B-3400 to 7B-3404
Art. 35. Emancipation, G.S. 7B-3500 to 7B-3509
Art. 36. Judicial Consent for Emergency Surgical or Medical Treatment, G.S. 7B-3600

Subchapter V. Placement of Juveniles

Art. 37. Placing or Adoption of Juvenile Delinquents or Dependents, G.S. 7B-3700 to 7B-3705
Art. 38. Interstate Compact on the Placement of Children, G.S. 7B-3800 to 7B-3806
Art. 39. Interstate Compact on Adoption and Medical Assistance, G.S. 7B-3900 to 7B-3906
Art. 40. Interstate Compact for Juveniles, G.S. 7B-4000 to 7B-4002
Chapter 8. Evidence, G.S. 8-1 to 8-110
  Art. 1. Statutes, G.S. 8-1 to 8-5
  Art. 2. Grants, Deeds and Wills, G.S. 8-6 to 8-33
  Art. 3. Public Records, G.S. 8-34 to 8-37
  Art. 3A. Findings, Records and Reports of Federal Officers and Employees, G.S. 8-37.1 to 8-37.3
  Art. 4. Other Writings in Evidence, G.S. 8-38 to 8-45
  Art. 4A. Photographic Copies of Business and Public Records, G.S. 8-45.1 to 8-45.4
  Art. 4B. Evidence of Fraud, Duress, Undue Influence, G.S. 8-45.5
  Art. 5. Life Tables, G.S. 8-46 to 8-47

Art. 6. Calendars, G.S. 8-48
Art. 7. Competency of Witnesses, G.S. 8-49 to 8-58.5
Art. 7A. Restrictions on Evidence in Rape Cases [Repealed.]
Art. 7B. Expert Testimony, G.S. 8-58.15 to 8-58.19 [Reserved.]
Art. 7C. Admissibility of Forensic Evidence, G.S. 8-58.20
Art. 8. Attendance of Witness, G.S. 8-59 to 8-64
Art. 9. Attendance of Witnesses from Without State [Transferred.]
Art. 10. Depositions, G.S. 8-71 to 8-84
Art. 11. Perpetuation of Testimony, G.S. 8-85 to 8-88
Art. 12. Inspection and Production of Writings [Repealed and Reserved.]
Art. 13. Photographs, G.S. 8-97 to 8-102
Art. 14. Chain of Custody, G.S. 8-103 to 8-109
Art. 15. Mediation Negotiations, G.S. 8-110
Chapter 8A. Interpreters for Deaf Persons [Recodified.]
Chapter 8B. Interpreters for Deaf Persons, G.S. 8B-1 to 8B-10

Chapter 1B.

Contribution.

Article 1.

Uniform Contribution Among Tort-Feasors Act.

Sec.
1B-1. Right to contribution.
1B-2. Pro rata shares.
1B-3. Enforcement.
1B-4. Release or covenant not to sue.
1B-5. Uniformity of interpretation.
1B-6. Short title.

Article 2.

Judgment Against Joint Obligors or Joint Tort-Feasors.

Sec.
1B-7. Payment of judgment by one of several.

Article 3.

Cross Claims and Joinder of Third Parties for Contribution.

1B-8. [Repealed.]

ARTICLE 1.

Uniform Contribution Among Tort-Feasors Act.

§ 1B-1. Right to contribution.

(a) Except as otherwise provided in this Article, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tort-feasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(c) There is no right of contribution in favor of any tort-feasor who has intentionally caused or contributed to the injury or wrongful death.

(d) A tort-feasor who enters into a settlement with a claimant is not entitled to recover contribution from another tort-feasor whose liability for the injury or wrongful death has not been extinguished nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(e) A liability insurer, who by payment has discharged in full or in part the liability of a tort-feasor and has thereby discharged in full its obligation as insurer, succeeds to the tort-feasor's right of contribution to the extent of the amount it has paid in excess of the tort-feasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

(f) This Article does not impair any right of indemnity under existing law. Where one tort-feasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

(g) This Article shall not apply to breaches of trust or of other fiduciary obligation.

(h) The provisions of this Article shall apply to tort claims against the State. However, in such cases, the same rules governing liability and the limits of liability shall apply to the State and its agencies as in cases heard before the Industrial Commission. The State's share in such cases shall not exceed the pro rata share based upon the maximum amount of liability under the Tort Claims Act.

(i) The provisions of this Article shall apply to the injury or death of an employee of any common carrier by rail which is subject to the provisions of Chapter 2 of Title 45 of the United States Code (45 U.S.C. § 51 et seq.) or G.S. 62-242 where such injury or death is caused by the joint or concurring negligence of such common carrier by rail and any other person or persons. In any such instance, the following will apply:

(1) Where liability is imposed or sought to be imposed only on such common carrier by rail, the railroad is entitled to contribution from any other such person or persons;
(2) Where liability is imposed or sought to be imposed only on a person or persons other than a common carrier by rail, such other person or persons are entitled to contribution from the railroad;
(3) Where liability is imposed or sought to be imposed on both a common carrier by rail and any other person or persons, damages shall be determined as provided in Chapter 2 of Title 45 of the United States Code (45 U.S.C. § 51 et seq.) or G.S. 62-242 whichever controls the claim. (1967, c. 847, s. 1; 1975, c. 587, s. 2; 1979, c. 620.)

Legal Periodicals. — For article on permissive joinder of parties and causes, see 34 N.C.L. Rev. 405 (1956).

For note on effect of covenant not to sue, see 35 N.C.L. Rev. 141 (1956).

For note on cross claim for contribution, see 40 N.C.L. Rev. 633 (1962).

For comment on rights of contribution, see 41 N.C.L. Rev. 882 (1963).

For comment on contribution among joint tort-feasors and rights of insurers, see 44 N.C.L. Rev. 142 (1965).

For case law survey as to contribution, indemnity and settlement, see 44 N.C.L. Rev. 1051 (1966).

For comment on this chapter, see 47 N.C.L. Rev. 274 (1968).

For additional comment on this chapter, see 5 Wake Forest Intra. L. Rev. 160 (1969).

For note discussing North Carolina's retention of its partial parent-child immunity doctrine, in light of Lee v. Mowett Sales Co., 316 N.C. 489, 342 S.E.2d 882 (1986), and arguing for its abrogation, see 65 N.C.L. Rev. 1457 (1987).

For note, "The Release Provision of the Uniform Contribution Among Tort-Feasors Act Applies to Vicarious Liability in the Master-Servant Context — Yates v. New South Pizza, Ltd.," see 15 Campbell L. Rev. 55 (1992).

CASE NOTES

I. In General.
II. Decisions under Prior Law.

I. IN GENERAL.

Chapter Inapplicable in Contract Actions. — By its terms, this Chapter applies only in tort actions, not contract actions. Duke Univ. v. St. Paul Mercury Ins. Co., 95 N.C. App. 663, 384 S.E.2d 36 (1989).

It is the intent of draftsmen of uniform acts that as much as possible they be given uniform interpretation among those states where they are in force. Battle v. Clanton, 27 N.C. App. 616, 220 S.E.2d 97 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

Article Applies Specifically to Liability for Injury or Wrongful Death. — This Article specifically refers to liability for injury or wrongful death. Simmons v. Wilder, 6 N.C. App. 179, 169 S.E.2d 480 (1969).

And Contemplates Encouragement of Settlements. — This Article contemplates that settlements are to be encouraged. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

This statute provides a new right of action wholly distinct from common-law right of indemnity. Ingram v. Smith, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

But it does not affect the common-law right of indemnity arising from primary-secondary liability. Ingram v. Smith, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

Irrespective of whether this Chapter codifies the right to indemnification as it does the right to contribution, there exists in North Carolina a common law right to indemnification of a passively negligent tort-feasor from an actively negligent tort-feasor. Teachy v. Coble Dairies, Inc., 306 N.C. 324, 293 S.E.2d 182 (1982).

The rights of contribution and indemnity are mutually inconsistent; the former assumes joint fault, the latter only derivative fault. Ingram v. Smith, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

Person who takes the position that he is free of negligence is not entitled to contribution. Nationwide Mut. Ins. Co. v. Weeks-Allen Motor Co., 18 N.C. App. 689, 198 S.E.2d 88 (1973).

The right to contribution is statutory and is applicable only between joint tort-feasors. Roseboro Ford, Inc. v. Bass, 77 N.C. App. 363, 335 S.E.2d 214 (1985).

No Right to Contribution from One Not a Joint Tort-Feasor. — Where the party from whom contribution is sought is not a tort-feasor and not jointly liable, there is no right to contribution. Nationwide Mut. Ins. Co. v. Weeks-Allen Motor Co., 18 N.C. App. 689, 198 S.E.2d 88 (1973).

There is no right to contribution from one who is not a joint tort-feasor. Holland v. Edgerton, 85 N.C. App. 567, 355 S.E.2d 514 (1987).

The right to contribution does not exist unless two or more parties are joint tort-feasors. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

Since plaintiff general contractor did not allege negligence claims against defendant subcontractors that were not otherwise covered by contractual obligations, there was no tort-feasor, and thus, no statutory right to contribution under G.S. 1B-1; the trial court properly dismissed the claims against the subcontractors under G.S. 1A-1, Rule 12(b)(6). Kaleel Builders, Inc. v. Ashby, 161 N.C. App. 34, 587 S.E.2d 470, 2003 N.C. App. LEXIS 1993 (2003), cert. denied, 358 N.C. 235, 595 S.E.2d 152 (2004).

Nor for Claim on Contract. — Under subsection (a) of this section, a defendant is entitled to contribution where he and one or more other persons are jointly or severally liable in tort. By the clear language of the statute, a defendant is not entitled to contribution for a claim against him in contract. Holland v. Edgerton, 85 N.C. App. 567, 355 S.E.2d 514 (1987).

Claim for relief, based on a breach of implied warranty, gave rise to no right of contribution on the part of third party plaintiff, because it sounded in contract and not in tort. Holland v. Edgerton, 85 N.C. App. 567, 355 S.E.2d 514 (1987).

Contribution Not Available for Intentional Infliction of Mental Distress. — The language of subsection (c) of this section clearly excludes the possibility of contribution on any claim by plaintiffs for intentional infliction of mental distress. Holland v. Edgerton, 85 N.C. App. 567, 355 S.E.2d 514 (1987).

Liability of State Restricted. — Although under this Article, the State may be sued for contribution as a joint tort-feasor; the rules governing and limiting the liability of the State and its agencies as provided in the Tort Claims Act apply. Guthrie v. North Carolina State Ports Auth., 307 N.C. 522, 299 S.E.2d 618 (1983).

Effect of Release or Covenant Not to Sue under § 1B-4. — The provisions of this section provide for contribution under certain circumstances, but G.S. 1B-4 takes away this right of contribution when the provisions thereof are complied with. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

Releases and covenants not to sue. — Releases and covenants not to sue are treated the same under the Uniform Contribution Among Tort-feasors Act, G.S. 1B-1 et seq., and absent other evidence, a release that releases all other persons or entities is valid; an all encompassing release signed by a pedestrian in exchange for a payment from a motorist's insurance company barred the pedestrian's later underinsured motorist claim against his employer's insurer, and summary judgment in favor of the motorist and the insurer was affirmed. Van Keuren v. Little, 165 N.C. App. 244, 598 S.E.2d 168, 2004 N.C. App. LEXIS 1154 (2004), cert. denied, 359 N.C. 197, 608 S.E.2d 328 (2004).

The determination of whether a settlement was reached in good faith is within the discretion of the trial court, which will consider the "totality of the circumstances" and may, but is not obligated to, consider any number of factors, such as "a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, . . . a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial[,] . . . the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants." Brooks v. Wal-Mart Stores, Inc., 139 N.C. App. 637, 535 S.E.2d 55 (2000).

Primary and secondary liability between defendants exists only when: (1) They are jointly and severally liable to the plaintiff; and (2) Either (a) one has been passively negligent but is exposed to liability through the active negligence of the other, or (b) one alone has done the act which produced the injury, but the other is derivatively liable for the negligence of the former. Ingram v. Smith, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

The doctrine of primary-secondary liability is based upon a contract implied in law. Ingram v. Smith, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

And is therefore subject to the three-

year statute of limitations under G.S. 1-52(1). Ingram v. Smith, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

Who Are Joint Tort-Feasors. — Two or more parties are joint tort-feasors when their negligent or wrongful acts are united in time or circumstance such that the two acts constitute one transaction or when two separate acts concur in point of time and place to cause a single injury. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

If independent wrongful acts of two or more persons unite in producing a single indivisible injury, the parties are joint tort-feasors within the meaning of the law. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

Suit Against One or More Joint Tort-Feasors by Personal Representative. — The personal representative of a person killed by the negligence of two joint tort-feasors may, at his election, sue one or both of the tort-feasors. If he sues both and the jury finds them to be joint tort-feasors, the resulting judgment is joint and several and the party paying more than his pro rata share of the judgment is entitled to contribution from the other. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

Joinder of Other Tort-Feasors by Defendant. — Where plaintiff elects to sue only one of several joint tort-feasors, the original defendant may have others joined as additional or third party defendants. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

Separate Action by Defendant Against Other Tort-Feasor. — Where one of two joint tort-feasors is not made a party to the original action, either by the plaintiff or the original defendant, the original defendant may nevertheless, by separate action, seek contribution from the other tort-feasor. In such a case he must establish, not only that a judgment has been entered against him, but that the other party is in fact a joint tort-feasor, that is, that the other party is liable jointly with the original defendant to the plaintiff for damages. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

The burden is on the tort-feasor seeking contribution to show that the right exists, and to allege facts which show liability to the injured party as well as a right to contribution. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

Collateral Estoppel Not Available to Show Joint and Several Liability of One Not Made Defendant in Action. — Where, after wrongful death action in which mother was neither named as a defendant nor named as a third party defendant, and in which insured was found to have caused the death of child in a car accident, insurer sought contribution from mother for half of the money paid to the child's estate, the doctrine of collateral estoppel was not available to the insurer to show mother's joint and several liability to the estate of the child; since mother was not a party to the wrongful death claim and was not made a third party defendant for the purpose of contribution, neither her liability to the estate of child nor her liability to insurer as a joint tort-feasor was established by the judgment in the original action. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

To permit an original defendant against whom a judgment is entered in a claim for the wrongful death of a child to collect one-half of the judgment from the parent, based solely on determination of parent's negligence for the purpose of assessing damages against defendant, would effectively remove any need to make the parent a third party defendant. The practical effect of such a holding would be to prevent the parent's insurer from having an opportunity to defend a claim against the parent. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

Plaintiff's suit for contribution from a joint tortfeasors was not precluded by res judicata or collateral estoppel where an earlier settlement case between the defendants/tortfeasors and decedent's estate dealt only with issues of (1) good faith and (2) best interests of the estate and where the issue of the effect of the order approving the settlement on the respective rights of the joint tortfeasors to contribution was not ripe for determination until the plaintiff, as insurer for one of the joint tortfeasors, paid more than its share of the judgment. Medical Mut. Ins. Co. v. Mauldin, 137 N.C. App. 690, 529 S.E.2d 697, 2000 N.C. App. LEXIS 532 (2000), aff'd, 353 N.C. 352, 543 S.E.2d 478 (2001).

Third-party plaintiff had an affirmative burden to show that he met the requirements of subsection (d) of this section, and he failed to meet this burden where he did not introduce evidence of a release that he claimed he obtained from the injured party, nor show that third-party defendant's liability to the injured party had been extinguished. King v. Humphrey, 88 N.C. App. 143, 362 S.E.2d 614 (1987).

Trial court erred in not applying § 1B-4 where, in their complaint, plaintiffs treated defendants as joint tort-feasors and sought relief from flood damage caused by mud and silt runoff from all defendants' properties, and evidence at trial revealed only a single indivisible injury, the flooding of plaintiffs' property, and until appeal plaintiffs did not attempt to allocate their injury among defendants. Cox v.

Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

For defendant to be entitled to verdict reduction in the amount of a pretrial settlement between plaintiffs and two other defendants, it must not only appear that the three defendants are tort-feasors, but also that the negligence of all three defendants caused an indivisible injury. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

Church was not entitled to contribution from the YMCA where the church paid nothing of its own in settlement; therefore, it did not pay more than its pro rata share and was not entitled to contribution. Jones v. Shoji, 336 N.C. 581, 444 S.E.2d 203 (1994).

Although it appears that the legislature intended the phrase in subsection (f) of this section to mean "where one tort-feasor is entitled to indemnity from another tort-feasor," the language of the statute is simply "where one tort-feasor is entitled to indemnity from another." Since the term "another" as used in the statute is ambiguous, by applying principles of statutory construction to ascertain the legislative will, and the title of the Act makes clear that the statute applies to "tort-feasors"; the context of the legislation indicates that it is concerned only with the apportionment of loss as between tort-feasors, and the Act should not be read to speak to apportionment of loss by contract between a tort-feasor and a third party. Yates v. New S. Pizza, Ltd., 102 N.C. App. 66, 401 S.E.2d 380 (1991), rev'd on other grounds, 330 N.C. 790, 412 S.E.2d 666, reh'g denied, 331 N.C. 292, 417 S.E.2d 73 (1992).

Underinsured insurance carrier cannot assert a claim of contribution because the carrier is not a tortfeasor; however, the carrier can bring a direct action against one of the defendants even though that defendant executed a release in favor of the other defendants. Johnson v. Hudson, 122 N.C. App. 188, 468 S.E.2d 64 (1996).

If a negligent insurance broker was found to be an insurer's agent, the insurer could be liable for the broker's negligence, under the Uniform Contribution Among Tort-feasors Act, even though the broker settled with the insured who sued the insurer and the broker, G.S. 1B-1(a), the insurer was liable to the negligent broker for contribution to the amount for which the broker settled, because the broker's settlement with and release by the insured did not release the insurer, and the insurer's lack of direct negligence was immaterial. Jefferson Pilot Fin. Ins. Co. v. Marsh USA, Inc., 159 N.C. App. 43, 582 S.E.2d 701, 2003 N.C. App. LEXIS 1436 (2003), review dismissed sub nom. Jefferson Pilot Fin. Ins. Co. v. Marsh United States, Inc., 357 N.C. 658, 590 S.E.2d 266 (2003), review denied, 357 N.C. 658, 590 S.E.2d 267 (2003).

A Negligent Insurance Broker, Who Was an Agent of Insurer, Was Not Prohibited From Pursuing Contribution Against Insurer. Under the Uniform Contribution Among Tort-feasors Act, G.S. 1B-1(d), a negligent insurance broker, who was an agent of an insurer, was not prohibited from pursuing contribution against the insurer because the agent extinguished its tort cross-claims against the insurer. Jefferson Pilot Fin. Ins. Co. v. Marsh USA, Inc., 159 N.C. App. 43, 582 S.E.2d 701, 2003 N.C. App. LEXIS 1436 (2003), review dismissed sub nom. Jefferson Pilot Fin. Ins. Co. v. Marsh United States, Inc., 357 N.C. 658, 590 S.E.2d 266 (2003), review denied, 357 N.C. 658, 590 S.E.2d 267 (2003).

Pre-Judgment Interest. — Although an underlying wrongful death judgment awarded compensatory damages, apportionment of that judgment did not; therefore, prejudgment interest under G.S. 24-5(b) was properly denied since the contribution action under this article was derivative and based upon the codification of equitable principles. Medical Mut. Ins. Co. v. Mauldin, 157 N.C. App. 136, 577 S.E.2d 680, 2003 N.C. App. LEXIS 376 (2003).

Claim Sufficient to Survive Summary Judgment. — City's claim for contribution under the North Carolina Uniform Contribution Among Tortfeasors Act would survive summary judgment where facts could lead a rational jury to conclude that the driver was negligent in leaving her car with the keys inside, and that her negligence proximately caused plaintiff to be injured when her car was struck by driver's vehicle, being driven by another and being pursued by law enforcement officers. D'Alessandro v. Westall, 972 F. Supp. 965 (W.D.N.C. 1997).

Applied in Mann v. Virginia Dare Transp. Co., 283 N.C. 734, 198 S.E.2d 558 (1973); United States v. Ward, 618 F. Supp. 884 (E.D.N.C. 1985); Yates v. New S. Pizza, Ltd., 330 N.C. 790, 412 S.E.2d 666 (1992); Potter v. Hilemn Labs., Inc., 150 N.C. App. 326, 564 S.E.2d 259, 2002 N.C. App. LEXIS 492 (2002).

Cited in Waden v. McGhee, 274 N.C. 174, 161 S.E.2d 542 (1968); Robertson v. Bankers & Tel. Employers Ins. Co., 1 N.C. App. 122, 160 S.E.2d 115 (1968); Payseur v. Rudisill, 15 N.C. App. 57, 189 S.E.2d 562 (1972); Iowa Nat'l Mut. Ins. Co. v. Surratt, 19 N.C. App. 745, 200 S.E.2d 220 (1973); Wilson v. Bob Robinson's Auto Serv., Inc., 20 N.C. App. 47, 200 S.E.2d 393 (1973); Security Ins. Group v. Parker, 289 N.C. 391, 222 S.E.2d 437 (1976); Green v. Duke Power Co., 50 N.C. App. 646, 274 S.E.2d 889 (1981); Green v. Duke Power Co., 305 N.C. 603, 290 S.E.2d 593 (1982); Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 363 S.E.2d 643 (1988); Selective Ins. Co. v. NCNB Nat'l Bank, 324 N.C.

560, 380 S.E.2d 521 (1989); Sorrells v. M.Y.B. Hospitality Ventures, 108 N.C. App. 668, 424 S.E.2d 676 (1993); Broussad v. Meineke Disct. Muffler Shops, Inc., 958 F. Supp. 1087 (W.D.N.C. 1997); Bowman v. Alan Vester Ford Lincoln Mercury, 151 N.C. App. 603, 566 S.E.2d 818, 2002 N.C. App. LEXIS 886 (2002).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. *— The cases cited below were decided under former G.S. 1-240.*

Common Law. — At common law there was no right of contribution as between joint tort-feasors. Shaw v. Baxley, 270 N.C. 740, 155 S.E.2d 256 (1967).

Under the rules of the common law the right of one joint tort-feasor to compel contribution from another did not exist. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

Prior to enactment of former G.S. 1-240 one tort-feasor was, as a rule, not entitled to contribution from another. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

Legislative Intent. — It is safe to assume that the General Assembly was moved to enact former G.S. 1-240 by the reason underlying the entire law of contribution, namely, that where one person has been compelled to pay money which others were equally bound to pay, each of the latter in good conscience should contribute the proportion which he ought to pay of the amount expended to discharge the common burden or obligation. Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953).

Right to Contribution Among Joint Tort-Feasors Is Statutory. — At common law no right of action for contribution existed between or among joint tort-feasors who were in pari delicto; thus such right is statutory, and its use necessarily depends upon the terms of the statute. Godfrey v. Tidewater Power Co., 223 N.C. 647, 27 S.E.2d 736 (1943); Hayes v. City of Wilmington, 239 N.C. 238, 79 S.E.2d 792 (1954); Bell v. Lacey, 248 N.C. 703, 104 S.E.2d 833 (1958); Greene v. Charlotte Chem. Labs., 254 N.C. 680, 120 S.E.2d 82 (1961).

The enactment of former G.S. 1-240 created as to parties jointly and severally liable a new right and ready means for the enforcement of that right. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957).

Common-law rule that there is no right of contribution between joint tort-feasors has been modified in this State so as to provide for enforcement of contribution as between joint tort-feasors in the manner and to the extent provided by statute. Herring v. Jackson, 255 N.C. 537, 122 S.E.2d 366 (1961).

In this jurisdiction, the common-law rule has been modified by statute so as to provide for enforcement of contribution as between joint tort-feasors in accordance with its provisions. Shaw v. Baxley, 270 N.C. 740, 155 S.E.2d 256 (1967).

Former G.S. 1-240 seemed to abrogate the well-settled rule, that, subject to some exceptions (see Gregg v. City of Wilmington, 155 N.C. 18, 70 S.E. 1070 (1911), there can be no contribution between joint tort-feasors. Raulf v. Elizabeth City Light & Power Co., 176 N.C. 691, 97 S.E. 236 (1918); Lineberger v. Gastonia, 196 N.C. 445, 146 S.E. 79 (1929); Hayes v. City of Wilmington, 239 N.C. 238, 79 S.E.2d 792 (1954).

And Must Be Enforced According to Statute. — The right to contribution comes from the statute, and it is to be enforced according to the form of the statute. Tarkington v. Rock Hill Printing & Finishing Co., 230 N.C. 354, 53 S.E.2d 269 (1949); Potter v. Frosty Morn Meats, Inc., 242 N.C. 67, 86 S.E.2d 780 (1955).

Former G.S. 1-240 created a new right and provided an exclusive remedy, and substantial compliance with its terms was necessary to make it available. Hoft v. Mohn, 215 N.C. 397, 2 S.E.2d 23 (1939); Potter v. Frosty Morn Meats, Inc., 242 N.C. 67, 86 S.E.2d 780 (1955).

Contribution is made the rule and not the exception by statute. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

Enforcement of Contribution Authorized. — In substance former G.S. 1-240 provided that where two or more persons were liable for their joint tort and judgment had been rendered against some, but not all, those who had paid could enforce contribution against the others who were jointly liable. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

Joint tort-feasors and joint judgment debtors are given the right to contribution. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

And there can be no contribution unless the parties are joint tort-feasors. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

Liability for contribution under the statute cannot be invoked except among joint tort-feasors. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953); Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965).

An original defendant may not invoke the statutory right of contribution against another party in a tort action unless both parties are liable as joint tort-feasors to the plaintiff in the action. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965).

A defendant who has been sued for tort may bring into the action for the purpose of enforcing contribution only a joint tort-feasor whom plaintiff could have sued originally in the same action. Petrea v. Ryder Tank Lines, 264 N.C. 230, 141 S.E.2d 278 (1965).

Where insureds are adjudged to be joint tort-feasors and judgments are rendered against them, they are within the specific provisions of the statute. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

The right of contribution is a personal right. Pittman v. Snedeker, 264 N.C. 55, 140 S.E.2d 740 (1965).

And Cannot Be Assigned or Transferred. — The right of contribution is not one that can be assigned or transferred by operation of law under the doctrine of subrogation. Pittman v. Snedeker, 264 N.C. 55, 140 S.E.2d 740 (1965).

Right to Contribution Is Not Dependent on Plaintiff's Continued Right to Sue. — The right of one joint tort-feasor to enforce contribution against another is said to spring from the plaintiff's suit. This right of contribution, however, projects itself beyond the plaintiff's suit, and is not dependent upon the plaintiff's continued right to sue both or all the joint tort-feasors. Godfrey v. Tidewater Power Co., 223 N.C. 647, 27 S.E.2d 736, 149 A.L.R. 1183 (1943).

As it is the joint tort and common liability to suit which gives rise to the right to enforce contribution. Tarkington v. Rock Hill Printing & Finishing Co., 230 N.C. 354, 53 S.E.2d 269 (1949); White v. Keller, 242 N.C. 97, 86 S.E.2d 795 (1955).

And Permission of Original Plaintiff Is Not Required. — When one joint tort-feasor is sued alone, he may join other joint tort-feasors for contribution without permission from the original plaintiff. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957); McBryde v. Coggins-McIntosh Lumber Co., 246 N.C. 415, 98 S.E.2d 663 (1957).

How Right of Contribution May Be Enforced. — The right of the party sued to have contribution from all responsible for the damage may be enforced in either of two ways. The party sued may wait until a judgment has been obtained against him, whereupon he may maintain an action against the other tort-feasors; or he may, in the action against him, have the other tort-feasors made parties. In either event the party called on to compensate the injured party is a plaintiff in the action against his alleged joint tort-feasors. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

Only Pro Rata Share Required of Additional Defendants. — The statute does not contemplate that one brought in as an additional defendant shall pay more than a pro rata part of any verdict rendered against the original defendants. Jordan v. Blackwelder, 250 N.C. 189, 108 S.E.2d 429 (1959).

Plaintiff himself may sue any one or all of the tort-feasors. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965).

Plaintiff Cannot Be Compelled to Sue Joint Tort-Feasors. — Insofar as plaintiff is concerned, when he has elected to sue only one of several joint tort-feasors, the others are not necessary parties and plaintiff cannot be compelled to pursue them; nor can the original defendant compel plaintiff to join issue with a defendant he has elected not to sue. Moreover, the original defendant cannot rely on the liability to the original plaintiff of the party brought in, but must recover, if at all, upon the liability of such party to him. Charnock v. Taylor, 223 N.C. 360, 26 S.E.2d 911, 148 A.L.R. 1126 (1943); Hayes v. City of Wilmington, 239 N.C. 238, 79 S.E.2d 792 (1954); Bell v. Lacey, 248 N.C. 703, 104 S.E.2d 833 (1958); Greene v. Charlotte Chem. Labs., 254 N.C. 680, 120 S.E.2d 82 (1961).

A defendant sued in tort cannot compel plaintiff to sue all those responsible for the damage, but may have contribution from all responsible for the damage. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

But Defendant May Bring Them In. — When the aggrieved party elects to sue less than all the tort-feasors, the original defendant or defendants may have the others made additional defendants for the purpose of enforcing contribution in the event the plaintiff recovers. Phillips v. Hassett Mining Co., 244 N.C. 17, 92 S.E.2d 429 (1956).

When a person has been injured through the concurring negligence of two or more persons, he may sue one or all of the joint tort-feasors, at his option. Insofar as he is concerned, the others are not necessary parties and he may not be compelled to bring them in. They may, however, be brought in by the original defendant on a cross complaint in which he alleges joint tort-feasorship and his right to contribution in the event plaintiff recovers judgment against him. Hayes v. City of Wilmington, 239 N.C. 238, 79 S.E.2d 792 (1954).

When a defendant in a negligent injury action files answer denying negligence but alleging that if it were negligent a third party was also guilty of negligence which concurred in causing the injury in suit, and demands affirmative relief against such third person, he is entitled to have such third person joined as a codefendant. Freeman v. Thompson, 216 N.C. 484, 5 S.E.2d 434 (1939); Lackey v. Southern Ry., 219 N.C. 195, 13 S.E.2d 234 (1941). See also, Bost v. Metcalfe, 219 N.C. 607, 14 S.E.2d 648 (1941); Hayes v. City of Wilmington, 243 N.C. 525, 91 S.E.2d 673 (1956); Denny v. Coleman, 245 N.C. 90, 95 S.E.2d 352 (1956); Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965).

A party is given the right to bring in joint obligors for contribution. Overton v. Tarkington, 249 N.C. 340, 106 S.E.2d 717 (1959).

Applicability of § 1-166 to Cross Action Against Unknown Joint Tort-Feasor. — The obvious purpose of G.S. 1-166 is to provide plaintiff a means to toll the statute of limitations when he does not yet know the proper designation of the defendant. No comparable necessity exists when a defendant desires to pursue a cross action for contribution against an unknown joint tort-feasor, since the statute does not begin to run on the claim for contribution until judgment has been recovered against the first tort-feasor. Wall Funeral Home v. Stafford, 3 N.C. App. 578, 165 S.E.2d 532 (1969).

Judicial Admission of Negligence Need Not Be Made in Order to Interplead Third Party. — To interplead a third party for contribution the law does not require a defendant in a personal injury suit to make a judicial admission that his negligence was one of the proximate causes of the injury for which plaintiff sues. He may deny negligence and allege, conditionally or alternatively, that if he was negligent, the third party's negligence concurred with his as a proximate cause of plaintiff's injuries. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965).

The party brought in may assert any defense appropriate to the cause of action asserted against him. He may plead estoppel by settlement or a judgment binding the parties. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957).

Additional Party Under No Obligation to Answer Allegations in Original Complaint. — An additional party defendant has no cause of action stated against him except that asserted in the cross action and set out in the cross complaint. Hence, the additional party defendant is under no obligation to answer any allegations in the original complaint, but only those alleged against him in the cross complaint. Greene v. Charlotte Chem. Labs., 254 N.C. 680, 120 S.E.2d 82 (1961).

Too Late to Bring in Other Joint Tort-Feasors After Entry of Default Judgment. — When joint tort-feasors who have been sued in an action fail to file an answer to a complaint that states a good cause of action, and plaintiffs obtain a judgment by default and inquiry, which is regular in all respects, a motion, lodged thereafter, to bring in other joint tort-feasors so as to determine liability for contribution as between themselves comes too late. Denny v. Coleman, 245 N.C. 90, 95 S.E.2d 352 (1956).

Allegations in Cross Action for Contribution. — In order to maintain a cross action against another for contribution, the original defendant must allege facts sufficient to show that both of them are liable to the plaintiff as joint tort-feasors. Potter v. Frosty Morn Meats, Inc., 242 N.C. 67, 86 S.E.2d 780 (1955).

In order for one defendant to join another as a third-party defendant for the purpose of contribution, he must allege facts sufficient to show joint tort-feasorship and his right to contribution in the event plaintiff recovers against him. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965); Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965).

In order for one defendant to join another as an additional defendant for the purpose of contribution, he must show by his allegations facts sufficient to make them both liable to plaintiff as joint tort-feasors, and allegations showing only a cause of action which would entitle the plaintiff to recover of such additional party are not sufficient. Hayes v. City of Wilmington, 239 N.C. 238, 79 S.E.2d 792 (1954); Hayes v. City of Wilmington, 243 N.C. 525, 91 S.E.2d 673 (1956).

In order to show joint tort-feasorship, it is necessary that the facts alleged in the cross complaint are sufficient to make the third party liable to the plaintiff along with the cross-complaining defendant in the event of a recovery by the plaintiff against him. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965); Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965).

The allegations of the cross complaint must be so related to the subject matter declared on in the plaintiff's complaint as to disclose that the plaintiff, had he desired to do so, could have joined the third party as a defendant in the action. Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965).

To entitle the original defendant in a tort action to have some third party made an additional party defendant to enforce contribution, it must be made to appear from the facts alleged in the cross action that the defendant and such third person are tort-feasors in respect to the subject of controversy, jointly liable to the plaintiff for the particular wrong alleged in the complaint. The facts must be such that the plaintiff, had he desired so to do, could have joined such third party as defendant in the action. Hobbs v. Goodman, 240 N.C. 192, 81 S.E.2d 413 (1954). See also, Hobbs v. Goodman, 241 N.C. 297, 84 S.E.2d 904 (1954); Hayes v. City of Wilmington, 243 N.C. 525, 91 S.E.2d 673 (1956); Johnson v. Catlett, 246 N.C. 341, 98 S.E.2d 458 (1957); Jones v. Douglas Aircraft Co., 253 N.C. 482, 117 S.E.2d 496 (1960).

The pleading filed by the original defendant must state facts which are sufficient to show that the original defendant is entitled to contribution from the additional defendant. If the facts alleged do not suffice to establish a right to contribution, the party or parties brought in as additional defendants are unnecessary parties and may on motion have the allegations stricken and the action dismissed as to them. Etheridge v. Carolina Power & Light Co., 249 N.C. 367, 106 S.E.2d 560 (1959).

When an alleged joint tort-feasor was brought into a case as an additional party defendant, and it turned out that no cause of action was stated against him, either in the main action or in a cross action pleaded by another defendant, he was an unnecessary party to the action and, on motion, could have his name stricken from the record as mere surplusage. Hayes v. City of Wilmington, 243 N.C. 525, 91 S.E.2d 673 (1956).

For allegations sufficient to state a cause of action against joint tort-feasor for contribution, see Read v. Young Roofing Co., 234 N.C. 273, 66 S.E.2d 821 (1951).

Original Defendant Becomes a Plaintiff as to Additional Defendant. — Where plaintiff does not bring his action against all joint tort-feasors, and an original defendant sets up a cross action against a third party and has him brought in as an additional party defendant for contribution, such original defendant makes himself a plaintiff as to the additional party defendant. Bell v. Lacey, 248 N.C. 703, 104 S.E.2d 833 (1959); Cox v. E.I. DuPont Chem. Labs., 254 N.C. 680, 120 S.E.2d 82 (1961).

When an injured party elects to sue some but not all of the tort-feasors responsible for his injuries, those sued have a right to bring the other wrongdoers in for contribution. The original defendant then becomes a plaintiff as to the tort-feasors not originally sued. Etheridge v. Carolina Power & Light Co., 249 N.C. 367, 106 S.E.2d 560 (1959).

Additional Defendant May File Counterclaim Against Original Defendant. — Where the original defendant has another joined as additional defendant for contribution on the ground of their concurring negligence in producing plaintiff's injury, the additional defendant may file a counterclaim against the original defendant for damages to the additional defendant's property allegedly resulting from the negligence of the original defendant, and such counterclaim is improperly stricken upon motion of the original defendant. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957).

Interjection of Action Which Is Not Germane Not Contemplated. — The cross action for contribution between defendants charged with tort may not be used to interject into the litigation another action not germane to the plaintiff's action. White v. Keller, 242 N.C. 97, 86 S.E.2d 795 (1955).

Burden Is on Original Defendant to Prove Cross Action. — Where plaintiff does not demand any relief against a codefendant joined by the original defendant as a joint tort-feasor, the burden is on the original defendant to prove his cross action for contribution, and upon motion of the codefendant for nonsuit on the cross action the evidence must be considered in the light most favorable to the original defendant upon that cause. Pascal v. Burke Transit Co., 229 N.C. 435, 50 S.E.2d 534 (1948); Stansel v. McIntyre, 237 N.C. 148, 74 S.E.2d 345 (1953).

Where one joint tort-feasor has others joined for contribution, he is, as to the new defendants, a plaintiff and must establish his right of action, and such additional defendants may assert any appropriate defense to the cross action without regard to relevancy to the claim of plaintiff. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957).

As to procedure for contribution between defendants, see Whiteman v. Seashore Transp. Co., 231 N.C. 701, 58 S.E.2d 752 (1950); Byerly v. Shell, 312 F.2d 141 (4th Cir. 1962).

Original Defendant's Right to Contribution Not Affected by Payment of Judgment by Insurer. — Where insurer of original defendant pays plaintiff's judgment against its insured and plaintiff's judgment is marked paid and satisfied, the original defendant's right to contribution from another defendant is not affected and the insurer is entitled to enforce his claim. Pittman v. Snedeker, 264 N.C. 55, 140 S.E.2d 740 (1965).

Assertion of Right Against Another Tort-Feasor Not Barred by Failure to Perfect Appeal. — Where plaintiff has established one tort-feasor's duty to compensate her, that tort-feasor, by its failure to perfect its appeal from the adjudication of its liability to plaintiff and the discharge thereof, is not thereby barred from asserting its right against another tort-feasor. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

Dismissal of Codefendants. — Where plaintiff elected to sue both joint tort-feasors and alleged active negligence on the part of both which concurred in producing the injury, each was entitled to contribution from the other if there was a judgment of joint and several liability against them, but during the course of the trial each was a defendant as to the plaintiff only, and neither could preclude dismissal of the action against the other if plaintiff failed to make out a prima facie case against the other; moreover, allegations and prayer for contribution contained in the answer of one were properly stricken on motion. Greene v. Charlotte Chem. Labs., 254 N.C. 680, 120 S.E.2d 82 (1961).

Where the plaintiff made out a prima facie case against both defendants, dismissal of other defendants was improper, since this prevented codefendants from pressing their claim for contribution. Byerly v. Shell, 312 F.2d 141 (4th Cir. 1962).

Additional Defendant Held Entitled to Motion for Nonsuit. — For the failure of original defendant to allege and offer any evidence tending to show that joint and concurring negligence on the part of herself and additional defendant proximately caused injury to plaintiff, additional defendant's motion for judgment of nonsuit should have been sustained. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965).

Effect of Settlement with Regard to Injured Party Not Involved Therein. — While passengers, by making settlement with one joint tort-feasor, waived any right they might have possessed to seek compensation from the other, the tort-feasor making settlement with them waived no right it possessed to assert its claim to contribution against the other alleged joint tort-feasor in an action by a passenger with whom no settlement has been made. Snyder v. Kenan Oil Co., 235 N.C. 119, 68 S.E.2d 805 (1952).

Res Judicata in Subsequent Action Between Joint Tort-Feasors. — Where initial action is instituted by the passenger in one vehicle against the driver of the other vehicle, and the passenger's driver is joined for contribution, adjudication that the passenger's driver was not guilty of negligence constituting a proximate cause of the accident, is res judicata in a subsequent action between the drivers. It is equally true in such a factual situation, where the plaintiff recovers judgment against the original defendant and the jury finds the additional defendant guilty of negligence and that such negligence concurred in jointly and proximately causing plaintiff's injuries, and gives the original defendant a verdict for contribution, that such judgment is res judicata in a subsequent action between such drivers, based on the same facts litigated in the cross action in the former trial. Hill v. Edwards, 255 N.C. 615, 122 S.E.2d 383 (1961); Sisk v. Perkins, 264 N.C. 43, 140 S.E.2d 753 (1965).

Defendant may not exculpate himself from liability for his negligence by showing that codefendant was also negligent. Byerly v. Shell, 312 F.2d 141 (4th Cir. 1962).

Allegation by plaintiff that defendants jointly and concurrently proximately caused injuries is a conclusion of the pleader and is not admitted by demurrer. Anderson v. Robinson, 275 N.C. 132, 165 S.E.2d 502 (1969).

Joint and Several Judgments in Favor of Plaintiff Held Error. — Where plaintiffs sought no affirmative relief against a codefendant joined by the original defendant for the purpose of enforcing contribution against it as a joint tort-feasor, it was error for the court to enter joint and several judgments in favor of plaintiffs against both defendants upon the jury's finding that both were guilty of actionable negligence, since the liability of the codefendant was solely to the original defendant on its claim for contribution. Pascal v. Burke Transit Co., 229 N.C. 435, 50 S.E.2d 534 (1948); Shaw v. Eaves, 262 N.C. 656, 138 S.E.2d 520 (1964).

As to the binding effect of a consent judgment in a foreign action, see Carolina Coach Co. v. Cox, 337 F.2d 101 (4th Cir. 1964).

In an action against a third party tortfeasor by an employee subject to the Worker's Compensation Act, the defendant was not entitled to join the employer or the insurance carrier for contribution or to set up the defense that its liability was secondary and that of the employer was primary. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953); Johnson v. Catlett, 246 N.C. 341, 98 S.E.2d 458 (1957).

Where a third party tort-feasor is sued for the wrongful death of an employee, he is not entitled to have the employer joined as a joint tort-feasor nor as a necessary party to the determination of the action when the original defendant does not rely upon the doctrine of primary and secondary liability. Clark v. Pilot Freight Carriers, 247 N.C. 705, 102 S.E.2d 252 (1958); Jones v. Douglas Aircraft Co., 253 N.C. 482, 117 S.E.2d 496 (1960).

Where the personal representative of a deceased employee sued a third party tort-feasor in an action instituted in this State, and defendant had the employer and a fellow employee of the deceased employee joined for contribution, motions of the additional defendants to strike the cross action were properly allowed where it appeared that the deceased was employed in another state, that the injury came within the purview of the compensation act of such state, and that an award had been entered therein adjudicating the liabilities of the additional defendants for the death. Johnson v. Catlett, 246 N.C. 341, 98 S.E.2d 458 (1957).

In an action by property owner to recover damages from mining company due to dumping of silt in river in its mining operations, defendant company could file a cross complaint for contribution against two other mining companies committing the same injurious acts in their operations. Phillips v. Hassett Mining Co., 244 N.C. 17, 92 S.E.2d 429 (1956).

Where plaintiff sued a newspaper for alleged libel, the newspaper, upon allegations that an individual composed the libelous matter and had it published as a paid advertisement, was entitled to have such individual joined as a joint tort-feasor for the purpose of contribution, and such individual's demurrer to the cross action of the newspaper against him was properly overruled. Taylor v. Kinston Free Press Co., 237 N.C. 551, 75 S.E.2d 528 (1953).

Joinder of Injured or Deceased Child's Parents Held Improper. — In an action for wrongful death instituted by the administrator of a deceased unemancipated child against the driver of the car inflicting the fatal injury, defendant was not entitled to have the child's mother joined as a party defendant for the purpose of contribution or indemnity upon allegations that the child's mother was negligent in permitting the child to enter upon the highway unattended, since the mother could not be liable to the plaintiff as a joint tort-feasor, and the statutory right of contribution and the right to indemnity on the ground of primary and secondary liability are both based upon the liability of a joint tort-feasor. Lewis v. Farm Bureau Mut. Auto. Ins. Co., 243 N.C. 55, 89 S.E.2d 788 (1955).

In an action on behalf of an unemancipated child to recover for negligent injury, the defendants could not file a cross action against the plaintiff's parents for contribution, because such cross action would indirectly hold the unemancipated minor's parents liable to him for the injury. Watson v. Nichols, 270 N.C. 733, 155 S.E.2d 154 (1967).

Subrogation was not included within the framework of former § 1-240. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

The right permitted to be enforced under former G.S. 1-240 was one of contribution and not one of subrogation. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

And Therefore Former § 1-240 Was Inapplicable to Subrogation by Insurers. — Since the liability of insurance carriers of tort-feasors is contractual and not founded on tort, where no judgment was recovered against such a carrier by any of the parties to an action, former G.S. 1-240 was inapplicable, as by its express terms it applied only to joint tort-feasors and to joint judgment debtors. Gaffney v. Lumbermen's Mut. Cas. Co., 209 N.C. 515, 184 S.E. 46 (1936); Lumbermen's Mut. Cas. Co. v. United States Fid. & Guar. Co., 211 N.C. 13, 188 S.E. 634 (1936); Squires v. Sorahan, 252 N.C. 589, 114 S.E.2d 277 (1960).

Under former G.S. 1-240, the insurance carrier who paid a joint tort-feasor's obligations to the injured party could not force contribution from other tort-feasors, as the statute could not be stretched to include subrogation, which arises by reason of contract, into contribution, which arises by reason of participation in the tort. Squires v. Sorahan, 252 N.C. 589, 114 S.E.2d 277 (1960).

Under former G.S. 1-240, an insurer paying the judgment obtained by the injured party against one tort-feasor had no right of action to enforce contribution against the other tort-feasor, and could not acquire such right of action by the device of a "loan" to the injured party payable only in the event and to the extent of any recovery which the injured party might obtain against the other tort-feasor; and in an action for contribution in the name of the injured party, maintained solely in the interest of the insurer, the injured party was not a real party in interest. Herring v. Jackson, 255 N.C. 537, 122 S.E.2d 366 (1961).

An automobile insurer of one joint tort-feasor, after discharging in full a judgment obtained by an injured party against its insured, could not maintain in its own name an action for contribution under former G.S. 1-240 against a second joint tort-feasor whose negligence proximately caused and contributed to the injury for which the judgment was obtained, where the second tort-feasor was not made a party to the original suit, as the plaintiff's rights as insurer arose by contract of subrogation under its policy and not as a result of its joint liability as a tort-feasor who had paid the judgment and was entitled to force contribution. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

Primary and secondary liability between defendants exists only when: (1) They are jointly and severally liable to the plaintiff; and (2) Either (a) one has been passively negligent but is exposed to liability through the active negligence of the other, or (b) one alone has done the act which produced the injury but the other is derivatively liable for the negligence of the former. Anderson v. Robinson, 275 N.C. 132, 165 S.E.2d 502 (1969).

In order for one defendant to establish a right to indemnity from a second defendant, he must allege and prove (1) That the second defendant is liable to plaintiff, and (2) That the first defendant's liability to plaintiff is derivative, that is, based on tortious conduct of the second defendant, or that the first defendant is only passively negligent but is exposed to liability through the active negligence of the second defendant. Anderson v. Robinson, 275 N.C. 132, 165 S.E.2d 502 (1969).

Tort-feasor whose liability is secondary, upon payment by him of the injured party's recovery, is entitled to indemnity against the primary wrongdoer. Ingram v. Nationwide Mut. Ins. Co., 258 N.C. 632, 129 S.E.2d 222 (1963).

Where two persons are jointly liable in respect to a tort, one being liable because he is the actual wrongdoer, and the other by reason of constructive or technical fault imposed by law, the latter, if blameless as between himself and his co-tort-feasor, ordinarily will be allowed to recover full indemnity over against the actual wrongdoer. Hendricks v. Leslie Fay, Inc., 273 N.C. 59, 159 S.E.2d 362 (1968).

Where liability has been imposed on the master because of the negligence of his servant, and the master did not participate in the wrong and incurs liability solely under the doctrine of respondeat superior, the master, having discharged the liability, may recover full indemnity from the servant. Hendricks v. Leslie Fay, Inc., 273 N.C. 59, 159 S.E.2d 362 (1968).

A defendant secondarily liable, when sued alone, may have the person primarily liable brought in to respond to the original defendant's cross action. Hendricks v. Leslie Fay, Inc., 273 N.C. 59, 159 S.E.2d 362 (1968).

The law permits an adjudication in one action of primary and secondary liability between joint tort-feasors who are not in pari delicto. A defendant secondarily liable, when sued alone, may have the tort-feasor primarily liable brought into the action by alleging a cross action for indemnification against him. Edwards v. Hamill, 262 N.C. 528, 138 S.E.2d 151 (1964).

Where two alleged tort-feasors are sued by the injured party, one may set up a cross action against the other for indemnity, under the doctrine of primary-secondary liability, and have the matter adjudicated in that action. Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963); Hendricks v. Leslie Fay, Inc., 273 N.C. 59, 159 S.E.2d 362 (1968).

Lessees Held Not Entitled to Join Lessor on Principle of Primary and Secondary Liability. — Where plaintiff sued to recover for injuries sustained when a sign erected by lessees over a sidewalk fell and struck her, lessees were not entitled to join the lessor as a party defendant on the principle of primary and secondary liability, since upon the cause as set out in the complaint, lessees' active negligence created the situation which caused the injury, and therefore lessees were primarily liable. Hobbs v. Goodman, 240 N.C. 192, 81 S.E.2d 413 (1954).

§ 1B-2. Pro rata shares.

In determining the pro rata shares of tort-feasors in the entire liability

(1) Their relative degree of fault shall not be considered;

(2) If equity requires, the collective liability of some as a group shall constitute a single share; and

(3) Principles of equity applicable to contribution generally shall apply. (1967, c. 847, s. 1.)

CASE NOTES

Computing Share of Judgment. — In an insured's action against an insurer and a broker, where the insured settled with the broker, who admitted negligence, when it was established that the broker was the insurer's agent, the insurer was liable for half of the amount of the settlement, under the Uniform Contribution Among Tort-feasors G.S. 1B-2, even though it did not participate in the broker's settlement with the insured, because the total damage award was divided by the number of jointly and severally liable tortfeasors, without considering a tortfeasor's relative degree of fault, and the trial court's judgment in determining the liability of the broker and insurer to the insured for the same injury was binding among them in determining their right to contribution, under G.S. 1B-3(f). Jefferson Pilot Fin. Ins. Co. v. Marsh USA, Inc., 159 N.C. App. 43, 582 S.E.2d 701, 2003 N.C. App. LEXIS 1436 (2003), review dismissed sub nom. Jefferson Pilot Fin. Ins. Co. v. Marsh United States, Inc., 357 N.C. 658, 590 S.E.2d 266 (2003), review denied, 357 N.C. 658, 590 S.E.2d 267 (2003).

Cited in Medical Mut. Ins. Co. v. Mauldin, 137 N.C. App. 690, 529 S.E.2d 697, 2000 N.C. App. LEXIS 532 (2000), aff'd, 353 N.C. 352, 543 S.E.2d 478 (2001).

§ 1B-3. Enforcement.

(a) Whether or not judgment has been entered in an action against two or more tort-feasors for the same injury or wrongful death, contribution may be enforced by separate action.

(b) Where a judgment has been entered in an action against two or more tort-feasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

(c) If there is a judgment for the injury or wrongful death against the tort-feasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after final judgment is entered in the trial court in conformity with the decisions of the appellate court.

(d) If there is no judgment for the injury or wrongful death against the tort-feasor seeking contribution, his right of contribution is barred unless he has either

(1) Discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment,
(2) Agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution, or
(3) While action is pending against him, joined the other tort-feasors as third-party defendants for the purpose of contribution.

(e) The recovery of judgment against one tort-feasor for the injury or wrongful death does not of itself discharge the other tort-feasors from liability to the claimant. The satisfaction of the judgment discharges the other tort-feasors from liability to the claimant for the same injury or wrongful death, but does not impair any right of contribution. Provided, however, that a consent judgment in a civil action brought on behalf of a minor, or other person under disability, for the sole purpose of obtaining court approval of a settlement between the injured minor or other person under disability and one of two or more tort-feasors, shall not be deemed to be a judgment as that term is used herein, but shall be treated as a release or covenant not to sue as those terms are used in G.S. 1B-4 unless the judgment shall specifically provide otherwise.

(f) The judgment of the court in determining the liability of the several defendants to the claimant for the same injury or wrongful death shall be binding as among such defendants in determining their right to contribution. (1967, c. 847, s. 1; 1973, c. 465, s. 1; 1975, c. 866, s. 5.)

CASE NOTES

Subsection (e) codifies the common-law rule applicable to joint tort-feasors. Ipock v. Gilmore, 73 N.C. App. 182, 326 S.E.2d 271, cert. denied, 314 N.C. 116, 332 S.E.2d 481 (1985), aff'd, 85 N.C. App. 70, 354 S.E.2d 315 (1987).

Party Entitled to One Satisfaction. — Although an injured party may pursue and obtain judgments against all joint tort-feasors for a single injury, he may have only one satisfaction. Ipock v. Gilmore, 73 N.C. App. 182, 326 S.E.2d 271, cert. denied, 314 N.C. 116, 332 S.E.2d 481 (1985), aff'd, 85 N.C. App. 70, 354 S.E.2d 315 (1987).

Statute of Limitations. — Subdivision (d)(3) must be read to provide for a three-year statute of limitations for refiling contribution claims. Safety Mut. Cas. Corp. v. Spears, 104 N.C. App. 467, 409 S.E.2d 736 (1991), cert. granted, 331 N.C. 118, 415 S.E.2d 200 (1992), petition withdrawn, 333 N.C. 346, 429 S.E.2d 552 (1993).

The legislature has failed to fix a time in subdivision (d)(3) for refiling contribution claims in the situation where a party brings a claim for contribution that is voluntarily dismissed after settlement of the underlying claim. However, the legislature has provided that a three-year statute of limitations applies upon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it. Safety Mut. Cas. Corp. v. Spears, 104 N.C. App. 467, 409 S.E.2d 736 (1991), cert. granted, 331 N.C. 118, 415 S.E.2d 200 (1992), petition withdrawn, 333 N.C. 346, 429 S.E.2d 552 (1993).

Claims Between Insurance Companies. — Claim for contribution by insurance company against another insurance company was sufficiently analogous to claim for subrogation to warrant application of three year statute of limitations of G.S. 1-52(1); this section, which applies to actions among joint tortfeasors, did not apply to claims between insurance companies who both provide coverage to the same tortfeasor. Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 122 N.C. App. 449, 470 S.E.2d 556 (1996).

Insurer Liable For Half of The Amount of A Settlement Entered Into by His Agent. — In an insured's action against an insurer and a broker, where the insured settled with the broker, who admitted negligence, when it was established that the broker was the insurer's agent, the insurer was liable for half of the amount of the settlement, under the Uniform

Contribution Among Tort-feasors Act, G.S. 1B-2, even though it did not participate in the broker's settlement with the insured, because the total damage award was divided by the number of jointly and severally liable tortfeasors, without considering a tortfeasor's relative degree of fault, and the trial court's judgment in determining the liability of the broker and insurer to the insured for the same injury was binding among them in determining their right to contribution, under G.S. 1B-3(f). Jefferson Pilot Fin. Ins. Co. v. Marsh USA, Inc., 159 N.C. App. 43, 582 S.E.2d 701, 2003 N.C. App. LEXIS 1436 (2003), review dismissed sub nom. Jefferson Pilot Fin. Ins. Co. v. Marsh United States, Inc., 357 N.C. 658, 590 S.E.2d 266 (2003), review denied, 357 N.C. 658, 590 S.E.2d 267 (2003).

Collateral Estoppel Not Available to Show Joint and Several Liability of One Not Made Defendant in Action. — Where, after wrongful death action in which mother was neither named as a defendant nor named as a third party defendant, and in which insured was found to have caused the death of child in a car accident, insurer sought contribution from mother for half of the money paid to the child's estate, the doctrine of collateral estoppel was not available to the insurer to show mother's joint and several liability to the estate of the child; since mother was not a party to the wrongful death claim and was not made a third party defendant for the purpose of contribution, neither her liability to the estate of child nor her liability to insurer as a joint tort-feasor was established by the judgment in the original action. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

Section 1B-4 Not Applicable Where Requirements of Subsection (e) Not Met. — Where plaintiff did not bring previous wrongful death action for death of his son on behalf of an injured minor or minor plaintiff as required by subsection (e) of this section, and consent judgment entered therein between himself and his wife, the defendant, did not specify that it was anything other than a judgment, G.S. 1B-4 did not apply to the case which he subsequently brought against motorcycle dealer, manufacturer and credit company. Therefore, under subsection (e), the judgment entered therein was fully satisfied by the insurance company of plaintiff's wife, discharging defendants in the subsequent case from liability for the same injury or wrongful death. Severance v. Ford Motor Co., 98 N.C. App. 330, 390 S.E.2d 704 (1990).

This section controls the liability of joint tortfeasors after a judgment establishing their joint and several liability has been entered; consequently, G.S. 1B-4 does not permit one of multiple tortfeasors to avoid liability for contribution to other joint tortfeasors by a settlement, after judgment, for less than his pro rata share of the judgment. Medical Mut. Ins. Co. v. Mauldin, 137 N.C. App. 690, 529 S.E.2d 697, 2000 N.C. App. LEXIS 532 (2000), aff'd, 353 N.C. 352, 543 S.E.2d 478 (2001).

Where prior judgment is invalid, there can be no effective satisfaction of it within the meaning of subsection (e). Ballard v. Hunter, 12 N.C. App. 613, 184 S.E.2d 423 (1971), cert. denied, 280 N.C. 180, 185 S.E.2d 704 (1972).

Settlement of Minor's Claim Is Not Recovery and Satisfaction. — The settlement of a minor's tort claim which becomes effective and binding upon him only upon judicial examination and adjudication does not constitute a recovery and satisfaction of judgment within the meaning of subsection (e). Payseur v. Rudisill, 15 N.C. App. 57, 189 S.E.2d 562, cert. denied, 281 N.C. 758, 191 S.E.2d 356 (1972), decided prior to 1973 and 1975 amendments.

Trial court properly granted motion to enforce Texas judgment as a North Carolina judgment where the Texas judgment was well within the time limitation for enforcement of foreign judgments and the Texas judgment merely apportioned damages between parties and was not a separate action for contribution. In re Aerial Devices, Inc., 126 N.C. App. 709, 486 S.E.2d 463 (1997).

Applied in Mann v. Virginia Dare Transp. Co., 283 N.C. 734, 198 S.E.2d 558 (1973).

Cited in Wall Funeral Home v. Stafford, 3 N.C. App. 578, 165 S.E.2d 532 (1969).

§ 1B-4. Release or covenant not to sue.

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

(2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor. (1967, c. 847, s. 1.)

Legal Periodicals. — For note on avoidance of releases in personal injury cases in North Carolina, see 5 Wake Forest Intra. L. Rev. 359 (1969).

CASE NOTES

Chapter Inapplicable in Contract Actions. — By its terms, this Chapter applies only in tort actions, not contract actions. Duke Univ. v. St. Paul Mercury Ins. Co., 95 N.C. App. 663, 384 S.E.2d 36 (1989).

Construction with § 1B-3(f). — This section does not permit one of multiple tortfeasors to avoid liability for contribution to other joint tortfeasors by a settlement, after judgment, for less than his pro rata share of the judgment; G.S. 1B-3(f) controls the liability of joint tortfeasors after a judgment establishing their joint and several liability has been entered. Medical Mut. Ins. Co. v. Mauldin, 137 N.C. App. 690, 529 S.E.2d 697, 2000 N.C. App. LEXIS 532 (2000), aff'd, 353 N.C. 352, 543 S.E.2d 478 (2001).

Section Not Applicable Where Requirements of § 1B-3(e) Not Met. — Where plaintiff did not bring previous wrongful death action for death of his son on behalf of an injured minor or minor plaintiff as required by subsection (e) of this section, and consent judgment entered therein between himself and his wife, the defendant, did not specify that it was anything other than a judgment, G.S. 1B-4 did not apply to the case which he subsequently brought against motorcycle dealer, manufacturer and credit company. Therefore, under subsection (e), the judgment entered therein was fully satisfied by the insurance company of plaintiff's wife, discharging defendants in the subsequent case from liability for the same injury or wrongful death. Severance v. Ford Motor Co., 98 N.C. App. 330, 390 S.E.2d 704 (1990).

This section permits a tort-feasor to enter into a good faith settlement and release with an injured party and relieve himself of further liability to remaining joint tort-feasors for contribution. Menard ex rel. Menard v. Johnson, 105 N.C. App. 70, 411 S.E.2d 825 (1992).

This section abolishes the distinction which had existed between a release and a covenant not to sue. Ottinger v. Chronister, 13 N.C. App. 91, 185 S.E.2d 292 (1971).

One Recovery for Each Injury. — North Carolina recognizes the common law principle of "one recovery" for each injury, even where the legislature has authorized damages that are punitive in character. Ferris v. Haymore, 967 F.2d 946 (4th Cir. 1992).

In an action which an investor filed against an accountant who worked for the investor's former wife's corporation, alleging that the accountant led him to believe the corporation was profitable so he would sign personal guarantees in favor of a bank that loaned the corporation money, the appellate court reversed the trial court's judgment in favor of the accountant because there were questions of fact about whether a settlement the investor negotiated in a separate action against his former wife fully compensated the investor for his losses, such that he was no longer entitled to recover damages from the accountant. Kogut v. Rosenfeld, 157 N.C. App. 487, 579 S.E.2d 400, 2003 N.C. App. LEXIS 741, cert. granted, 357 N.C. 461, 585 S.E.2d 762 (2003).

Effect of This Section on Right of Contribution. — The provisions of G.S. 1B-1 provide for contribution under certain circumstances, but this section takes away this right of contribution when the provisions thereof are complied with. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

Burden of showing a lack of good faith is upon the party asserting it. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

Settlement Between Injured Party and Tort-Feasor Insufficient to Show Lack of Good Faith. — The mere showing that there has been a settlement between an injured party and a tort-feasor is insufficient to show that there has been a lack of good faith in the settlement. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

Execution of Release by Minor with Court Approval. — Infant plaintiff, having obtained the court's approval of his release agreement, is entitled to the same status as an adult executing a release under the provisions of this section. Payseur v. Rudisill, 15 N.C. App. 57, 189 S.E.2d 562, cert. denied, 281 N.C. 758, 191 S.E.2d 356 (1972).

Settlement of Minor's Claim Not Recovery and Satisfaction. — The settlement of a minor's tort claim which becomes effective and binding upon him only upon judicial examination and adjudication does not constitute a recovery and satisfaction of judgment within the meaning of G.S. 1B-3, subsection (e). Payseur v. Rudisill, 15 N.C. App. 57, 189 S.E.2d 562, cert. denied, 281 N.C. 758, 191 S.E.2d 356 (1972), decided prior to 1973 and 1975 amendments to § 1B-3.

Judgment Against One Tort-Feasor Reduced by Amount of Settlement with Another. — Where a passenger injured in an automobile accident settled with one tort-feasor for $3,750, the other tort-feasor, who went to trial, was entitled to have judgment of $10,000 rendered against him reduced by $3,750, but he was not entitled to have judgment reduced to $3,750. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

In a wrongful death action based on the medical specialist's malpractice, the trial court did not err in requiring the specialist to pay all pre-judgment interest and costs because the medical specialist failed to make any objection on the record as to the imposition of costs and pre-judgment interest or the apportionment thereof as required by G.S. 1A-1, Rule 10(b)(1, and the trial court properly determined costs and interest before entitling the specialist to set-off for the settlement amount involving the other treating doctor, a former codefendant. Boykin v. Kim, 174 N.C. App. 278, 620 S.E.2d 707, 2005 N.C. App. LEXIS 2396 (2005).

Trial court erred in not applying this section where, in their complaint, plaintiffs treated defendants as joint tort-feasors and sought relief from flood damage caused by mud and silt runoff from all defendants' properties, and evidence at trial revealed only single indivisible injury, the flooding of plaintiffs' property, and until appeal plaintiffs did not attempt to allocate their injury among defendants. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

A defendant who settles with a plaintiff and invokes this section to bar a cross claim for contribution from a co-defendant does not lose his rights to pursue his own cross claim or counterclaim against the same co-defendant for damages (personal and property) allegedly inflicted upon him by the co-defendant. Menard ex rel. Menard v. Johnson, 105 N.C. App. 70, 411 S.E.2d 825 (1992).

Reduction of a claim because of a settlement with one defendant is not limited to cases where the defendant is a joint tortfeasor, but applies to all cases where a plaintiff is seeking recovery from several defendants for single, indivisible injury. Ryals v. Hall-Lane Moving & Storage Co., 122 N.C. App. 134, 468 S.E.2d 69 (1996).

Claims for Injury or Damage Not Addressed. — The plain language of this section does not address cross claims or counterclaims for personal injury or property damage; this section only addresses the statutory right to contribution. Menard ex rel. Menard v. Johnson, 105 N.C. App. 70, 411 S.E.2d 825 (1992).

For defendant to be entitled to verdict reduction in the amount of a pretrial settlement between plaintiffs and two other defendants, it must not only appear that the three defendants are tort-feasors, but also that the negligence of all three defendants caused an indivisible injury. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

Trial court did not err in awarding attorney's fees to a passenger pursuant to G.S. 6-21.1 in her action for personal injuries sustained in an automobile collision because she obtained a judgment against defendant for damages and was the prevailing party, notwithstanding the subsequent reduction of her judgment pursuant to G.S. 1B-4 by the amount of her settlement with a third-party defendant. Reinhold v. Lucas, 167 N.C. App. 735, 606 S.E.2d 412, 2005 N.C. App. LEXIS 10 (2005).

Trial court did not err in declining to award costs to defendant pursuant to G.S. 1A-1, N.C. R. Civ. P. 68 in a passenger's action for personal injuries sustained in an automobile collision because the total amount of the judgment obtained by the passenger, including the amount of damages, attorney's fees, and costs, exceeded defendant's offer for judgment, even after the amount of damages was reduced by the passenger's settlement with a third-party defendant pursuant to G.S. 1B-4. Reinhold v. Lucas, 167 N.C. App. 735, 606 S.E.2d 412, 2005 N.C. App. LEXIS 10 (2005).

Appellate Review Limited. — The trial court's determination of whether a settlement was made in good faith pursuant to this section may be reversed only if the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. Brooks v. Wal-Mart Stores, Inc., 139 N.C. App. 637, 535 S.E.2d 55 (2000).

Passenger's appeal of the reduction of her judgment against defendant in an action for personal injuries sustained in an automobile collision by the amount of her settlement with a third-party defendant, pursuant to G.S. 1B-4, on the ground that she sustained two distinct injuries rather than a single indivisible injury, was dismissed because the passenger did not separate the injuries in the trial court, thus failing to preserve the issue for appeal pursuant to N.C. R. App. P. 10(b)(1). Reinhold v. Lucas, 167 N.C. App. 735, 606 S.E.2d 412, 2005 N.C. App. LEXIS 10 (2005).

Applied in Simmons v. Wilder, 6 N.C. App. 179, 169 S.E.2d 480 (1969); McArver v. Pound & Moore, Inc., 17 N.C. App. 87, 193 S.E.2d 360 (1972); Battle v. Clanton, 27 N.C. App. 616, 220 S.E.2d 97 (1975); Ryder v. Benfield, 43 N.C. App. 278, 258 S.E.2d 849 (1979); Macklin v. Dowler, 53 N.C. App. 488, 281 S.E.2d 164 (1981); Warren v. Canal Indus., Inc., 61 N.C. App. 211, 300 S.E.2d 557 (1983).

Cited in Genesco, Inc. v. Cone Mills Corp., 604 F.2d 281 (4th Cir. 1979); Sullivan v. Smith, 56 N.C. App. 525, 289 S.E.2d 870 (1982).

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§ 1B-5. Uniformity of interpretation.

This Article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it. (1967, c. 847, s. 1.)

CASE NOTES

Cited in Medical Mut. Ins. Co. v. Mauldin, 137 N.C. App. 690, 529 S.E.2d 697, 2000 N.C. App. LEXIS 532 (2000), aff'd, 353 N.C. 352, 543 S.E.2d 478 (2001).

§ 1B-6. Short title.

This Article may be cited as the Uniform Contribution among Tort-Feasors Act. (1967, c. 847, s. 1.)

CASE NOTES

Cited in Waden v. McGhee, 274 N.C. 174, 161 S.E.2d 542 (1968); Payseur v. Rudisill, 15 N.C. App. 57, 189 S.E.2d 562 (1972).

ARTICLE 2.

Judgment Against Joint Obligors or Joint Tort-Feasors.

§ 1B-7. Payment of judgment by one of several.

(a) In all cases in the courts of this State wherein judgment has been, or may hereafter be, rendered against two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint tort-feasors, and the same has not been paid by all the judgment debtors by each paying his pro rata share thereof, if one or more of the judgment debtors shall pay the judgment creditor, either before or after execution has been issued, the full amount due on said judgment, and shall have entered on the judgment docket in the manner hereinafter set out a notation of the preservation of the right of contribution, such notation shall have the effect of preserving the lien of the judgment and of keeping the same in full force as against any judgment debtor who does not pay his pro rata share thereof to the extent of his liability thereunder in law and equity. Such judgment may be enforced by execution or otherwise in behalf of the judgment debtor or debtors who have so preserved the judgment.

(b) The entry on the judgment docket shall be made in the same manner as other cancellations of judgment, and shall recite that the same has been satisfied, released and discharged, together with all costs and interest, as to the paying judgment debtor, naming him, but that the lien of the judgment is preserved as to the other judgment debtors for the purpose of contribution. No entry of cancellation as to such other judgment debtors shall be made upon the judgment docket or judgment index by virtue of such payment.

(c) If the judgment debtors disagree as to their pro rata shares of the liability, on the grounds that any judgment debtor is insolvent or is a nonresident of the State and cannot be forced under the execution of the court to contribute to the payment of the judgment, or upon other grounds in law and equity, their shares may be determined upon motion in the cause and notice to all parties to the action. Issues of fact arising therein shall be tried by jury as in other civil actions. (1967, c. 847, s. 1.)

Legal Periodicals. — For comment on this Chapter, see 5 Wake Forest Intra. L. Rev. 160 (1969).

CASE NOTES

Equitable Contribution. — Nothing on the face of this section, or in its history, indicates that the General Assembly intended to eliminate the right to seek equitable contribution. Holcomb v. Holcomb, 70 N.C. App. 471, 320 S.E.2d 12 (1984).

At no point did any prior version of the contribution statute, nor does the modern version, expressly or impliedly eliminate the equitable contribution action. Rather, equitable contribution has continued as an independent action, separate from the summary proceedings set out in statute for preserving the judgment. Holcomb v. Holcomb, 70 N.C. App. 471, 320 S.E.2d 12 (1984).

Cited in Broussad v. Meineke Disct. Muffler Shops, Inc., 958 F. Supp. 1087 (W.D.N.C. 1997).

OPINIONS OF ATTORNEY GENERAL

Satisfaction of Judgment by Joint Tort-Feasor May Not Satisfy Judgment for Other Tort-Feasor for Driver License Suspension Purposes. — See opinion of Attorney General to Mr. Freeman, Department of Motor Vehicles, 41 N.C.A.G. 99 (1970).

ARTICLE 3.

Cross Claims and Joinder of Third Parties for Contribution.

§ **1B-8:** Repealed by Session Laws 1969, c. 895, s. 19.

Cross References. — For provisions of Rules of Civil Procedure as to crossclaims, see G.S. 1A-1, Rule 13. For provisions similar to those of subsection (b) of repealed G.S. 1B-8, see G.S. 1A-1, Rule 14.

Chapter 1C.

Enforcement of Judgments.

Articles 1 to 15.

[Reserved.]

Article 16.

Exempt Property.

Sec.

1C-1601. What property exempt; waiver; exceptions.
1C-1602. Alternative exemptions.
1C-1603. Procedure for setting aside exempt property.
1C-1604. Effect of exemption.
1C-1605 through 1C-1700. [Reserved.]

Article 17.

Uniform Enforcement of Foreign Judgments Act.

1C-1701. Short title.
1C-1702. Definitions.
1C-1703. Filing and status of foreign judgments.
1C-1704. Notice of filing; service.
1C-1705. Defenses; procedure; stay.
1C-1706. Fees.
1C-1707. Optional procedure.
1C-1708. Judgments against public policy.
1C-1709 through 1C-1749. [Reserved.]

Article 17A.

Enforcement of Foreign Judgments for Noncompensatory Damages.

1C-1750. [Repealed.]
1C-1751 through 1C-1759. [Reserved].
1C-1760. [Repealed.]
1C-1761 through 1C-1799. [Reserved].

Article 18.

North Carolina Foreign Money Judgments Recognition Act.

1C-1800. Short title.
1C-1801. Definitions.

Sec.

1C-1802. Applicability of Article.
1C-1803. Recognition and enforcement.
1C-1804. Grounds for nonrecognition.
1C-1805. Basis for personal jurisdiction.
1C-1806. Stay pending an appeal.
1C-1807. Situations not covered by Article.
1C-1808. Uniformity of interpretation.
1C-1809 through 1C-1819. [Reserved.]

Article 19.

The North Carolina Foreign-Money Claims Act.

1C-1820. Definitions.
1C-1821. Scope of Article.
1C-1822. Variation by agreement.
1C-1823. Determining proper money of the claim.
1C-1824. Determining amount of the money of certain contract claims.
1C-1825. Asserting and defending foreign-money claims.
1C-1826. Judgments and awards on foreign-money claims, times of money conversion; form of judgments.
1C-1827. Conversions of foreign money in distribution proceedings.
1C-1828. Prejudgment and judgment interest.
1C-1829. Enforcement of foreign judgments.
1C-1830. Determining United States dollar value of assets to be seized or restrained.
1C-1831. Effect of currency revalorization.
1C-1832. Supplementary general principles of law.
1C-1833. Uniformity of application and construction.
1C-1834. Short title.
1C-1835 through 1C-1839. [Reserved.]

ARTICLES 1 TO 15.

ARTICLE 16.

Exempt Property.

§ 1C-1601. What property exempt; waiver; exceptions.

(a) Exempt property. — Each individual, resident of this State, who is a debtor is entitled to retain free of the enforcement of the claims of creditors:

(1) The debtor's aggregate interest, not to exceed eighteen thousand five hundred dollars ($18,500) in value, in real property or personal

property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor; however, an unmarried debtor who is 65 years of age or older is entitled to retain an aggregate interest in the property not to exceed thirty-seven thousand dollars ($37,000) in value so long as the property was previously owned by the debtor as a tenant by the entireties or as a joint tenant with rights of survivorship and the former co-owner of the property is deceased.

(2) The debtor's aggregate interest in any property, not to exceed five thousand dollars ($5,000) in value of any unused exemption amount to which the debtor is entitled under subdivision (1) of this subsection.

(3) The debtor's interest, not to exceed three thousand five hundred dollars ($3,500) in value, in one motor vehicle.

(4) The debtor's aggregate interest, not to exceed five thousand dollars ($5,000) in value for the debtor plus one thousand dollars ($1,000) for each dependent of the debtor, not to exceed four thousand dollars ($4,000) total for dependents, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest, not to exceed two thousand dollars ($2,000) in value, in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor.

(6) Life insurance as provided in Article X, Section 5 of the Constitution of North Carolina.

(7) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(8) Compensation for personal injury, including compensation from private disability policies or annuities, or compensation for the death of a person upon whom the debtor was dependent for support, but such compensation is not exempt from claims for funeral, legal, medical, dental, hospital, and health care charges related to the accident or injury giving rise to the compensation.

(9) Individual retirement plans as defined in the Internal Revenue Code and any plan treated in the same manner as an individual retirement plan under the Internal Revenue Code, including individual retirement accounts and Roth retirement accounts as described in section 408(a) and section 408A of the Internal Revenue Code, individual retirement annuities as described in section 408(b) of the Internal Revenue Code, and accounts established as part of a trust described in section 408(c) of the Internal Revenue Code.

(10) Funds in a college savings plan qualified under section 529 of the Internal Revenue Code, not to exceed a cumulative limit of twenty-five thousand dollars ($25,000), but excluding any funds placed in a college savings plan account within the preceding 12 months (except to the extent any of the contributions were made in the ordinary course of the debtor's financial affairs and were consistent with the debtor's past pattern of contributions) and only to the extent that the funds are for a child of the debtor and will actually be used for the child's college or university expenses.

(11) Retirement benefits under the retirement plans of other states and governmental units of other states, to the extent that these benefits are exempt under the laws of the state or governmental unit under which the benefit plan is established.

(12) Alimony, support, separate maintenance, and child support payments or funds that have been received or to which the debtor is

entitled, to the extent the payments or funds are reasonably necessary for the support of the debtor or any dependent of the debtor.

(b) Definitions. — As used in this section, the following definitions apply:

(1) "Internal Revenue Code" means Code as defined in G.S. 105-228.90.

(2) "Value" means fair market value of an individual's interest in property, less valid liens superior to the judgment lien sought to be enforced.

(c) Waiver. — The exemptions provided in this Article cannot be waived except by:

(1) Transfer of property allocated as exempt (and in that event only as to the specific property transferred);

(2) Written waiver, after judgment, approved by the clerk or district court judge. The clerk or district court judge must find that the waiver is made freely, voluntarily, and with full knowledge of the debtor's rights to exemptions and that he is not required to waive them; or

(3) Failure to assert the exemption after notice to do so pursuant to G.S. 1C-1603. The clerk or district court judge may relieve such a waiver made by reason of mistake, surprise or excusable neglect, to the extent that the rights of innocent third parties are not affected.

(d) Recent purchases. — The exemptions provided in subdivisions (2), (3), (4), and (5) of subsection (a) of this section are inapplicable with respect to tangible personal property purchased by the debtor less than 90 days preceding the initiation of judgment collection proceedings or the filing of a petition for bankruptcy, unless the purchase of the property is directly traceable to the liquidation or conversion of property that may be exempt and no additional property was transferred into or used to acquire the replacement property.

(e) Exceptions. — The exemptions provided in this Article are inapplicable to claims:

(1) Of the United States or its agencies as provided by federal law;

(2) Of the State or its subdivisions for taxes, appearance bonds or fiduciary bonds;

(3) Of lien by a laborer for work done and performed for the person claiming the exemption, but only as to the specific property affected;

(4) Of lien by a mechanic for work done on the premises, but only as to the specific property affected;

(5) For payment of obligations contracted for the purchase of the specific real property affected;

(6) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1224, s. 6, effective September 1, 1982;

(7) For contractual security interests in the specific property affected; provided, that the exemptions shall apply to the debtor's household goods notwithstanding any contract for a nonpossessory, nonpurchase money security interest in any such goods;

(8) For statutory liens, on the specific property affected, other than judicial liens;

(9) For child support, alimony or distributive award order pursuant to Chapter 50 of the General Statutes;

(10) For criminal restitution orders docketed as civil judgments pursuant to G.S. 15A-1340.38.

(f) Federal Bankruptcy Code. — The exemptions provided in The Bankruptcy Code, 11 U.S.C. § 522(d), are not applicable to residents of this State. The exemptions provided by this Article and by other statutory or common law of this State shall apply for purposes of The Bankruptcy Code, 11 U.S.C. § 522(b).

(g) Effect of exemptions. — Notwithstanding any other provision of law, a creditor shall not obtain possession of a debtor's household goods and furnishings in which the creditor holds a nonpossessory, nonpurchase money security interest until the creditor has fully complied with the procedures required by G.S. 1C-1603. (1981, c. 490, s. 1; 1981 (Reg. Sess., 1982), c. 1224, ss. 1-7, 20; 1991, c. 506, s. 1; 1995, c. 250, s. 1; 1998-212, s. 19.4(j); 1999-337, s. 2; 2005-401, s. 1.)

Effect of Amendments. — Session Laws 2005-401, s. 1, effective January 1, 2006, and applicable to judgments and bankruptcy petitions filed on or after that date, rewrote this section.

Legal Periodicals. — For note on the nonpurchase security agreement as a relinquishment of the personal property exemption, see 15 Wake Forest L. Rev. 708 (1979).

For article on North Carolina's new Exemption Act, see 17 Wake Forest L. Rev. 865 (1981).

For article analyzing North Carolina's tenancy by the entirety reform legislation of 1982, see 5 Campbell L. Rev. 1 (1982).

For article analyzing North Carolina's exemptions law, see 18 Wake Forest L. Rev. 1025 (1982).

CASE NOTES

Subsection (c) Unconstitutional. — Subsection (c) of this section and G.S. 1C-1603(e)(2), as they attempt to limit the claiming of constitutional exemptions to 20 days after notice to designate is served, are unconstitutional. HFC v. Ellis, 107 N.C. App. 262, 419 S.E.2d 592 (1992), aff'd per curiam, 333 N.C. 786, 429 S.E.2d 716 (1993).

Legislative Intent. — There is no clear indication in G.S. 1C-1601 through 1C-1604 that the General Assembly intended to repeal any statutes other than G.S. 1-369 through 1-392. Therefore, to find that G.S. 1C-1601 through 1C-1604 precludes the exemption granted by G.S. 135-9 would be to determine that G.S. 135-9 has been repealed by implication. Repeal by implication is not favored in North Carolina. In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983).

North Carolina General Assembly's purpose in enacting G.S. 1C-1601(a)(9) was to protect a debtor's right to receive retirement benefits and not to limit the exemption to a specific class of retirement plans or trusts. Rather than give a blanket exemption to all "retirement" plans, the General Assembly limited the exemption to any retirement tool that was treated in the same manner as an individual retirement plan under the Internal Revenue Code. In re Grubbs, 325 B.R. 151, 2005 Bankr. LEXIS 1101 (Bankr. M.D.N.C. 2005).

Construction of Section. — The general rule is that North Carolina's exemption laws are to be liberally construed in favor of the exemption. In re Laues, 90 Bankr. 158 (Bankr. E.D.N.C. 1988).

Since the primary purpose of a bond is to provide a source of funds to be applied to the satisfaction of a valid judgment, as a matter of public policy, a party is not permitted to post a cash bond to stay execution of a money judgment and then avoid forfeiture of the bond after default by claiming debtor's exemptions. Barrett v. Barrett, 122 N.C. App. 264, 468 S.E.2d 264 (1996).

Construction with G.S. 1-362. — G.S. 1-362 does not incorporate the exemptions of G.S. 1C-1601 by reference. Kroh v. Kroh, 154 N.C. App. 198, 571 S.E.2d 643, 2002 N.C. App. LEXIS 1404 (2002).

Construction with 11 U.S.C.S. § 522(f). — Implication in G.S. 1C-1601(c) that exemptions can be waived by conveyance of the property must not be applied in preference to the avoidance power of 11 U.S.C.S. § 522(f). In re Bowes, — Bankr. —, 2005 Bankr. LEXIS 1089 (Bankr. M.D.N.C. Feb. 11, 2005).

North Carolina, by this section, "opted out" of the federal exemptions in bankruptcy pursuant to 11 U.S.C. § 522(b)(1). In re Banks, 22 Bankr. 891 (Bankr. W.D.N.C. 1982); In re Laues, 90 Bankr. 158 (Bankr. E.D.N.C. 1988).

North Carolina has opted-out of the § 522(d) exemptions of the Bankruptcy Code and has instead created its own. In re McQueen, 196 Bankr. 31 (E.D.N.C. 1995).

North Carolina has opted out of the exemption scheme provided by the U.S. Bankruptcy Code, so bankruptcy debtors in North Carolina depend on state law both for substance and for procedure. G.S. 1C-1601(f). In re McRae, 282 Bankr. 704, 2002 Bankr. LEXIS 957 (2002).

The provisions of §§ 1C-1601 to 1C-1604 govern the federal government's efforts to execute a judgment. United States v. Scott, 45 Bankr. 318 (M.D.N.C. 1984).

As to consumer loan contract divesting debtor of personal property otherwise exempt, see Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978), decided under former Article 32 of Chapter 1.

Exemption for Tenancies by the Entireties Not Eliminated by Section. — The legislature, by the passage of this section, did not alter or eliminate the exemption from North Carolina process of tenancy by the entireties. The legislative history reflects that the General

Assembly considered eliminating, altering, and limiting tenancy by the entirety. However, the statute which was enacted does not mention tenancy by the entirety in any way. Thus, the General Assembly did not intend to alter the common law doctrine of tenancy by the entirety but to leave it in full force and effect. In re Banks, 22 Bankr. 891 (Bankr. W.D.N.C. 1982).

The purpose of the exemption under subdivision (a)(1) of this section is to permit the debtor some flexibility in determining which of his assets should be sheltered from creditors' claims. There is no reason to treat motor vehicles differently from other forms of property in according protection to this legislative goal. Avco Fin. Servs. v. Isbell, 67 N.C. App. 341, 312 S.E.2d 707 (1984).

The residential exemption of subdivision (a)(1) is conditional; property allocated to the debtor as a residence is free from the enforcement of creditors' claims only so long as the debtor or dependent for the debtor uses the property as a residence. Once the debtor ceases to so use the exempt property as a residence, the prohibition on the creditor's enforcement of his judgment ceases. In re Love, 42 Bankr. 317 (Bankr. E.D.N.C. 1984), aff'd, 54 Bankr. 947 (E.D.N.C. 1985).

The North Carolina residential exemption is conditioned upon continued ownership of the property by the debtor. In re Love, 42 Bankr. 317 (Bankr. E.D.N.C. 1984), aff'd, 54 Bankr. 947 (E.D.N.C. 1985).

The North Carolina residential exemption was enacted in 1983 as a part of the legislation which included the "opt out" of the federal bankruptcy exemptions of 11 U.S.C. § 522(d), and an overhaul of many of North Carolina's exemptions. The concept of the conditional residential exemption is entirely consistent with a long line of North Carolina cases holding that the homestead exemption in North Carolina is conditioned on continued use as a residence and continued ownership. In re Love, 42 Bankr. 317 (Bankr. E.D.N.C. 1984), aff'd, 54 Bankr. 947 (E.D.N.C. 1985).

North Carolina law clearly provides for a residential exemption which is conditioned upon continued use as a residence and continued ownership. If the exempt residence ceases to be used as a residence or ceases to be owned by the debtor (or a dependent) the property is no longer exempt. In that event, a judgment creditor can enforce the judgment lien. If the judgment lien is unconditionally cancelled the judgment creditor would lose the right to pursue the property in the future should the use or ownership of the property change. In re Love, 42 Bankr. 317 (Bankr. E.D.N.C. 1984), aff'd, 54 Bankr. 947 (E.D.N.C. 1985).

Involuntary Absence Did Not Constitute Abandonment of Residence. — Claimed homestead exemption was allowed, pursuant to G.S. 1C-1601(a)(1), over a trustee's objection because the debtor was forced to vacate and did not voluntarily abandon her damaged home as a result of hurricanes and she paid property taxes, stored personalty there, lived in temporary housing, and intended to use the home as a residence as soon as repairs were practicable. In re Foster, 348 B.R. 58, 2006 Bankr. LEXIS 1833 (Bankr. E.D.N.C. 2006).

North Carolina law clearly requires individual to retain both ownership and use of residence if that person is to retain a homestead exemption. North Carolina's courts have failed to draw a distinction between bankruptcy debtors and civil judgment debtors when interpreting the statutory provision creating the homestead exemption. In re Love, 54 Bankr. 947 (E.D.N.C. 1985).

If jewelry is acquired and kept as an investment rather than as an item of ornamental apparel, then it is not wearing apparel. In re Mims, 49 Bankr. 283 (Bankr. E.D.N.C. 1985).

"Wearing apparel" exemption provided in this section may include a diamond engagement ring. In re Mims, 49 Bankr. 283 (Bankr. E.D.N.C. 1985).

Where the court found that the debtor had worn her diamond engagement ring as part of her daily attire since she received it from her ex-husband, the ring was not held as an investment, and the engagement ring was part of the debtor's daily wearing apparel. In re Mims, 49 Bankr. 283 (Bankr. E.D.N.C. 1985).

Subdivision (a)(2) of this section is known as the "wild card" exemption and allows the debtor to exempt his or her aggregate interest in any property, not to exceed $2,500 (now $3,500) in value less any amount of the exemption used under subdivision (a)(1). In re Laues, 90 Bankr. 158 (Bankr. E.D.N.C. 1988).

The language of subdivision (a)(2) of this section is clear and free from ambiguity. Avco Fin. Servs. v. Isbell, 67 N.C. App. 341, 312 S.E.2d 707 (1984).

Under subdivision (a)(2) a debtor may use the exemption to shelter any property except that described in the residence exemption, whether it be motor vehicles, other personal property, tools of the trade, or property not qualifying for any other exemption. Avco Fin. Servs. v. Isbell, 67 N.C. App. 341, 312 S.E.2d 707 (1984).

The limits contained in subdivision (a)(3) of this section apply only to exemptions claimed under that subsection, and have no application to exemptions claimed under subdivision (a)(2) of this section. Avco Fin. Servs. v. Isbell, 67 N.C. App. 341, 312 S.E.2d 707 (1984).

Subdivision (a)(8) of this section was intended to afford protection to those debtors who receive personal injury compensation and to those creditors who have certain kinds of claims for services rendered specifically related to the personal injury. Professional Health Servs., Inc. v. Brank, 67 Bankr. 1005 (W.D.N.C. 1986), aff'd sub nom. Brank v. Barrier, 826 F.2d 1059 (4th Cir. 1987).

The policy behind the exception to the exemption in subdivision (a)(8) is to protect those persons who helped the debtor receive personal injury compensation in the first place or rendered services for the personal injury. Professional Health Servs., Inc. v. Brank, 67 Bankr. 1005 (W.D.N.C. 1986), aff'd sub nom. Brank v. Barrier, 826 F.2d 1059 (4th Cir. 1987).

Gross Amount of Compensation Not Subject to All Claims. — Under subdivision (a)(8) of this section, the gross amount of the personal injury compensation subject to claims for legal or medical charges is not subject to claims for all debts by all creditors, regardless of whether they have claims for legal or medical charges. Professional Health Servs., Inc. v. Brank, 67 Bankr. 1005 (W.D.N.C. 1986), aff'd sub nom. Brank v. Barrier, 826 F.2d 1059 (4th Cir. 1987).

Portion of Compensation Not Exempt. — Although a general creditor is prevented from reaching any part of personal injury compensation which the debtor claims is exempt, a creditor having one of the claims enumerated in subdivision (a)(8) of this section is entitled to reach that portion of the compensation attributable to his services related to the injury. Professional Health Servs., Inc. v. Brank, 67 Bankr. 1005 (W.D.N.C. 1986), aff'd sub nom. Brank v. Barrier, 826 F.2d 1059 (4th Cir. 1987).

The court looked beyond the language of a Settlement Agreement and Release and determined that, in accord with the subject employment contract and complaint, while at least $11,725.56 of the bankrupt's $50,000 settlement represented income loss and was, therefore, not exempt under this section, the remainder received for mental anguish was exempt. In re LoCurto, 239 Bankr. 314 (E.D.N.C. 1999).

The "compensation" exemption provided in subdivision (a)(8) of this section does not include life insurance proceeds. In re Ragan, 64 Bankr. 384 (Bankr. E.D.N.C. 1986).

Retirement Account Exemption Does Not Apply to Shield a Debtor's Claim to Someone Else's Retirement Account. — Former husband was allowed pursuant to G.S. 1-362 to satisfy a tort judgment against his former wife by executing on her future interest in an equitable distribution award of his 401(k) retirement accounts, as the exemption for individual retirement plans in G.S 1C-1601(a)(9) did not shield from execution the wife's mere expectancy in an equitable distribution claim against the husband's retirement accounts. Kroh v. Kroh, 154 N.C. App. 198, 571 S.E.2d 643, 2002 N.C. App. LEXIS 1404 (2002).

Applicability to Tax-Sheltered Annuities. — Given the close similarity between the tax treatment of tax-sheltered annuities and individual retirement plans and the common purpose of both types of plans, the United States Bankruptcy Court for the Middle District of North Carolina, Greensboro Division, is convinced that the Supreme Court of North Carolina Court would conclude that 26 U.S.C.S. § 403(b) tax-sheltered annuities are "treated in the same manner as" individual retirement plans and therefore would construe G.S. 1C-1601(a)(9) as encompassing such tax-sheltered annuities as property that may be exempted under that statute. Accordingly, the debtor was allowed to claim an exemption in this type of retirement plan. In re Garner, — Bankr. —, 2005 Bankr. LEXIS 1118 (Bankr. M.D.N.C. Apr. 29, 2005).

Applicability to Alimony. — Since G.S. 1C-1601(e)(9) did not apply to claims for alimony, the trial court properly denied the ex-husband's motion to exempt his retirement account. Rhew v. Felton, 178 N.C. App. 475, 631 S.E.2d 859, 2006 N.C. App. LEXIS 1560, appeal dismissed, review denied, 636 S.E.2d 810 (2006).

Subsection (c) of this section does not preclude the use of § 135-9 by a bankruptcy debtor to claim an exemption in state employee retirement benefits. In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983).

For interpretation of subsection (d) of this section, see In re Hallman, 26 Bankr. 34 (Bankr. W.D.N.C. 1982).

Purpose of Subsection (d). — The obvious purpose of subsection (d) of this section is to prevent pre-petition planning whereby a debtor uses nonexempt property to purchase exempt personal property, or purchases exempt personal property with the proceeds of a dischargeable loan obligation. In re Ellis, 33 Bankr. 16 (Bankr. E.D.N.C. 1983).

Applicability of Subsection (e) to Court Appointed Counsel Fees. — The State assumes the status of a judgment lien creditor against the assets of an indigent defendant who has accepted court-appointed counsel and been found guilty of the offense. The lien is not valid unless the indigent defendant was given both notice of the state claim and the opportunity to resist its perfection in a hearing before the trial court. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

North Carolina is not barred from structuring a program to collect the amount it is owed from a financially-able defendant through reasonable and fairly administered procedures. The State's initiatives in this area naturally must be narrowly drawn to avoid either chilling the indigent's exercise of the right to counsel, or creating discriminating terms of repayment based solely on the defendant's poverty. Beyond these threshold requirements, however, the State has wide latitude to shape its attorneys' fees recoupment or restitution program along the lines it deems most appropriate for achieving lawful state objectives. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

Compensation for Personal Injury Includes Attorney Fees. — Law in the Fourth Circuit was quite clear that the attorney fees paid to a debtor's personal injury attorneys as part of the settlement of her personal injury case were exempt under G.S. 1C-1601(a)(8); therefore, there was no legal basis for the Chapter 7 trustee's motion to determine that they were part of the debtor's bankruptcy estate. In re Simmons, — Bankr. —, 2006 Bankr. LEXIS 3280 (Bankr. M.D.N.C. Nov. 22, 2006).

Term "purchase" does not encompass every means of acquiring property, and should be defined in the context of subsection (d) of this section so as not to include an acquisition of exemptable personal property where there is no new interest in property obtained, but merely a transfer of equity from the property given to the property received. This definition allows the statute to accomplish its purpose of denying debtors the benefit of certain prebankruptcy petition planning, but will not unnecessarily hinder an honest debtor who trades certain property which could be claimed as exempt for other property of like kind a short time before seeking a fresh start. In re Ellis, 33 Bankr. 16 (Bankr. E.D.N.C. 1983).

Trial Court's Findings As to Value of Stock Unsupported by Evidence. — In a G.S. 1C-1603(e) proceeding on an objection to a debtor's claimed exemption, a trial court failed to make sufficient findings as to how or by what methodology it concluded that the value of the debtor's stock in a development company was zero; there was no evidence supporting the trial court's finding that, purely as a result of pending litigation, the company had no value, and no authority permitted the trial court to base its allowance of a party's claim of exemption on the court's assessment of the equities between the parties rather than on the actual value of the property. Susi v. Aubin, 173 N.C. App. 608, 620 S.E.2d 682, 2005 N.C. App. LEXIS 2093 (2005).

This section expresses interest in ensuring that a bankruptcy debtor retain sufficient possessions for a fresh start. In re Ellis, 33 Bankr. 16 (Bankr. E.D.N.C. 1983).

State Exemptions Apply in Bankrutpcy Proceeding. — Where a bankruptcy trustee objected to the use by a wife of her wild card exemption for property owned by her husband, pursuant to G.S. 1C-1601(f), the state exemptions applied to North Carolina residents in bankruptcy actions. In re Horstman, 276 Bankr. 80, 2002 Bankr. LEXIS 379 (Bankr. E.D.N.C. 2002).

Trustee could exercise his strong arm powers under 11 U.S.C.S. § 544(a)(3) to include the property, which a debtor held in a resulting trust for her sister, and its equity in the bankruptcy estate, after applying the wildcard exemption in G.S. 1C-1601(a)(2); therefore, the trustee's objection that the Chapter 13 plan, which proposed to pay unsecured creditors one percent, did not comply with 11 U.S.C.S. § 1325(a)(4) was sustained and confirmation denied. In re Alston, 355 B.R. 529, 2006 Bankr. LEXIS 2968 (Bankr. M.D.N.C. 2006).

Two joint Chapter 13 debtors were permitted to claim a $20,000 exemption in their real property under G.S. 1C-1601(a)(1) several years after their Chapter 13 plan was confirmed; the debtors had successfully moved to reopen their case to assert the exemption, and caselaw from the Eastern District of North Carolina District court provided that debtors could avoid a judicial lien against their residence under 11 U.S.C.S. § 522(f)(1) and claim an exemption under G.S. 1C-1601(a)(1), even though they did not have any equity in the real property at issue. In re Male, 362 B.R. 238, 2007 Bankr. LEXIS 583 (Bankr. E.D.N.C. 2007).

What Property Exempt in Bankruptcy. — An individual debtor in this State may, pursuant to 11 U.S.C. § 522(b)(2)(A), claim as exempt property under subsection (a) of this section and may, pursuant to 11 U.S.C. § 522(b)-(2)(B), claim as exempt property under the North Carolina common law doctrine of tenancy by the entireties. In re Banks, 22 Bankr. 891 (Bankr. W.D.N.C. 1982).

The legislature exercised its right to "opt out" of the federal bankruptcy exemptions law by adopting a statute which provides North Carolina citizens with a list of exemptions available to them, and precludes a debtor's use of the federal "laundry list" by expressly not authorizing its use. Thus the exemptions available to a North Carolina debtor in bankruptcy are those prescribed by G.S. 1C-1601, 1C-1602 and the exemptions, other than those in 11 U.S.C. § 522(d), afforded by federal law. Berry v. First-Citizens Bank & Trust Co., 33 Bankr. 351 (Bankr. W.D.N.C. 1983).

Under G.S. 1C-1601(a)(8), where all claims against a debtor for services related to her personal injury had been paid, the Chapter 7 Trustee could not use any remaining funds from the debtor's personal injury settlement to pay general creditors; G.S. 1C-1601(a)(8) prevented a general creditor from reaching any part of personal injury compensation, but such compensation was not exempt from claims for services related to the personal injury: funeral, legal, medical, dental, hospital, and health care charges. In re Thompson, 313 B.R. 683, 2004 Bankr. LEXIS 1693 (Bankr. M.D.N.C. 2004).

In North Carolina, compensatory damages for purposes of a personal injury settlement included lost wages, and these compensatory damages were "compensation for the personal injury" and, therefore, exempt pursuant to G.S. 1C-1601(a)(8); accordingly, a Chapter 7 Trustee could not recover the lost wages portion from a debtor's personal injury settlement as this amount was exempt. In re Thompson, 313 B.R. 683, 2004 Bankr. LEXIS 1693 (Bankr. M.D.N.C. 2004).

Where North Carolina, pursuant to G.S. 1C-1601(f), opted out of 11 U.S.C.S. § 522, any bankruptcy property exemptions were controlled by state law; thus, a North Carolina debtor could not use § 522 to exempt disability insurance policy payments from his bankruptcy estate and the payments were not exempt under G.S. 1-362 because such payments were not earnings for performance of personal services but resulted from nonperformance. In re Dillon, — Bankr. —, 2005 Bankr. LEXIS 1314 (Bankr. M.D.N.C. July 8, 2005).

Exemptions Under 11 U.S.C. § 522(d) Compared. — Many of the new North Carolina exemptions were borrowed from the 11 U.S.C. § 522(d) bankruptcy exemptions. In fact, while the amounts are different, the categories of personal property which may be exempt under subdivision (a)(4) of this section are identical to the categories which are exemptable under 11 U.S.C. § 522(d)(3). In re Mims, 49 Bankr. 283 (Bankr. E.D.N.C. 1985).

Controlling Effect of 11 U.S.C. § 522(f). — There may be an inconsistency in the operation of the state exemption statute and the Bankruptcy Code due to the conditional nature of North Carolina exemptions. To the extent that there is any conflict between the operation of 11 U.S.C. § 522(f) and the state statute, the federal provision controls. In re Jackson, 55 Bankr. 343 (Bankr. M.D.N.C. 1985).

State May Not "Opt-Out" of 11 U.S.C. § 522(f). — While a state may "opt-out" of the federal exemptions listed in 11 U.S.C. § 522(d), a state may not "opt-out" of 11 U.S.C. § 522(f). In re Jackson, 55 Bankr. 343 (Bankr. M.D.N.C. 1985), granting debtors' motion to avoid nonpossessory, nonpurchase money security interest in debtors' household personal property, which impaired the total value of the property as exempt.

A debtor's failure to properly preserve his exemptions by not complying with the requirements of exemption laws in a prior state regulated proceeding will be fatal to the debtor's later claim of exemptions in bankruptcy. In re Laughinghouse, 44 Bankr. 789 (Bankr. E.D.N.C. 1984).

Once a debtor validly waives his exemptions by failure to act after being given both notice and an opportunity to claim them as required by state law, the exemptions cannot be revived merely by filing a bankruptcy petition. In re Laughinghouse, 44 Bankr. 789 (Bankr. E.D.N.C. 1984).

Debtor's Intent in Determining Homestead Exemption. — Debtor's intent must be the focus in determining whether an involuntary absence constitutes abandonment for the purposes of G.S. 1C-1601(a)(1); a narrow interpretation of the statute would be contrary to the North Carolina Supreme Court's prior decisions regarding state law exemptions and a liberal construction is consistent with the Court's efforts to embrace all persons fairly within the exemptions statutes. In re Foster, 348 B.R. 58, 2006 Bankr. LEXIS 1833 (Bankr. E.D.N.C. 2006).

Conveyance of Part of Homestead Did Not Bar Lien Avoidance Action. — Debtors' conveyance of part of their homestead to their daughter, post-petition, did not impair their homestead exemption, bar them from seeking relief under 11 U.S.C.S. § 522(f), or bar them from claiming the conveyed property as exempt pursuant to G.S. 1C-1601(c). They did not have to have an interest in the property when they filed their motion to avoid creditor's judicial lien against the property, and the implication in G.S. 1C-1601(c) that exemptions could be waived by conveyance of the property could not be applied in preference to the avoidance power of 11 U.S.C.S. § 522(f). In re Bowes, — Bankr. —, 2005 Bankr. LEXIS 1089 (Bankr. M.D.N.C. Feb. 11, 2005).

Relief from Waiver of Exemption in Bankruptcy. — Debtor who had waived his property exemption by failing to have his exempt property designated by motion within 20 days as required by G.S. 1C-1603 was entitled to relief from such waiver under 11 U.S.C. § 522, which provides no specific time limit for filing exemption. North Carolina Baptist Hosps. v. Howell, 51 Bankr. 1015 (M.D.N.C. 1985).

Where credit union contended that it had a valid security interest in debtors' account by virtue of broad language in loan documents by which the debtors pledged to the credit union all deposits in their checking account with the credit union as security for an automobile loan, and the debtors filed a Chapter 7 bankruptcy action, the language of the loan documents did not constitute a waiver of debtors' right to exempt the account balance under either G.S. 1C-1601 or G.S. 1-362. In re Laues, 90 Bankr. 158 (Bankr. E.D.N.C. 1988).

Debtors may not claim exemption rights in bankruptcy which they would not be entitled to under state law due to their failure to comply with procedural requirements, i.e., failing to respond to the notice of right to have exemptions designated. In re McLamb, 93 Bankr. 72 (Bankr. E.D.N.C. 1988).

Testimony that debtor turned all documents he received in relation to Land Bank and Protection Credit Association judgments over to his attorney was insufficient to establish grounds for relief from the procedural waiver; under North Carolina law a waiver of exemption by failure to act may be relieved because of mistake, surprise or excusable neglect, and bankruptcy court has authority to grant such relief. In re McLamb, 93 Bankr. 72 (Bankr. E.D.N.C. 1988).

Exemption Laws Construed in Favor of Debtor. — The State recognizes that the waiver of exemptions may result in harsh consequences to debtors, and the waiver issue is not one to be taken lightly. The courts have held that the exemption laws must be liberally construed in favor of the debtor. In re Laughinghouse, 44 Bankr. 789 (Bankr. E.D.N.C. 1984).

Excusable Neglect. — In considering granting relief from a court order finding the waiver of exemptions by failure to act, the court must focus on the litigant's excusable neglect, not the attorney's. The negligence of the attorney, in attending to his clients' case, although inexcusable, may still be cause for relief. In re Laughinghouse, 44 Bankr. 789 (Bankr. E.D.N.C. 1984).

Surplus Funds Arising From Foreclosure Sale. — A debtor has a property interest in surplus funds arising from a foreclosure sale; consequently, the interest becomes property of the estate upon filing of a petition for bankruptcy and the debtor may claim exemption in it to the extent permitted by law. In re Harris, 139 Bankr. 386 (Bankr. E.D.N.C. 1992).

Life Insurance Policy. — Upon filing a bankruptcy petition, a debtor can claim as exempt the value of her life insurance policy. There is no provision, however, that extends the protection of the life insurance exemption to the beneficiary of the policy once the proceeds are in the beneficiary's hands. The proceeds are treated like any other asset of the beneficiary and are available to his creditors, except to the extent an exemption or other protection is available to the beneficiary in his own right under applicable law. The result is no different where the beneficiary is the codebtor of the insured in a joint bankruptcy case. Butler v. Sharik, 41 Bankr. 388 (Bankr. E.D.N.C. 1984).

I.R.C. § 403(b) Annuity Exempt. — Annuity created pursuant to I.R.C. § 403(b) is exempt under North Carolina law because a § 403(b) annuity, at least within the meaning of the exemption statute, is treated in the same manner as an individual retirement plan under the Internal Revenue Code. Exemption statute governing retirement plans, G.S. 1C-1601(a)(9), was applicable to debtor's annuity. In re Grubbs, 325 B.R. 151, 2005 Bankr. LEXIS 1101 (Bankr. M.D.N.C. 2005).

No Property Exemptions for Past Residents. — Neither N.C. Const., Art. X, § 1, nor subsection (a) of this section confers any property exemptions on past residents of this State. Indeed, the constitutional and statutory provisions both contemplate the possibility that changes in a debtor's residency or other changing circumstances may warrant subsequent modification of the debtor's right to constitutional or statutory exemptions. First Union Nat'l Bank v. Rolfe, 90 N.C. App. 85, 367 S.E.2d 367 (1988).

Finding of Nonresidency Upheld. — Where the only evidence supporting defendant's contention of residency was her statement that she "hoped" to return to this State as soon as her sister's estate in Ireland was settled, this general declaration did not of itself defeat the trial court's findings of nonresidency in light of the other facts of the case, especially the undisputed evidence that defendant had moved to Ireland (her place of citizenship) at least one year previously, had no dwelling in this State, and offered no definite plan to return. First Union Nat'l Bank v. Rolfe, 90 N.C. App. 85, 367 S.E.2d 367 (1988).

Exemption Unavailable to Defeat Valid Security Interest. — As a general proposition, a debtor may not use an exemption to defeat a valid contractual security interest. In re Laues, 90 Bankr. 158 (Bankr. E.D.N.C. 1988).

Interest of Creditor in Goods of Debtor Who Failed to Elect Exemption. — When debtor failed to make an election for an exemption under this section, allowing debtor to retain $2,500 (now $3,500) worth of household goods and furnishings free from judgment, there was no unfair or deceptive practice on the part of a creditor who took a nonpossessory, nonpurchase money security interest in debtor's household goods and furnishings, even if creditor failed to inform debtor that such an exemption was available. See Ken-Mar Fin. v. Harvey, 90 N.C. App. 362, 368 S.E.2d 646, cert. denied, 323 N.C. 365, 373 S.E.2d 545 (1988).

Chapter 13 debtor was entitled to avoid lien that impaired homestead exemption where he had an ownership interest in the real property prior to the attachment of the creditor's judgment lien. In re Ulmer, 211 Bankr. 523 (Bankr. E.D.N.C. 1997).

Chapter 7 debtors were not entitled to exempt their tax refunds pursuant to subdivision (a)(4) of this section, and the trustee's objection would therefore be allowed. In re Batton, 88 Bankr. 90 (Bankr. E.D.N.C. 1988).

The 1987 Ford truck used by the debtor in his boat hauling business did not qualify as a tool of the trade under subdivision (a)(5). In re Trevino, 96 Bankr. 608 (Bankr. E.D.N.C. 1989).

A horse trailer without a motor does not qualify as a motor vehicle subject to exemption pursuant to subdivision (a)(3); the trustee's objection on this point would be allowed. In re Trevino, 96 Bankr. 608 (Bankr. E.D.N.C. 1989).

A horse trailer does not constitute a household good or appliance or fall within any of the other categories enumerated in subdivision (a)(4). In re Trevino, 96 Bankr. 608 (Bankr. E.D.N.C. 1989).

Tools including sockets, wrenches, pliers, hammers, a screwdriver, a level, and a handsaw were used to work on cars, but these tools could also be used to fix the drain on a sink and qualified for exemption under subdivision (a)(4). In re Trevino, 96 Bankr. 608 (Bankr. E.D.N.C. 1989).

When husband elected to deposit cash bond in lieu of surety bond to stay execution of a judgment against him for spousal support and breach of separation agreement, husband waived any exemption to which he otherwise may have been entitled. Barrett v. Barrett, 122 N.C. App. 264, 468 S.E.2d 264 (1996).

Applied in Schewel Furn. Co. v. Goard, 26 Bankr. 316 (Bankr. M.D.N.C. 1982); In re Pinner, 146 Bankr. 659 (Bankr. E.D.N.C. 1992).

Cited in Dossenbach's of Clinton, Inc. v. Bartelt (In re Beasley), 23 Bankr. 404 (Bankr. E.D.N.C. 1982); In re Russell, 44 Bankr. 452 (Bankr. E.D.N.C. 1984); Carter v. Homesley (In re Strom), 46 Bankr. 144 (Bankr. E.D.N.C. 1985); Summerlin v. Outlaw, 66 Bankr. 413 (Bankr. E.D.N.C. 1986); First Union Nat'l Bank v. Rolfe, 83 N.C. App. 625, 351 S.E.2d 117 (1986); In re Horstman, 276 Bankr. 80, 2002 Bankr. LEXIS 379 (Bankr. E.D.N.C. 2002); In re Connelly, 276 Bankr. 421, 2002 Bankr. LEXIS 562 (Bankr. W.D.N.C. 2002); In re Young, — Bankr. —, 2001 Bankr. LEXIS 2184 (Bankr. M.D.N.C. July 12, 2001); In re Rice, — Bankr. —, 2006 Bankr. LEXIS 1511 (Bankr. M.D.N.C. June 21, 2006).

OPINIONS OF ATTORNEY GENERAL

Effect of Federal Claims on Exemptions. — North Carolina's exemptions in this Article "are inapplicable" to federal claims only insofar as federal law or regulations provide that they are inapplicable. In other words, there must be a provision of federal law or regulation which specifically creates an exception to the general exemption provisions; otherwise, the property is exempt from federal claims. See opinion of Attorney General to Ms. Sarah S. Kaylor, Special Investigator, Department of Social Services, Catawba County, 55 N.C.A.G. 13 (1985).

The exemptions of this Article are applicable to civil claims arising from the Aid for Families with Dependent Children, Medicaid, and food stamp programs asserted by county departments of social services acting as the administering agencies for such programs. The exemptions are inapplicable to Child Support and Establishment of Paternity (Title IV, Part D of the Social Security Act) programs insofar as they are claims for child support under Chapter 50. See opinion of Attorney General to Ms. Sarah S. Kaylor, Special Investigator, Department of Social Services, Catawba County, 55 N.C.A.G. 13 (1985).

§ 1C-1602. Alternative exemptions.

The debtor may elect to take the personal property and homestead exemptions provided in Article X of the Constitution of North Carolina instead of the exemptions provided by G.S. 1C-1601. If the debtor elects to take his constitutional exemptions, the exemptions provided in G.S. 1C-1601 shall not apply and in that event the exemptions provided in this Article shall not be construed so as to affect the personal property and homestead exemptions granted by Article X of the Constitution of North Carolina. If the debtor elects to take his constitutional exemptions, the clerk or district court judge must designate the property to be exempt under the procedure set out in G.S. 1C-1603. The debtor is entitled to have one thousand dollars ($1,000) in value in real property owned and occupied by him and five hundred dollars ($500.00) in value in his personal property exempted from sale under execution. If the value of the property in which the debtor claims his constitutional exemption is in excess of his exemptions, the clerk, in an execution, may order the sale of the property with the proceeds of the sale being distributed first to the debtor to satisfy his exemption and the excess to be distributed as ordered. (1981, c. 490, s. 1; 1981 (Reg. Sess., 1982), c. 1224, s. 8.)

Legal Periodicals. — For article analyzing North Carolina's exemptions law, see 18 Wake Forest L. Rev. 1025 (1982).

CASE NOTES

Exemptions Available in Bankruptcy. — The legislature exercised its right to "opt out" of the federal bankruptcy exemptions law by adopting a statute which provides North Carolina citizens with a list of exemptions available to them, and precludes a debtor's use of the federal "laundry list" by expressly not authorizing its use. Thus the exemptions available to a North Carolina debtor in bankruptcy are those prescribed by G.S. 1C-1601, 1C-1602 and the exemptions, other than those in 11 U.S.C. § 522(d), afforded by federal law. Berry v. First-Citizens Bank & Trust Co., 33 Bankr. 351 (Bankr. W.D.N.C. 1983).

Applied in United States v. Scott, 45 Bankr. 318 (M.D.N.C. 1984).

Cited in In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983); First Union Nat'l Bank v. Rolfe, 90 N.C. App. 85, 367 S.E.2d 367 (1988).

§ 1C-1603. Procedure for setting aside exempt property.

(a) Motion or Petition; Notice. —

(1) A judgment debtor may have his exempt property designated by motion after judgment has been entered against him.

(2) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1224, s. 10.

(3) The clerk or district court judge may determine that particular property is not exempt even though there has been no proceeding to designate the exemption.

(4) After judgment, except as provided in G.S. 1C-1603(a)(3) or when exemptions have already been designated, the clerk may not issue an execution or writ of possession unless notice from the court has been served upon the judgment debtor advising the debtor of the debtor's rights. The judgment creditor shall cause the notice, which shall be accompanied by the form for the statement by the debtor under subsection (c) of this section, to be served on the debtor as provided in G.S. 1A-1, Rule 4(j)(1). If the judgment debtor cannot be served as provided above, the judgment creditor may serve the judgment debtor by mailing a copy of the notice to the judgment debtor at the debtor's last known address. Proof of service by certified or registered mail or personal service is as provided in G.S. 1A-1, Rule 4. The judgment creditor may prove service by mailing to last known address by filing a certificate that the notice was served indicating the circumstances warranting the use of such service and the date and address of service. The notice shall be substantially in the following form:

NORTH CAROLINA ____________ COUNTY	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION CvD

____________________	)	NOTICE OF
Judgment Creditor	)	PETITION (OR
	)	MOTION) TO SET
vs.	)	OFF DEBTOR'S
____________________	)	EXEMPT PROPERTY

GREETINGS:

You have been named as a "judgment debtor" in a proceeding initiated by a "judgment creditor". A "judgment debtor" is a person who a court has declared owes money to another, the "judgment creditor". The purpose of this proceeding is to make arrangements to collect that debt from you personally or from property you own.

It is important that you respond to this notice no later than 20 days after you receive it because you may lose valuable rights if you do nothing. You may wish to consider hiring an attorney to help you with this proceeding to make certain that you receive all the protections to which you are entitled under the North Carolina Constitution and laws.

NOTICE TO JUDGMENT DEBTOR:

THERE ARE CERTAIN EXEMPTIONS UNDER STATE AND FEDERAL LAW THAT YOU ARE ENTITLED TO CLAIM IN ADDITION TO THE EXEMPTIONS LISTED ON THE "SCHEDULE OF DEBTOR'S PROPERTY AND REQUEST TO SET ASIDE EXEMPT PROPERTY" THAT IS ENCLOSED WITH THIS NOTICE.

These exemptions may include social security benefits, unemployment benefits, workers' compensation benefits, and earnings for your personal services rendered within the last 60 days. There is available to you a prompt procedure for challenging an attachment or levy on your property.

(b) Contents of Motion or Petition. — The motion or petition must:

(1) Name the judgment debtor;

(2) Name the judgment creditors of the debtor insofar as they are known to the movant;

(3) If it is a motion to modify a previously allocated exemption, describe the change of condition (if the movant received notice of the exemption hearing) and the modification desired.

(c) Statement by the Debtor. — When proceedings are instituted, the debtor shall file with the court a schedule of:

(1) The debtor's assets, including their location;

(2) The debtor's debts and the names and addresses of the debtor's creditors;

(3) The property that the debtor desires designated as exempt.

The form for the statement shall be substantially as follows:

NORTH CAROLINA ___________ COUNTY	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION CvD

Judgment Creditor	)	SCHEDULE OF DEBTOR'S
	)	PROPERTY
vs.	)	AND REQUEST TO
	)	SET ASIDE EXEMPT
Judgment Debtor	)	PROPERTY

NOTICE TO JUDGMENT DEBTOR:

THERE ARE CERTAIN EXEMPTIONS UNDER STATE AND FEDERAL LAW THAT YOU ARE ENTITLED TO CLAIM IN ADDITION TO THE EXEMPTIONS LISTED BELOW.

These exemptions may include social security benefits, unemployment benefits, workers' compensation benefits, and earnings for your personal services rendered within the last 60 days. There is available to you a prompt procedure for challenging an attachment or levy on your property.

I, ______________________, being duly sworn do depose and say:
(fill in your name)

1. That I am a citizen and resident of ____________________________ County, North Carolina;

2. That I was born on ________________________;
(date of birth)

3. That I am (married to ______________________________________)
(spouse's name)
______________;
(not married)

4. That the following persons live in my household and are in substantial need of my support:

NAME	RELATIONSHIP TO DEBTOR	AGE
______________	____	____
______________	____	____
______________	____	____
______________	____	____

(Use additional space, as necessary)

5. That (I own) (I am purchasing) (I rent) (choose one; mark out the other choices) a (house)(trailer)(apartment) (choose one; mark out the other choices) located at ____
which is my residence. (address, city, zip code)

6. That I (do) (do not) own any other real property. If other real property is owned, list that property on the following lines; if no other real property is owned, mark "not applicable" on the first line.

____
____
____
____

7. That the following persons are, so far as I am able to tell, all of the persons or companies to whom I owe money:

____
____
____
____
____

8. That I wish to claim my interest in the following real or personal property, or in a cooperative that owns property, that I use as a residence or my dependent uses as a residence. I also wish to claim my interest in the following burial plots for myself or my dependents. I understand that my total interest claimed in the residence and burial plots may not exceed $18,500, except that if I am unmarried and am 65 years of age or older, I am entitled to claim a total exemption in the residence and burial plots not to exceed $37,000 so long as the property was previously owned by me as a tenant by the entireties or as a joint tenant with rights of survivorship, and the former co-owner of the property is deceased.

I understand that I am not entitled to this exemption if I take the homestead exemption provided by the Constitution of North Carolina in other property. I understand that if I wish to claim more than one parcel exempt I must attach additional pages setting forth the following information for each parcel claimed exempt.

Property Location:
County ______________ Township ____

Street Address ____________________

Legal Description:

Number by which county tax assessor identifies property ____________

Description (Attach a copy of your deed or other instrument of conveyance that describes the property and indicate here: ____________ or describe the property in as much detail as possible. Attach additional sheets if necessary.)

____

____

____

Record Owner(s) ____________________

____

____

Estimated Value: ____________________

Lienholders: ____________________

(1) Name ____________ Current Balance ____________
Address ____________________

(2) Name ____________ Current Balance ____________
Address ____________________

(3) Name ____________ Current Balance ____________
Address ____________________

(4) If others, attach additional pages.

If you are unmarried and 65 years of age or older, specify which, if any, property listed above was previously owned by you as a tenant by the entireties or as a joint tenant with rights of survivorship and as to which the former co-owner of the property is deceased:

____

____

9. That I wish to claim the following life insurance policies whose sole beneficiaries are (my wife) (my children) (my wife and children) as exempt:

Name of Insurer	Policy Number	Face Value	Beneficiary(ies)
________	________	________	________
________	________	________	________
________	________	________	________

10. That I wish to claim the following items of health care aid necessary for (myself) (my dependents) to work or sustain health:

Item	Purpose	Person using item
________	________	________
________	________	________
________	________	________

11. That I wish to claim the following implements, professional books, or tools (not to exceed $2,000), of my trade or the trade of my dependent. I understand that such property purchased within 90 days of this proceeding may not be exempt:

Item	Estimated Value
________	________
________	________
________	________

12. That I wish to claim the following personal property consisting of household furnishings, household goods, wearing apparel, appliances, books, animals, crops or musical instruments as exempt from the claims of my creditors. I affirm, that these items of personal property are held primarily for my personal, family or household use or for such use by my dependents.

I understand that I am entitled to personal property worth the sum of $5,000. I understand that I am also entitled to $1,000 for each person dependent on me for support, but not to exceed $4,000 for dependents. I further understand that I am entitled to this amount after deduction from the value of the property the amount of any valid lien or purchase money security interest and that property purchased within 90 days of this proceeding may not be exempt.

Item (or class) of Property	Amount of Lien or Security Interest	Location	Estimated Value of Debtor's Interest

13. That I wish to claim my interest in the following motor vehicle as exempt from the claims of my creditors. I understand that I am entitled to my interest in a motor vehicle worth the sum of $3,500 after deduction of the amount of any valid liens or purchase money security interest. I understand that a motor vehicle purchased within 90 days of this proceeding may not be exempt.

Make and Model of Motor Vehicle	Year	Name(s) of Title Owner of Record	Name(s) of Lien Holder(s) of Record	Estimated Value of Debtor's Interest

14. That I wish to claim as exempt the following compensation that I received or to which I am entitled for the personal injury of myself or a person upon whom I was dependent for support, including compensation from a private disability policy or an annuity, or compensation that I received for the death of a person upon whom I was dependent for support. I understand that this compensation is not exempt from claims for funeral, legal, medical, dental, hospital or health care charges related to the accident or injury that resulted in the payment of the compensation to me. I understand that if I wish to claim more than one amount of compensation exempt, I must attach additional pages setting forth the following information for each amount of compensation claimed exempt.

(a) amount of compensation ____________________

(b) method of payment: lump sum or installments ____________________

(If installments, state amount, frequency and duration of payments)

____

(c) name and relationship to debtor of person(s) injured or killed giving rise to compensation ____________________

(d) location/source of compensation if received in lump or installments, including name and account number of any disability policy or annuity

____

(e) unpaid debts arising out of the injury or death giving rise to compensation ____________________

Name and Address	Services Rendered	Amount of Debt

15. That I wish to claim the following property as exempt because I claimed residential real or personal property as exempt that is worth less than $18,500 or I made no claim for a residential exemption under section (8) above. I understand that I am entitled to an exemption of up to $5,000 in any property only if I made no claim under section (8) above or a claim that was less than $18,500 under section (8) above. I understand that I am entitled to claim any

unused amount that I was permitted to make under section (8) above up to a maximum of $5,000 in any property. (Examples: (a) if you claim $17,500 under section (8), $1,000 allowed here; (b) if you claim $13,500 under section (8), $5,000 allowed here; (c) if you claim $18,500 under section (8), no claim allowed here.) I further understand that the amount of my claim under this section is after the deduction from the value of this property of the amount of any valid lien or purchase money security interests and that tangible personal property purchased within 90 days of this proceeding may not be exempt.

PERSONAL PROPERTY:

Property Location	Amount of Liens or Purchase Money Security Interests	Value of Debtor's Interest
______	______	______
______	______	______
______	______	______
______	______	______

REAL PROPERTY (I understand that if I wish to claim more than one parcel exempt, I must attach additional pages setting forth the following information for each parcel claimed exempt):

Property Location
County ______ Township ______
Street Address ______

Legal Description:
Number by which county tax assessor identifies property ______
______
______

Description (Attach a copy of your deed or other instrument of conveyance that describes the property and indicate here: ______ or describe the property in as much detail as possible.
Attach additional sheets if necessary.)
______
______
______
______
______
______

Record Owner(s): ______
______
______
______
______

Estimated Value: ______

Lienholders:
(1) Name ______ Current Balance ______
Address ______
(2) Name ______ Current Balance ______
Address ______
(3) Name ______ Current Balance ______
Address ______
(4) If others, attach additional pages.

16. That I wish to claim as exempt the following retirement plans that I have that are individual retirement plans as described in the Internal Revenue Code or that are treated in the same manner as an individual retirement plan under the Internal Revenue Code, including individual retirement accounts and Roth retirement accounts as described in section 408(a) and section 408A of the Internal Revenue Code, individual retirement annuities as described in

section 408(b) of the Internal Revenue Code, and accounts established as part of a trust described in section 408(c) of the Internal Revenue Code.

Type of Retirement Account	Name of Account	Account Number
____________	____________	____________
____________	____________	____________
____________	____________	____________

17. That I wish to claim as exempt the following funds I hold in a college savings plan, not to exceed $25,000. I understand that to qualify for this exemption, the college savings plan must qualify as a college savings plan under section 529 of the Internal Revenue Code, and the college savings plan must be for my child and must actually be used for my child's college or university expenses. I understand I may not exempt any funds I placed in this account within the preceding 12 months, except to the extent that any contributions were made in the ordinary course of my financial affairs and were consistent with my past pattern of contributions.

College Savings Plan	Account Number Value	Name(s) of Child(ren) Beneficiaries
____________	____________	____________
____________	____________	____________
____________	____________	____________

18. That I wish to claim as exempt the following retirement benefits to which I am entitled to under the retirement plans of other states and governmental units of other states. I understand that these benefits are exempt only to the extent these benefits are exempt under the laws of the state or governmental unit under which the benefit plan was established.

State/Government Unit	Name of Retirement Plan	Identifying Number
____________	____________	____________
____________	____________	____________
____________	____________	____________

19. That I wish to claim as exempt any alimony, support, separate maintenance, or child support payments or funds that I have received or that I am entitled to receive. I understand that these payments are exempt only to the extent that they are reasonably necessary for my support or for the support of a person dependent on me for support.

Type of Support	Person Paying Support	Amount & Location of Funds
____________	____________	____________
____________	____________	____________
____________	____________	____________

20. That the following is a complete listing of all of my assets that I have not claimed as exempt under any of the preceding paragraphs:

Item	Location	Estimated value
____________	____________	____________
____________	____________	____________
____________	____________	____________

This the ________ day of ________, ________

____
Judgment Debtor

Sworn to and Subscribed before
me this ________ day of ________, ________.

____
Notary Public

My Commission Expires:

(d) Notice to Persons Affected. — If the judgment debtor moves to designate his exemptions, a copy of the motion and schedule must be served on the judgment creditor as provided in G.S. 1A-1, Rule 5.

(e) Procedure for Setting Aside Exempt Property. —

(1) When served with the notice provided in G.S. 1C-1603(a)(4), the judgment debtor may either file a motion to designate his exemptions with a schedule of assets or may request, in writing, a hearing before the clerk to claim exemptions.

(2) If the judgment debtor does not file a motion to designate exemptions with a schedule of assets within 20 days after notice of his rights was served in accordance with G.S. 1C-1603(a)(4) or if he does not request a hearing before the clerk within 20 days after service of the notice of rights and appear at the requested hearing, the judgment debtor has waived the exemptions provided in this Article and in Sections 1 and 2 of Article X of the North Carolina Constitution. Upon request of the judgment creditor, the clerk shall issue a writ of execution or writ of possession.

(3) If the judgment debtor moves to designate his exemptions by filing a motion and schedule of assets, the judgment creditor is served as provided in G.S. 1C-1603(d).

(4) If the judgment debtor requests a hearing before the clerk to claim exemptions, the clerk sets a hearing date and gives notice of the hearing to the judgment debtor and judgment creditor. At the hearing, the judgment debtor may claim his exemptions.

(5) The judgment creditor has 10 days from the date served with a motion and schedule of assets or from the date of a hearing to claim exemptions to file an objection to the judgment debtor's schedule of exemptions.

(6) If the judgment creditor files no objection to the schedule filed by the judgment debtor or claimed at the requested hearing, the clerk shall enter an order designating the property allowed by law and scheduled by the judgment debtor as exempt property. Upon request of the judgment creditor, the clerk shall issue an execution or writ of possession except for exempt property.

(7) If the judgment creditor objects to the schedule filed or claimed by the judgment debtor, the clerk must place the motion for hearing by the district court judge, without a jury, at the next civil session.

(8) The district court judge must determine the value of the property. The district court judge or the clerk, upon order of the judge, may appoint a qualified person to examine the property and report its value to the judge. Compensation of that person must be advanced by the person requesting the valuation and is a court cost having priority over the claims.

(9) The district court judge must enter an order designating exempt property. Supplemental reports and orders may be filed and entered as necessary to implement the order.

(10) Where the order designating exemptions indicates excess value in exempt property, the clerk, in an execution, may order the sale of property having excess value and appropriate distribution of the proceeds.

(11) The clerk or district court judge may permit a particular item of property having value in excess of the allowable exemption to be retained by the judgment debtor upon his making available to judgment creditors money or property not otherwise available to them in an amount equivalent to the excess value. Priorities of judgment creditors are the same in the substituted property as they were in the original property.

(12) Appeal from a designation of exempt property by the clerk is to the district court judge. A party has 10 days from the date of entry of an

order to appeal. Appeal from a designation of exempt property by a district court judge is to the Court of Appeals. Decisions of the Court of Appeals with regard to questions of valuation of property are final as provided in G.S. 7A-28. Other questions may be appealed as provided in G.S. 7A-30 and 7A-31.

(f) Notation of Order on Judgment Docket. — A notation of the order setting aside exempt property must be entered by the clerk of court on the judgment docket opposite the judgment that was the subject of the enforcement proceeding. If real property located in a county other than the county in which the judgment was rendered is designated as exempt and the judgment has already been docketed in that county, the clerk must send a notice of the designation of exempt property to the county where the property is located. The clerk of the county where the land is located shall enter a notation of the designation of exempt property on the judgment docket. If a judgment is docketed in a county where real property is located after that real property has been designated as exempt, the transcript of judgment must indicate that the exemptions have been designated. The clerk in the county receiving the transcript must enter the notation of designation of exempt property as well as docket the judgment.

(g) Modification. — The debtor's exemption may be modified by motion in the original exemption proceeding by anyone who did not receive notice of the exemption hearing. Also, the debtor's exemption may be modified upon a change of circumstances, by motion in the original exemption proceeding, made by the debtor or anyone interested. A substantial change in value may constitute changed circumstances. Modification may include the substitution of different property for the exempt property.

(h) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1224, s. 14. (1981, c. 490, s. 1; 1981 (Reg. Sess., 1982), c. 1224, ss. 9-14, 18, 19; 1991, c. 607, s. 1; 1999-456, s. 59; 2005-401, ss. 2, 3.)

Effect of Amendments. — Session Laws 2005-401, ss. 2 and 3, effective January 1, 2006, and applicable to judgments and bankruptcy petitions filed on or after that date, rewrote subdivision (a)(4) and subsection (c).

Legal Periodicals. — For note on the nonpurchase security agreement as a relinquishment of the personal property exemption, see 15 Wake Forest L. Rev. 708 (1979).

For article analyzing North Carolina's exemptions law, see 18 Wake Forest L. Rev. 1025 (1982).

CASE NOTES

Subdivision (e)(2) Unconstitutional. — Subsection (c) of G.S. 1C-1601 and subdivision (e)(2) of this section, as they attempt to limit the claiming of constitutional exemptions to 20 days after notice to designate is served, are unconstitutional. HFC v. Ellis, 107 N.C. App. 262, 419 S.E.2d 592 (1992), aff'd per curiam, 333 N.C. 786, 429 S.E.2d 716 (1993).

Failure to Comply with Procedural Requirements. — Debtors may not claim exemption rights in bankruptcy which they would not be entitled to under state law due to their failure to comply with state law procedural requirements, such as by failing to respond to the notice of right to have exemptions designated. In re McLamb, 93 Bankr. 72 (Bankr. E.D.N.C. 1988).

Requirement of Notice. — Notice is required before each execution. A single notice before the first execution is not sufficient. HFC v. Ellis, 107 N.C. App. 262, 419 S.E.2d 592 (1992), aff'd per curiam, 333 N.C. 786, 429 S.E.2d 716 (1993).

Failure to Give Notice or Opportunity to Be Heard. — Defendant who defaulted on original complaint which alleged that she was a resident of this State was entitled to notice of plaintiff's subsequent motion to declare that none of her property was exempt by virtue of nonresidency, and an opportunity to contest the factual allegations as to her nonresidency. Where she was given neither notice nor an opportunity to be heard, in violation of statutory and constitutional provisions, the order declaring that her property was not exempt was invalid, and she was entitled to relief therefrom pursuant to G.S. 1A-1, Rule 60(b)(4). First Union Nat'l Bank v. Rolfe, 83 N.C. App. 625, 351 S.E.2d 117 (1986).

Exemptions Available in Bankruptcy. — The legislature exercised its right to "opt out" of the federal bankruptcy exemptions law by adopting a statute which provides North Carolina citizens with a list of exemptions available to them, and precludes a debtor's use of the federal "laundry list" by expressly not authorizing its use. Thus the exemptions available to a North Carolina debtor in bankruptcy are those prescribed by G.S. 1C-1601, G.S. 1C-1602 and the exemptions, other than those in 11 U.S.C. § 522(d), afforded by federal law. Berry v. First-Citizens Bank & Trust Co., 33 Bankr. 351 (Bankr. W.D.N.C. 1983).

Execution and Waiver. — This statute requires that no execution be issued until a Notice to Designate Exemptions has been served and any waiver applies only to the particular execution issued. HFC v. Ellis, 107 N.C. App. 262, 419 S.E.2d 592 (1992), aff'd per curiam, 333 N.C. 786, 429 S.E.2d 716 (1993).

Relief from Waiver of Exemption in Bankruptcy. — Debtor who had waived his property exemption by failing to have his exempt property designated by motion within 20 days, as required by this section, was entitled to relief from such waiver under 11 U.S.C. § 522, which provides no specific time limit for filing exemption. North Carolina Baptist Hosps. v. Howell, 51 Bankr. 1015 (M.D.N.C. 1985).

Conflicts Between 11 U.S.C. § 522(l) and Time Limits Under State Law. — G.S. 1C-1601(c) and G.S. 1C-1603(e) severely undermine the effectiveness and limit the application of the federal bankruptcy provisions. The federal provision, 11 U.S.C. § 522(l), must be read independent of the state provision in order to resolve the inherent conflict between the two. There is no question that when a state law conflicts with a federal law, the former is preempted by the latter. The inconsistencies which exist between federal and state law should undoubtedly be resolved in favor of federal law. Thus, where a time limitation or a lack of time limitation in a federal provision is different from a provision in state legislation, the federal legislation controls. To hold otherwise, especially in the context of bankruptcy, would frustrate Congress' policy of giving debtors a new start. North Carolina Baptist Hosps. v. Howell, 51 Bankr. 1015 (M.D.N.C. 1985).

North Carolina law clearly requires individual to retain both ownership and use of residence if that person is to retain a homestead exemption. North Carolina's courts have failed to draw a distinction between bankruptcy debtors and civil judgment debtors when interpreting the statutory provision creating the homestead exemption. In re Love, 54 Bankr. 947 (E.D.N.C. 1985).

Interest of Creditor in Goods of Debtor Who Failed to Elect Exemption. — When debtor failed to make an election for an exemption under G.S. 1C-1601, allowing debtor to retain $2,500 (now $3,500) worth of household goods and furnishings free from judgment, there was no unfair or deceptive practice on the part of a creditor who took a nonpossessory, nonpurchase money security interest in debtor's household goods and furnishings, even if creditor failed to inform debtor that such an exemption was available. See Ken-Mar Fin. v. Harvey, 90 N.C. App. 362, 368 S.E.2d 646, cert. denied, 323 N.C. 365, 373 S.E.2d 542 (1988).

Manner of Allotment. — Where the debtor requested that the allotment of his homestead begin at a point at the front door of his dwelling, with the result that the entire area allotted was located in the hallway adjacent to the front door of the house, the fact that the allotment was useless to the debtor and impaired the value of the remaining property available for satisfaction of the creditor's judgment did not entitle the debtor to claim his exemption in the entire dwelling. Seeman Printery, Inc. v. Schinhan, 34 N.C. App. 637, 239 S.E.2d 744 (1977), appeal dismissed, 294 N.C. 442, 241 S.E.2d 844 (1978), decided under former Article 32 of Chapter 1.

Surplus Funds Arising From Foreclosure Sale. — A debtor has a property interest in surplus funds arising from a foreclosure sale; consequently, the interest becomes property of the estate upon filing of a petition for bankruptcy and the debtor may claim exemption in it to the extent permitted by law. In re Harris, 139 Bankr. 386 (Bankr. E.D.N.C. 1992).

As to consumer loan contract divesting debtor of property otherwise exempt, see Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978), decided under former Article 32 of Chapter 1.

Authority of District Court. — Although no specific statute grants a district court authority, when a matter relating to exemptions is transferred, pursuant to subsection (e)(7), from the clerk to the district court, the district court must be given the same general authority granted to a superior court pursuant to G.S. 1-276. Bromhal v. Stott, 119 N.C. App. 428, 458 S.E.2d 724 (1995).

Jurisdiction of District Court. — Once the issue of exemptions is properly before the district court, that court has jurisdiction to order the sale of exempt property having excess value, unless it would be more efficient to remand this issue to the clerk. Bromhal v. Stott, 119 N.C. App. 428, 458 S.E.2d 724 (1995).

Where debtors' interest in two adjacent lots exceeded the amount of the available exemption debtors could not protect their entire interest in both lots; because they exhibited no intention to protect one lot at the expense of losing the lot on which their house rested and, without sacrificing the lot with their home, could not have exempted the other lot from sale, they had no standing to challenge the sale of the other lot. Hollar v. United States, 188 Bankr. 539 (M.D.N.C. 1995), aff'd without op. 92 F.3d 1179 (4th Cir. 1996).

Findings As to Value of Stock Unsupported by Evidence. — In a G.S. 1C-1603(e) proceeding on an objection to a debtor's claimed exemption, a trial court failed to make sufficient findings as to how or by what methodology it concluded that the value of the debtor's stock in a development company was zero; there was no evidence supporting the trial court's finding that, purely as a result of pending litigation, the company had no value, and no authority permitted the trial court to base its allowance of a party's claim of exemption on the court's assessment of the equities between the parties rather than on the actual value of the property. Susi v. Aubin, 173 N.C. App. 608, 620 S.E.2d 682, 2005 N.C. App. LEXIS 2093 (2005).

Applied in In re Love, 42 Bankr. 317 (Bankr. E.D.N.C. 1984); United States v. Scott, 45 Bankr. 318 (M.D.N.C. 1984).

Cited in In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983); First Union Nat'l Bank v. Rolfe, 90 N.C. App. 85, 367 S.E.2d 367 (1988).

§ 1C-1604. Effect of exemption.

(a) Property allocated to the debtor as exempt is free of the enforcement of the claims of creditors for indebtedness incurred before or after the exempt property is set aside, other than claims exempted by G.S. 1C-1601(e), for so long as the debtor owns it. When the property is conveyed to another, the exemption ceases as to liens attaching prior to the conveyance. Creation of a security interest in the property does not constitute a conveyance within the meaning of this section, but a transfer in satisfaction of, or for the enforcement of, a security interest is a conveyance. When exempt property is conveyed, the debtor may have other exemptions allotted.

(a1) The statute of limitations on judgments is suspended for the period of exemption as to the property which is exempt. However, the statute of limitations is not suspended as to the exempt property unless the judgment creditor shall have, prior to the expiration of the statute of limitations, recorded a copy of the order designating exempt property in the office of the register of deeds in the county where the exempt real property is located.

(b) Exempt property which passes by bequest, devise, intestate succession or gift to a dependent spouse, child or person to whom the debtor stands in loco parentis, continues to be exempt while held by that person. The exemption is terminated if the spouse remarries, or, with regard to a dependent, when the court determines that dependency no longer exists. (1981, c. 490, s. 1; 1991, c. 607, s. 2.)

Legal Periodicals. — For article analyzing North Carolina's exemptions law, see 18 Wake Forest L. Rev. 1025 (1982).

CASE NOTES

North Carolina law clearly requires individual to retain both ownership and use of residence if that person is to retain a homestead exemption. North Carolina's courts have failed to draw a distinction between bankruptcy debtors and civil judgment debtors when interpreting the statutory provision creating the homestead exemption. In re Love, 54 Bankr. 947 (E.D.N.C. 1985).

Ownership Interest Required. — Under North Carolina law, an individual must have an ownership interest in residential property in order to claim a homestead exemption in the property. Hollar v. United States, 184 Bankr. 25 (Bankr. M.D.N.C.), aff'd, 188 Bankr. 539 (M.D.N.C. 1995), aff'd, 92 F.3d 1179 (4th Cir. 1996).

Controlling Effect of 11 U.S.C. § 522(f). — There may be an inconsistency in the operation of the state exemption statute and the Bankruptcy Code due to the conditional nature of North Carolina exemptions. To the extent that there is any conflict between the operation of 11 U.S.C. § 522(f) and the state statute, the federal provision controls. In re Jackson, 55 Bankr. 343 (Bankr. M.D.N.C. 1985).

The provision of subsection (a) of this section limiting the homestead exemption to the duration of the debtor's actual residence in that place must not be applied in preference to the avoidance power of § 522(f) of the Bankruptcy Code. Wachovia Bank & Trust Co. v. Opperman, 943 F.2d 441 (4th Cir. 1991).

Applied in In re Love, 42 Bankr. 317 (Bankr. E.D.N.C. 1984); United States v. Scott, 45 Bankr. 318 (M.D.N.C. 1984).

Cited in In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983).

§§ 1C-1605 through 1C-1700: Reserved for future codification purposes.

ARTICLE 17.

Uniform Enforcement of Foreign Judgments Act.

§ 1C-1701. Short title.

This Article shall be known and may be cited as the Uniform Enforcement of Foreign Judgments Act. (1989, c. 747, s. 1.)

CASE NOTES

Applicability. — Uniform Enforcement of Foreign Judgments Act, G.S. 1C-1701 et seq., did not apply to a North Carolina court giving full faith and credit to a Kentucky judgment, as action on the judgment was not being sought in North Carolina, but the judgment was being relied on as a bar to an insured's claim against an insurer. Freeman v. Pac. Life Ins. Co., 156 N.C. App. 583, 577 S.E.2d 184, 2003 N.C. App. LEXIS 190 (2003).

Authenticated Foreign Judgment. — In an action to enforce a foreign judgment under this Article of the General Statutes, in the absence of any evidence from the judgment debtor, the introduction of a properly authenticated foreign judgment is entitled the foreign judgment to full faith and credit. Lust v. Fountain of Life, Inc., 110 N.C. App. 298, 429 S.E.2d 435 (1993).

Presumption of Validity. — Once a judgment creditor was entitled to a presumption that an out of state judgment was entitled to full faith and credit, the plaintiff was not required, as the defendants suggested, to bring forth evidence that none of the defenses available to defendants were valid; rather the defendants were required to bring forth evidence to rebut the presumption of validity, and, as the defendants offered no such evidence, the trial court correctly ordered that the plaintiff's motion to enforce the judgment be allowed and ordered that the out of state judgment be given full faith and credit. Lust v. Fountain of Life, Inc., 110 N.C. App. 298, 429 S.E.2d 435 (1993).

Full Faith And Credit Dependent on Personal Jurisdiction. — An Alabama default judgment was not entitled to full faith and credit because the Alabama court which entered it lacked personal jurisdiction; the plaintiffs had failed to argue in the North Carolina trial court that the service by mail was adequate, and personal service on defendants's attorney was inadequate because it was not in writing and signed by the defendant and a credible witness. Moss v. Improved Benevolent & Protective Order of Elks, 139 N.C. App. 172, 532 S.E.2d 825, 2000 N.C. App. LEXIS 810 (2000).

Cited in In re Aerial Devices, Inc., 126 N.C. App. 709, 486 S.E.2d 463 (1997); Wener v. Perrone & Cramer Realty, Inc., 137 N.C. App. 362, 528 S.E.2d 65, 2000 N.C. App. LEXIS 331 (2000); Security Credit Leasing, Inc. v. D.J.'s of Salisbury, Inc., 140 N.C. App. 521, 537 S.E.2d 227, 2000 N.C. App. LEXIS 1212 (2000).

§ 1C-1702. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Foreign Judgment" means any judgment, decree, or order of a court of the United States or a court of any other state which is entitled to full faith and credit in this State, except a "child support order," as defined in G.S. 52C-1-101 (The Uniform Interstate Family Support Act), a "custody decree," as defined in G.S. 50A-102 (The Uniform Child-Custody Jurisdiction and Enforcement Act), or a domestic violence protective order as provided in G.S. 50B-4(d).

(2) "Judgment Debtor" means the party against whom a foreign judgment has been rendered.

(3) "Judgment Creditor" means the party in whose favor a foreign judgment has been rendered. (1989, c. 747, s. 1; 1999-23, s. 3; 1999-223, s. 4.)

CASE NOTES

"Foreign Judgment." — Although the Israeli order in the husband and wife's divorce case was not a "foreign judgment" under the Uniform Enforcement of Foreign Judgments Act (UEFJA) because the order was not the order of a United States court or a state court, the trial court did not err in granting summary judgment to the wife and in recognizing that the husband owed a certain sum to the wife under the Israeli order; the wife made it clear in the wife's complaint that the wife was proceeding under the North Carolina Foreign Money-Judgments Recognition Act (NCFMJRA), which included in its definition of foreign state any governmental unit other than the United States, and thus the trial court could recognize the wife's rights under the NCFMJRA that would allow the wife to later pursue enforcement of the Israeli order under the UEFJA. Cotter v. Cotter, — N.C. App. —, 648 S.E.2d 552, 2007 N.C. App. LEXIS 1809 (2007).

§ 1C-1703. Filing and status of foreign judgments.

(a) A copy of any foreign judgment authenticated in accordance with an act of Congress or the statutes of this State may be filed in the office of the clerk of superior court of any county of this State in which the judgment debtor resides, or owns real or personal property. Along with the foreign judgment, the judgment creditor or his attorney shall make and file with the clerk an affidavit which states that the foreign judgment is final and that it is unsatisfied in whole or in part, and which sets forth the amount remaining unpaid on the judgment.

(b) Upon the filing of the foreign judgment and the affidavit, the foreign judgment shall be docketed and indexed in the same manner as a judgment of this State; however, no execution shall issue upon the foreign judgment nor shall any other proceeding be taken for its enforcement until the expiration of 30 days from the date upon which notice of filing is served in accordance with G.S. 1C-1704.

(c) A judgment so filed has the same effect and is subject to the same defenses as a judgment of this State and shall be enforced or satisfied in like manner; provided however, if the judgment debtor files a motion for relief or notice of defense pursuant to G.S. 1C-1705, enforcement of the foreign judgment is automatically stayed, without security, until the court finally disposes of the matter. (1989, c. 747, s. 1.)

CASE NOTES

This section specifically sets out how and where the judgment must be filed, and the specific documents which must be served on the defendant, in G.S. 1C-1704(a). Sun Bank/South Fla. v. Tracy, 104 N.C. App. 608, 410 S.E.2d 509 (1991).

This Act's 30 day limitation is a "waiting period"—a restriction on when plaintiff creditors may act and not on when defendant debtors may not; the 30 day limitation period is not one barring a defendant debtor's response but instead the limitation period is specifically set to bar a plaintiff creditor from obtaining a foreign judgment against one of our state's citizens and then immediately (within 30 days) being able to enforce it without that defendant debtor being afforded the notice required by due process. Security Credit Leasing, Inc. v. D.J.'s of Salisbury, Inc., 140 N.C. App. 521, 537 S.E.2d 227, 2000 N.C. App. LEXIS 1212 (2000).

Authenticated Foreign Judgment. — In an action to enforce a foreign judgment under this Article of the General Statutes, in the absence of any evidence from the judgment debtor, the introduction of a properly authenticated foreign judgment entitled the foreign judgment to full faith and credit. Lust v. Fountain of Life, Inc., 110 N.C. App. 298, 429 S.E.2d 435 (1993).

Enforcement of Foreign Judgments. — Foreign judgment that the judgment creditor obtained in New York was entitled to a presumption that the judgment was entitled to full faith and credit, as the judgment creditor met its burden of showing that entitlement by filing a properly authenticated judgment; however, the general contractor timely moved for relief from the foreign judgment by raising the defense that the New York trial court that entered it did not have personal jurisdiction over the general contractor, and because the trial court did not make any findings of fact or conclusions of law regarding the motion to enforce the judgment, the conclusion that the foreign judgment was enforceable in North Carolina was not supported by competent evidence and the case had to be remanded to the trial court for further proceedings. Quantum Corp. Funding, Ltd. v. B.H. Bryan Bldg. Co., 175 N.C. App. 483, 623 S.E.2d 793, 2006 N.C. App. LEXIS 187 (2006).

Although the Israeli order in the husband and wife's divorce case was not a "foreign judgment" under the Uniform Enforcement of Foreign Judgments Act (UEFJA) because the order was not the order of a United States court or a state court, the trial court did not err in granting summary judgment to the wife and in recognizing that the husband owed a certain sum to the wife under the Israeli order; the wife made it clear in the wife's complaint that the wife was proceeding under the North Carolina Foreign Money-Judgments Recognition Act (NCFMJRA), which included in its definition of foreign state any governmental unit other than the United States, and thus the trial court could recognize the wife's rights under the NCFMJRA that would allow the wife to later pursue enforcement of the Israeli order under the UEFJA. Cotter v. Cotter, — N.C. App. —, 648 S.E.2d 552, 2007 N.C. App. LEXIS 1809 (2007).

Applied in Walden v. Vaughn, 157 N.C. App. 507, 579 S.E.2d 475, 2003 N.C. App. LEXIS 727 (2003).

Cited in HCA Health Servs. of Tex., Inc. v. Reddix, 151 N.C. App. 659, 566 S.E.2d 754, 2002 N.C. App. LEXIS 876 (2002).

§ 1C-1704. Notice of filing; service.

(a) Promptly upon the filing of a foreign judgment and affidavit, the judgment creditor shall serve the notice of filing provided for in subsection (b) on the judgment debtor and shall attach thereto a filed-stamped copy of the foreign judgment and affidavit. Service and proof of service of the notice may be made in any manner provided for in Rule 4(j) of the Rules of Civil Procedure.

(b) The notice shall set forth the name and address of the judgment creditor, of his attorney if any, and of the clerk's office in which the foreign judgment is filed in this State, and shall state that the judgment attached thereto has been filed in that office, that the judgment debtor has 30 days from the date of receipt of the notice to seek relief from the enforcement of the judgment, and that if the judgment is not satisfied and no such relief is sought within that 30 days, the judgment will be enforced in this State in the same manner as any judgment of this State. (1989, c. 747, s. 1.)

CASE NOTES

Service and proof of service of the notice may be made in any manner provided for in Rule 4(j) of the Rules of Civil Procedure. Sun Bank/South Fla. v. Tracy, 104 N.C. App. 608, 410 S.E.2d 509 (1991).

Enforcement of Foreign Judgments. — Although the Israeli order in the husband and wife's divorce case was not a "foreign judgment" under the Uniform Enforcement of Foreign Judgments Act (UEFJA) because the order was not the order of a United States court or a state court, the trial court did not err in granting summary judgment to the wife and in recognizing that the husband owed a certain sum to the wife under the Israeli order; the wife made it clear in the wife's complaint that the wife was proceeding under the North Carolina Foreign Money-Judgments Recognition Act (NCFMJRA), which included in its definition of foreign state any governmental unit other than the United States, and thus the trial court could recognize the wife's rights under the NCFMJRA that would allow the wife to later pursue enforcement of the Israeli order under the UEFJA. Cotter v. Cotter, — N.C. App. —, 648 S.E.2d 552, 2007 N.C. App. LEXIS 1809 (2007).

This Act's 30 day limitation is a "waiting period"—a restriction on when plaintiff creditors may act and not on when defen-

dant debtors may not; the 30 day limitation period is not one barring a defendant debtor's response but instead the limitation period is specifically set to bar a plaintiff creditor from obtaining a foreign judgment against one of our state's citizens and then immediately (within 30 days) being able to enforce it without that defendant debtor being afforded the notice required by due process. Security Credit Leasing, Inc. v. D.J.'s of Salisbury, Inc., 140 N.C. App. 521, 537 S.E.2d 227, 2000 N.C. App. LEXIS 1212 (2000).

Cited in Lust v. Fountain of Life, Inc., 110 N.C. App. 298, 429 S.E.2d 435 (1993); HCA Health Servs. of Tex., Inc. v. Reddix, 151 N.C. App. 659, 566 S.E.2d 754, 2002 N.C. App. LEXIS 876 (2002).

§ 1C-1705. Defenses; procedure; stay.

(a) The judgment debtor may file a motion for relief from, or notice of defense to, the foreign judgment on the grounds that the foreign judgment has been appealed from, or enforcement has been stayed by, the court which rendered it, or on any other ground for which relief from a judgment of this State would be allowed. Notwithstanding subsection (b) of this section, the court shall stay enforcement of the foreign judgment for an appropriate period if the judgment debtor shows that:

(1) The foreign judgment has been stayed by the court that rendered it; or

(2) An appeal from the foreign judgment is pending or the time for taking an appeal has not expired and the judgment debtor executes a written undertaking in the same manner and amount as would be required in the case of a judgment entered by a court of this State under G.S. 1-289.

(b) If the judgment debtor has filed a motion for relief or notice of defenses then the judgment creditor may move for enforcement of the foreign judgment as a judgment of this State, unless the court stays enforcement of the judgment under subsection (a) of this section. The judgment creditor's motion shall be heard before a judge of the trial division which would be the proper division for the trial of an action in which the amount in controversy is the same as the amount remaining unpaid on the foreign judgment. The Rules of Civil Procedure (G.S. 1A-1) shall apply. The judgment creditor shall have the burden of proving that the foreign judgment is entitled to full faith and credit. (1989, c. 747, s. 1; 2003-19, s. 2.)

CASE NOTES

Grounds for Attacking Foreign Judgment. — A judgment of another state may be attacked in this state only on grounds of fraud, public policy, or lack of jurisdiction. Reinwand v. Swiggett, 107 N.C. App. 590, 421 S.E.2d 367 (1992).

Once a creditor establishes, under G.S. 1C-1705(b), that a foreign judgment is entitled to full faith and credit, the judgment may only be attacked on the grounds of fraud, public policy, or lack of jurisdiction; no authority permitted a district court to base its allowance of a party's claim of exemption on the court's assessment of the equities between the parties rather than on the actual value of the property. Susi v. Aubin, 173 N.C. App. 608, 620 S.E.2d 682, 2005 N.C. App. LEXIS 2093 (2005).

Judicial Review of Foreign Judgment. — Review of the jurisdiction of a court rendering a judgment is limited to determining if the issues were indeed fully and fairly litigated. Reinwand v. Swiggett, 107 N.C. App. 590, 421 S.E.2d 367 (1992).

Enforcement of Foreign Judgments. — Although the Israeli order in the husband and wife's divorce case was not a "foreign judgment" under the Uniform Enforcement of Foreign Judgments Act (UEFJA) because the order was not the order of a United States court or a state court, the trial court did not err in granting summary judgment to the wife and in recognizing that the husband owed a certain sum to the wife under the Israeli order; the wife made it clear in the wife's complaint that the wife was proceeding under the North Carolina Foreign Money-Judgments Recognition Act (NCFMJRA), which included in its definition of foreign state any governmental unit other than the United States, and thus the trial court could recognize the wife's rights under the NCFMJRA that would allow the wife to later pursue enforcement of the Israeli order under the UEFJA. Cotter v. Cotter, — N.C. App. —, 648 S.E.2d 552, 2007 N.C. App. LEXIS 1809 (2007).

Contesting Jurisdictional Issues. — For full faith and credit purposes, appearing specially to contest jurisdictional issues constitutes litigation of those issues. Reinwand v. Swiggett, 107 N.C. App. 590, 421 S.E.2d 367 (1992).

Foreign judgment that the judgment creditor obtained in New York was entitled to a presumption that the judgment was entitled to full faith and credit, as the judgment creditor met its burden of showing that entitlement by filing a properly authenticated judgment; however, the general contractor timely moved for relief from the foreign judgment by raising the defense that the New York trial court that entered it did not have personal jurisdiction over the general contractor, and because the trial court did not make any findings of fact or conclusions of law regarding the motion to enforce the judgment, the conclusion that the foreign judgment was enforceable in North Carolina was not supported by competent evidence and the case had to be remanded to the trial court for further proceedings. Quantum Corp. Funding, Ltd. v. B.H. Bryan Bldg. Co., 175 N.C. App. 483, 623 S.E.2d 793, 2006 N.C. App. LEXIS 187 (2006).

Contractual Provisions Prevented Surety from Claiming Lack of Personal Jurisdiction. — The Virginia court had personal jurisdiction over the defendant/surety who executed a contract guaranteeing immediate payment if the corporation failed to satisfy the debt owed the plaintiff and affirming the plaintiff's forum clause. United Leasing Corp. v. Plumides, 138 N.C. App. 696, 531 S.E.2d 891, 2000 N.C. App. LEXIS 793 (2000).

Where Jurisdiction Fully and Fairly Litigated. — Upon a finding that the issue of jurisdiction was fully and fairly litigated, constitutional federal principles preclude their relitigation elsewhere. Reinwand v. Swiggett, 107 N.C. App. 590, 421 S.E.2d 367 (1992).

Where the issue of personal jurisdiction was fully and fairly litigated in the Alaska court, defendant was precluded from relitigating the issue in the courts of North Carolina. Reinwand v. Swiggett, 107 N.C. App. 590, 421 S.E.2d 367 (1992).

Alaska Judgment. — For a case holding that plaintiff met his burden of proving that a judgment of the state courts of Alaska was entitled to full faith and credit, see Reinwand v. Swiggett, 107 N.C. App. 590, 421 S.E.2d 367 (1992).

Florida Judgment. — Creditor's 2006 motion under the Uniform Enforcement of Foreign Judgments Act (UEFJA) to register a 2005 Florida judgment against the debtors in North Carolina was timely filed within the 10-year period under G.S. 1-47 because the creditor timely filed a new action in Florida in 2005 in accordance with the 20-year period under Fla. Stat. § 95.11(1) to start the limitation period anew, the creditor's 1990 judgment was extinguished by the 2005 judgment, and the UEFJA action was based on the 2005 judgment and not the 1990 judgment. Palm Coast Recovery Corp. v. Moore, — N.C. App. —, 646 S.E.2d 438, 2007 N.C. App. LEXIS 1466 (2007).

Texas Judgment. — Trial court properly granted motion to enforce Texas judgment as a North Carolina judgment where the Texas judgment was well within the time limitation for enforcement of foreign judgments and the Texas judgment merely apportioned damages between parties and was not a separate action for contribution. In re Aerial Devices, Inc., 126 N.C. App. 709, 486 S.E.2d 463 (1997).

Trial court's factual findings on judgment debtor's claim that judgment debtor did not sign an agreed judgment which a corporation filed in Texas and sought to enforce in North Carolina were insufficient and the appellate court vacated the trial court's judgment in favor of the judgment debtor and remanded the case for further proceedings. HCA Health Servs. of Tex., Inc. v. Reddix, 151 N.C. App. 659, 566 S.E.2d 754, 2002 N.C. App. LEXIS 876 (2002).

Cited in Lust v. Fountain of Life, Inc., 110 N.C. App. 298, 429 S.E.2d 435 (1993); Security Credit Leasing, Inc. v. D.J.'s of Salisbury, Inc., 140 N.C. App. 521, 537 S.E.2d 227, 2000 N.C. App. LEXIS 1212 (2000); Wener v. Perrone & Cramer Realty, Inc., 137 N.C. App. 362, 528 S.E.2d 65, 2000 N.C. App. LEXIS 331 (2000).

§ 1C-1706. Fees.

The enforcement of a foreign judgment under this Article shall be subject to the costs and fees set forth in Article 28 of Chapter 7A of the General Statutes. The amount remaining unpaid on the foreign judgment as set forth in the affidavit filed under G.S. 1C-1703(b) shall determine the amount of the costs to be collected at the time of the filing of the foreign judgment and assessed pursuant to G.S. 7A-305. (1989, c. 747, s. 1.)

§ 1C-1707. Optional procedure.

This Article may not be construed to impair a judgment creditor's right to bring a civil action in this State to enforce such creditor's judgment. (1989, c. 747, s. 1.)

§ 1C-1708. Judgments against public policy.

The provisions of this Article shall not apply to foreign judgments based on claims which are contrary to the public policies of North Carolina. (1989, c. 747, s. 1.)

§§ 1C-1709 through 1C-1749: Reserved for future codification purposes.

Article 17A.

Enforcement of Foreign Judgments for Noncompensatory Damages.

§ 1C-1750: Repealed by Session Laws 2003-19, s. 1, effective April 23, 2003.

Editor's Note. — Session Laws 2000-1 (Extra Session), s. 3, contains a severability clause.

Session Laws 2000-1 (Extra Session), s. 4, made the Article effective April 5, 2000, and applicable to judgments filed or entered in the State on or after that date, without regard to the date on which the foreign judgment was rendered in the foreign state.

§§ 1C-1751 through 1C-1759: Reserved for future codification purposes.

§ 1C-1760: Repealed by Session Laws 2003-19, s. 1, effective April 23, 2003.

§§ 1C-1761 through 1C-1799: Reserved for future codification purposes.

Article 18.

North Carolina Foreign Money Judgments Recognition Act.

§ 1C-1800. Short title.

This Article may be cited as the North Carolina Foreign Money Judgments Recognition Act. (1993, c. 188, s. 1.)

§ 1C-1801. Definitions.

As used in this Article:

(1) "Foreign judgment" means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.

(2) "Foreign state" means any governmental unit other than the United States, any state, district, commonwealth, territory, insular posses-

sion thereof, the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands. (1993, c. 188, s. 1.)

CASE NOTES

"Foreign Judgment." — Although the Israeli order in the husband and wife's divorce case was not a "foreign judgment" under the Uniform Enforcement of Foreign Judgments Act (UEFJA) because the order was not the order of a United States court or a state court, the trial court did not err in granting summary judgment to the wife and in recognizing that the husband owed a certain sum to the wife under the Israeli order; the wife made it clear in the wife's complaint that the wife was proceeding under the North Carolina Foreign Money-Judgments Recognition Act (NCFMJRA), which included in its definition of foreign state any governmental unit other than the United States, and thus the trial court could recognize the wife's rights under the NCFMJRA that would allow the wife to later pursue enforcement of the Israeli order under the UEFJA. Cotter v. Cotter, — N.C. App. —, 648 S.E.2d 552, 2007 N.C. App. LEXIS 1809 (2007).

§ 1C-1802. Applicability of Article.

This Article applies to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal of the judgment is pending or the judgment is subject to appeal. (1993, c. 188, s. 1.)

CASE NOTES

Enforcement of Foreign Judgments. — Although the Israeli order in the husband and wife's divorce case was not a "foreign judgment" under the Uniform Enforcement of Foreign Judgments Act (UEFJA) because the order was not the order of a United States court or a state court, the trial court did not err in granting summary judgment to the wife and in recognizing that the husband owed a certain sum to the wife under the Israeli order; the wife made it clear in the wife's complaint that the wife was proceeding under the North Carolina Foreign Money-Judgments Recognition Act (NCFMJRA), which included in its definition of foreign state any governmental unit other than the United States, and thus the trial court could recognize the wife's rights under the NCFMJRA that would allow the wife to later pursue enforcement of the Israeli order under the UEFJA. Cotter v. Cotter, — N.C. App. —, 648 S.E.2d 552, 2007 N.C. App. LEXIS 1809 (2007).

§ 1C-1803. Recognition and enforcement.

Except as provided in G.S. 1C-1804, a foreign judgment meeting the requirements of G.S. 1C-1802 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the manner set forth in Article 17 of this Chapter. The defenses available to a judgment debtor under G.S. 1C-1804 may be asserted by the judgment debtor in the manner set forth in G.S. 1C-1705. (1993, c. 188, s. 1.)

CASE NOTES

Enforcement of Foreign Judgments. — Although the Israeli order in the husband and wife's divorce case was not a "foreign judgment" under the Uniform Enforcement of Foreign Judgments Act (UEFJA) because the order was not the order of a United States court or a state court, the trial court did not err in granting summary judgment to the wife and in recognizing that the husband owed a certain sum to the wife under the Israeli order; the wife made it clear in the wife's complaint that the wife was proceeding under the North Carolina Foreign Money-Judgments Recognition Act (NCFMJRA), which included in its definition of foreign state any governmental unit other than the United States, and thus the trial court could recognize the wife's rights under the NCFMJRA that would allow the wife to later pursue enforcement of the Israeli order under the UEFJA. Cotter v. Cotter, — N.C. App. —, 648 S.E.2d 552, 2007 N.C. App. LEXIS 1809 (2007).

§ 1C-1804. Grounds for nonrecognition.

(a) A foreign judgment is not conclusive if:
  (1) The judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
  (2) The foreign court did not have personal jurisdiction over the defendant; or
  (3) The foreign judgment did not have jurisdiction over the subject matter.
(b) A foreign judgment need not be recognized if:
  (1) The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable the presentation of a defense;
  (2) The judgment was obtained by fraud;
  (3) The cause of action on which the judgment is based is repugnant to the public policy of this State;
  (4) The judgment conflicts with another final and conclusive judgment;
  (5) The proceedings in the foreign court were contrary to an agreement between the parties under which the dispute in question was to be settled out of court;
  (6) In the case of jurisdiction based on personal service, the foreign court was a seriously inconvenient forum for the trial of the action; or
  (7) The foreign court rendering the judgment would not recognize a comparable judgment of this State. (1993, c. 188, s. 1.)

CASE NOTES

Application of Act. — Defendant's contention, that the North Carolina Foreign Money Judgments Recognition Act had nothing to do with the facts of the case because defendant was not seeking to enforce his Honduran judgment in North Carolina, was unavailing; the Act does not govern the enforcement of foreign judgments, but pertains only to whether a court should recognize the judgment. Pursuant to G.S. 1C-1804(b)(5), the court did not need to recognize the Honduran judgments. VF Jeanswear Ltd. P'ship v. Molina, 320 F. Supp. 2d 412, 2004 U.S. Dist. LEXIS 10810 (M.D.N.C. 2004).

Although the Israeli order in the husband and wife's divorce case was not a "foreign judgment" under the Uniform Enforcement of Foreign Judgments Act (UEFJA) because the order was not the order of a United States court or a state court, the trial court did not err in granting summary judgment to the wife and in recognizing that the husband owed a certain sum to the wife under the Israeli order; the wife made it clear in the wife's complaint that the wife was proceeding under the North Carolina Foreign Money-Judgments Recognition Act (NCFMJRA), which included in its definition of foreign state any governmental unit other than the United States, and thus the trial court could recognize the wife's rights under the NCFMJRA that would allow the wife to later pursue enforcement of the Israeli order under the UEFJA. Cotter v. Cotter, — N.C. App. —, 648 S.E.2d 552, 2007 N.C. App. LEXIS 1809 (2007).

Factual Findings by Trial Court; Insufficient. — Trial court's factual findings on judgment debtor's claim that judgment debtor did not sign an agreed judgment which a corporation filed in Texas and sought to enforce in North Carolina, pursuant to North Carolina's Uniform Enforcement of Foreign Judgments Act, G.S. 1C-1701 to 1C-1708 (2001), were insufficient. HCA Health Servs. of Tex., Inc. v. Reddix, 151 N.C. App. 659, 566 S.E.2d 754, 2002 N.C. App. LEXIS 876 (2002).

Foreign judgment that the judgment creditor obtained in New York was entitled to a presumption that the judgment was entitled to full faith and credit, as the judgment creditor met its burden of showing that entitlement by filing a properly authenticated judgment; however, the general contractor timely moved for relief from the foreign judgment by raising the defense that the New York trial court that entered it did not have personal jurisdiction over the general contractor, and because the trial court did not make any findings of fact or conclusions of law regarding the motion to enforce the judgment, the conclusion that the foreign judgment was enforceable in North Carolina was not supported by competent evidence and the case had to be remanded to the trial court for further proceedings. Quantum Corp. Funding, Ltd. v. B.H. Bryan Bldg. Co., 175 N.C. App. 483, 623 S.E.2d 793, 2006 N.C. App. LEXIS 187 (2006).

§ 1C-1805. Basis for personal jurisdiction.

(a) The foreign judgment shall not be refused recognition for lack of personal jurisdiction if:

(1) The defendant was served personally in the foreign state;

(2) The defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of the court over the defendant;

(3) The defendant, prior to the commencement of the proceedings, had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;

(4) The defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;

(5) The defendant had a business office in the foreign state, and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign state; or

(6) The defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a cause of action arising out of such operation.

(b) The courts of this State may recognize other bases of jurisdiction. (1993, c. 188, s. 1.)

CASE NOTES

Consent to Personal Jurisdiction. — Foreign judgment that the judgment creditor obtained in New York was entitled to a presumption that the judgment was entitled to full faith and credit, as the judgment creditor met its burden of showing that entitlement by filing a properly authenticated judgment; however, the general contractor timely moved for relief from the foreign judgment by raising the defense that the New York trial court that entered it did not have personal jurisdiction over the general contractor, and because the trial court did not make any findings of fact or conclusions of law regarding the motion to enforce the judgment, the conclusion that the foreign judgment was enforceable in North Carolina was not supported by competent evidence and the case had to be remanded to the trial court for further proceedings. Quantum Corp. Funding, Ltd. v. B.H. Bryan Bldg. Co., 175 N.C. App. 483, 623 S.E.2d 793, 2006 N.C. App. LEXIS 187 (2006).

Foreign Judgment Supported by Contractual Agreement to Submit to Jurisdiction. — The Virginia court had personal jurisdiction over the defendant/surety who executed a contract guaranteeing immediate payment if the corporation failed to satisfy the debt owed the plaintiff and affirming the plaintiff's forum clause. United Leasing Corp. v. Plumides, 138 N.C. App. 696, 531 S.E.2d 891, 2000 N.C. App. LEXIS 793 (2000).

§ 1C-1806. Stay pending an appeal.

If the defendant satisfies the court either that an appeal is pending or that the defendant is entitled and intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal. (1993, c. 188, s. 1.)

§ 1C-1807. Situations not covered by Article.

This Article does not prevent the recognition of foreign judgments in situations not covered by this Article. (1993, c. 188, s. 1; 1995, c. 509, s. 1.)

§ 1C-1808. Uniformity of interpretation.

This Article shall be construed to effectuate its general purpose to make uniform the law of those states that enact it. (1993, c. 188, s. 1.)

§§ 1C-1809 through 1C-1819: Reserved for future codification purposes.

ARTICLE 19.

The North Carolina Foreign-Money Claims Act.

Editor's Note. — Permission to include the Official Comments was granted by the National Conference of Commissioners on Uniform State Laws and The American Law Institute. It is believed that the Official Comments will prove of value to the practitioner in understanding and applying the text of this Chapter.

§ 1C-1820. Definitions.

As used in this Article:

(1) "Action" means a judicial proceeding or arbitration in which a payment in money may be awarded or enforced with respect to a foreign-money claim.

(2) "Bank-offered spot rate" means the spot rate of exchange at which a bank will sell foreign money at a spot rate.

(3) "Conversion date" means the banking day next preceding the date on which money, in accordance with this Article, is:
   a. Paid to a claimant in an action or distribution proceeding;
   b. Paid to the official designated by law to enforce a judgment or award on behalf of a claimant; or
   c. Used to recoup, set off, or counterclaim in different moneys in an action or distribution proceeding.

(4) "Distribution proceeding" means a judicial or nonjudicial proceeding for the distribution of a fund in which one or more foreign-money claims is asserted and includes an accounting, an assignment for the benefit of creditors, a foreclosure, the liquidation or rehabilitation of a corporation or other entity, and the distribution of an estate, trust, or other fund.

(5) "Foreign money" means money other than money of the United States.

(6) "Foreign-money claim" means a claim upon an obligation to pay, or a claim for recovery of a loss, expressed in or measured by a foreign money.

(7) "Money" means a medium of exchange for the payment of obligations or a store of value authorized or adopted by a government or by intergovernmental agreement.

(8) "Money of the claim" means the money determined as proper for payment of the claim pursuant to G.S. 1C-1823.

(9) "Person" means an individual, a corporation, government or governmental subdivision or agency, business trust, estate, trust, joint

venture, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(10) "Rate of exchange" means the rate at which money of one country may be converted into money of another country in a free financial market convenient to or reasonably usable by a person obligated to pay or to state a rate of conversion. "Rate of exchange" means, if separate rates of exchange apply to different kinds of transactions, the rate applicable to the particular transaction giving rise to the foreign-money claim.

(11) "Spot rate" means the rate of exchange at which foreign money is sold by a bank or other dealer in foreign exchange for immediate or next day availability or for settlement by immediate payment in cash or its equivalent, by charge to an account, or by an agreed delayed settlement not exceeding two days.

(12) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or insular possession subject to the jurisdiction of the United States. (1995, c. 213, s. 1.)

OFFICIAL COMMENT

1. "Action." A suit or arbitration may be legal or equitable in nature, but it must be based on a pecuniary claim.

2. "Bank-offered spot rate" is the rate at which a bank will sell the requisite amount of foreign money for immediate or nearly immediate use by the buyer.

3. "Conversion date." Exchange rates may fluctuate from day to day. A date must be picked for calculating the value of foreign money in terms of United States dollars. As used in the Act, "conversion date" means the day before a foreign-money claim is paid or set-off. The day refers to the time period of the place of the payor, not necessarily that of the recipient. The exchange rate prevailing at or near the close of business on the banking day before the day payment is made will be well known at the time of payment. See Comment 2 to Section 7.

4. "Distribution proceeding." In keeping with the concept underlying Section 2, the coverage of this statute is limited to judicial actions and nonjudicial proceedings which involve the creation of a fund from which pro-rata distributions are made to claimants. As provided in Section 8, a different conversion date is required where either input to or outgo from a fund involves two or more different moneys. Thus, the term includes a mortgage foreclosure proceeding, judicial or under a trust deed, distribution of property in divorce and child support proceedings, distributions in the administration of a trust or a decedent's estate, an assignment for the benefit of creditors, an equity receivership, a liquidation by a statutory successor, a voluntary dissolution of a business or a nonprofit enterprise or the like when in each case a fund must be shared among claimants and where, usually, the fund will not satisfy all claimants of the same class. An asset or a liability of the fund must also involve one or more foreign-money claims, but not all of the claims can be in the same money.

5. "Foreign money." Since only the federal government has the power to coin money and regulate the value thereof, the term "foreign" means a government other than that of the United States of America. Special Drawing Rights of the International Monetary Fund are foreign money even though the United States is a member of the Fund. Foreign governments included are all those whose moneys are, in the currency markets of the world, exchangeable for the money of other currencies even though the government is not recognized by the United States.

6. "Foreign-money claim." The term "claim" is not limited to any one party to an action or a distribution proceeding and may be asserted by a plaintiff or a defendant or by a party to an arbitration or distribution proceeding. It may be based on a foreign judgment, or sound in contract, quasi-contract, or tort.

7. "Money." The definition includes composite currencies such as European Currency Units created by agreement of the governments that are members of the European Monetary System or the Special Drawing Rights created under the auspices of the International Money Fund. These are "stores of value" used to determine the quantity of payment in some international transactions.

8. "Money of the claim." See Section 4 and the Comment thereto.

9. "Party." This combines the Uniform Commercial Code's definitions of "person" and "organization," but is limited to those who are parties to transactions or involved in events which could give rise to a foreign-money claim.

10. "Rate of Exchange." A free market rate is

to be used rather than an official rate if both exist. Some countries have transactional differences in exchange rates with slightly different rates; for example, in Belgium one rate prevails for commercial and another for financial transactions. Both rates are recognized in money market transactions. The last sentence of the definition indicates that the rate appropriate to the transaction is the rate to be used.

11. "Spot rate" is the term used in the financial markets of the United States for the rate of exchange for immediate or nearly immediate transfers from one money to another, as distinguished from the rates for future options or future deliveries.

In the foreign exchange markets, as in the stock markets, quotations are either "bid" or "ask," and the spread between is where the dealer makes a profit. An "offered spot rate" is the rate at which the offeror will sell the particular money. It is, of course, higher than the rate at which that person will buy the same money. "Spot" refers to the time the trade is made, not the time for settlement, which in spot transactions is often two days after the date of the trade.

12. "State." The definition, as in other Uniform Laws, is extended to include areas given the same, or nearly the same, treatment in law as the states.

§ 1C-1821. Scope of Article.

(a) This Article applies only to a foreign-money claim in an action or distribution proceeding.

(b) This Article applies to foreign-money issues even if other law under the conflict of laws rules of this State applies to other issues in the action or distribution proceeding. (1995, c. 213, s. 1.)

OFFICIAL COMMENT

Under the rules of the conflict of laws, the determination of when a foreign money is converted to United States dollars is generally considered a procedural matter for the law of the forum. Subsection (b) removes any doubt.

§ 1C-1822. Variation by agreement.

(a) The effect of this Article may be varied by agreement of the parties made before or after commencement of an action or distribution proceeding or the entry of judgment.

(b) Parties to a transaction may agree upon the money to be used in a transaction giving rise to a foreign-money claim and may agree to use different moneys for different aspects of the transaction. Stating the price in a foreign money for one aspect of a transaction does not alone require the use of that money for other aspects of the transaction. (1995, c. 213, s. 1.)

OFFICIAL COMMENT

1. A basic policy of the Act is to preserve freedom of contract and to permit parties to resolve disputed matters by contract at any time, even as to choice of law problems. The parties may agree upon the date and time for conversion. After entry of judgment the parties may agree upon how the judgment is to be satisfied.

2. Subsection (b) covers cases where, for example, claims for petroleum may be settled in United States dollars but settlement for joint costs of exploration may be in pounds sterling. The parties also may agree on the money to be used for damages. The second sentence recognizes that a price stated in a particular money does not indicate, without more evidence, an intent that all damages from breach are to be in the same money. The principle of freedom of contract allows the parties to allocate the risks of currency fluctuations between foreign moneys as they desire. Sections 4 and 5 provide rules in the absence of special agreements by the parties for determining the money to be used. Parties may by agreement select a particular market or foreign exchange dealer to be used for exchange purposes.

§ 1C-1823. Determining proper money of the claim.

(a) The money in which the parties to a transaction have agreed that payment is to be made is the proper money of the claim for payment.

(b) If the parties to a transaction have not otherwise agreed, the proper money of the claim, as in each case may be appropriate, is the money:

(1) Regularly used between the parties as a matter of usage or course of dealing;

(2) Used at the time of a transaction in international trade, by trade usage or common practice, for valuing or settling transactions in the particular commodity or service involved; or

(3) In which the loss was ultimately felt or will be incurred by the party claimant. (1995, c. 213, s. 1.)

OFFICIAL COMMENT

1. Subsection (a) uses "payment" in a broad sense not related to just the price, but to any obligation arising out of a contract to transfer money. See also Section 3(b).

2. Subsection (b) states rules to fill gaps in the agreement of the parties with rules as to the allocation of risks of fluctuations in exchange rates. The three rules will normally apply in the order stated. Prior dealings may indicate the desired money. If there are none, it is appropriate to use the money indicated by trade usage or custom for transactions of like kind. The final rule of subsection (a) is one established in English cases. See *The Despina R and the Folias* (1979) A.C. 685. An example is the use of an operating account in United States dollars by a French company to buy Japanese yen for ship repairs; the loss is felt in the depletion of the dollar bank account. Appropriateness of a rule is to be determined by the judge from the facts of the case. See Section 6(d).

§ 1C-1824. Determining amount of the money of certain contract claims.

(a) If an amount contracted to be paid in a foreign money is measured by a specified amount of a different money, the amount to be paid shall be determined on the conversion date.

(b) If an amount contracted to be paid in a foreign money is to be measured by a different money at the rate of exchange prevailing on a date before default, that rate of exchange applies only to payments made within a reasonable time after default, not exceeding 30 days. Thereafter, conversion is made at the bank-offered spot rate on the conversion date.

(c) A monetary claim is neither usurious nor unconscionable for the reason that the agreement on which it is based provides that the amount of the debtor's obligation to be paid in the debtor's money, when received by the creditor, must equal a specified amount of the foreign money of the country of the creditor. If, because of unexcused delay in payment of a judgment or award, the amount received by the creditor does not equal the amount of the foreign money specified in the agreement, the court or arbitrator shall amend the judgment or award accordingly. (1995, c. 213, s. 1.)

OFFICIAL COMMENT

1. Subsections (a) and (b) cover different interpretation problems. One arises where the amount of the money to be paid is measured by another money, one of which is foreign. An example is "pay 5,000 Swiss francs in pounds sterling." The issue is the time at which the rate of exchange into pounds sterling is to be applied. Subsection (a) says in a "measured by" situation with no rate specified, the rate of exchange that controls is the one prevailing at or near the close of business on the day before the day of payment. See Section 1(2), the definition of "conversion date."

2. Another problem arises when an exchange rate in effect before a default is used, as in "pay on November 30, 1989, 5,000 Swiss francs in

pounds sterling at the exchange rate prevailing on June 30, 1989." In this case, the issue is how long does the specified exchange rate control in the absence of a clear expression of intent?

Inclusion of a fixed rate as of a date before default, under subsection (b), remains effective only if payment is made within a reasonable time after default, not to exceed 30 days. The 30-day limitation accords usually with the expectation of the parties. Parties may agree to a longer time.

3. The most common application of subsection (c) will be found in international loan transactions. For example, a loan by a Japanese bank to an American company could be made with dollars purchased by yen for the purpose. The loan agreement could provide for repayment in dollars of an amount which, when received by the lender, would repurchase the amount of yen used to acquire the dollars advanced.

An exemption is needed from the application of usury laws that may be interpreted to hold that the indexing of the principal amount creates additional interest. See *Aztec Properties, Inc. v. Union Planters National Bank*, 530 S.W.2d 756 (Tenn. Sup. Ct. 1975). The subsection removes all doubts as to the legal enforceability of such agreements under theories such as usury, merger in a judgment, unconscionability, or the like.

§ 1C-1825. Asserting and defending foreign-money claims.

(a) A person may assert a claim in a specified foreign money. If a foreign-money claim is not asserted, the claimant shall make the claim in United States dollars.

(b) An opposing party may allege and prove that a claim, in whole or in part, is in a different money than that asserted by the claimant.

(c) A person may assert a defense, setoff, recoupment, or counterclaim in any money without regard to the money of other claims.

(d) The determination of the proper money of the claim pursuant to G.S. 1C-1823 is a question of law. (1995, c. 213, s. 1.)

OFFICIAL COMMENT

1. Subsection (a) covers not only the claim of a plaintiff but also the assertion by a defendant of a defense, set-off, or counterclaim. Subsection (b) provides that the money asserted as the money of its defenses by the defendant need not be the same as that of the plaintiff.

2. The money to be used as the money of the claim is a threshold issue to be determined, if contested, by the court after any factual issues as to expenditures, custom, usage, or course of dealing are decided. See subsection (b). If a payment is made or a debt incurred in a money other than that in which the loss was felt, the party asserting the foreign-money claim should establish the amount of the money of the claim used to procure the money of expenditure and the applicable exchange rate used.

3. Judgments may be entered in more than one money when dealings impact on more than one area. An inn-keeper in Mexico, for example, in taking in customers from many countries, should be held to foresee that treatment for injuries at the inn would occur not only in Mexico, but also in the native land of the injured party or in a third country.

§ 1C-1826. Judgments and awards on foreign-money claims, times of money conversion; form of judgments.

(a) Except as provided in subsection (c) of this section, a judgment or award on a foreign-money claim must be stated in an amount of the money of the claim.

(b) A judgment or award on a foreign-money claim is payable in that foreign money or, at the option of the debtor, in the amount of United States dollars that will purchase that foreign money on the conversion date at a bank-offered spot rate.

(c) A judgment or award on a foreign-money claim shall assess costs in United States dollars.

(d) Each payment in United States dollars shall be accepted and credited on a judgment or award on a foreign-money claim in the amount of the foreign money that could be purchased by the dollars at a bank-offered spot rate of exchange at or near the close of business on the conversion date for that payment.

(e) A judgment or award made in an action or distribution proceeding on:

(1) A defense, setoff, recoupment, or counterclaim, and

(2) The adverse party's claim

shall be netted by converting the money of the smaller into the money of the larger, and by subtracting the smaller from the larger and shall specify the rates of exchange used.

(f) A judgment substantially in the following form satisfies the provisions of this section:

"It is ORDERED, ADJUDGED, AND DECREED that defendant (insert name) pay to Plaintiff (insert name) the sum of (insert amount in the foreign money) plus interest on that sum at the rate of (insert rate pursuant to G.S. 1C-1828) percent a year or, at the option of the judgment debtor, the number of United States dollars that will purchase the (insert name of foreign money) with interest due, at a bank-offered spot rate at or near the close of business on the banking day next before the day of payment, together with assessed costs of (insert amount) United States dollars."

(g) If a contract claim is of the type covered by G.S. 1C-1824(a) or G.S. 1C-1824(b), the judgment or award shall be entered for the amount of money stated to measure the obligation to be paid in the money specified for payment or, at the option of the debtor, the number of United States dollars that will purchase the computed amount of the money of payment on the conversion date at a bank-offered spot rate.

(h) A judgment shall be filed, docketed, and indexed in foreign money in the same manner as other judgments and has the same effect as a lien. A judgment may be discharged by payment.

(i) A party seeking enforcement of a judgment entered as provided in this section shall file with each request or application an affidavit or certificate executed in good faith by its counsel or a bank officer, stating the rate of exchange used and how it was obtained and setting forth the calculation and the amount of United States dollars that would satisfy the judgment on the date of the affidavit or certificate by applying that rate of exchange. Affected court officials shall incur no liability, after a filing of the affidavit or certificate, for acting as if the judgment were in the amount of United States dollars stated in the affidavit or certificate. The computation contained in the affidavit or certificate shall remain in effect for 90 days following the filing of the affidavit or certificate and may be recomputed before the expiration of 90 days by filing additional affidavits or certificates. Recomputation shall not affect any payment obtained before the filing of the recomputation.

(j) When a payment is made to a clerk's office pursuant to G.S. 1-239, the clerk may determine the spot rate of exchange on the conversion date on the basis of information received in good faith from any bank officer or other reliable source and shall incur no liability to any person for crediting a payment toward a judgment, or for marking a judgment satisfied in full, on the basis of the rate so determined. (1995, c. 213, s. 1.)

OFFICIAL COMMENT

1. Subsection (a) changes a number of statutes in the states which can be construed to require all values in legal proceedings to be expressed in United States dollars. Professor Brand, in his article in the Yale Journal of International Law, Vol. 11:139 at page 169, identified 18 states having statutes which could require all judgments to be entered in dollars. They are Arkansas, California, Idaho, Iowa, Louisiana, Maryland, Michigan, Montana, Ne-

vada, New Jersey, New Mexico, New York, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin. Brand, ibid. fn. 166. Hence, direct statutory authority must be given the courts in those states, and will be helpful in other states. In some states other statutes may need amendments. See, e.g., Wisc. Stats. §§ 138.01, 138.02, 138.03, and 779.05.

2. Subsection (d) gives defendants the option of paying in dollars which are, at the payment date, practically the economic equivalent of the foreign money awarded. The judgment creditor should be indifferent to whether the debtor exercises the right to pay in dollars as the only difference is a small bank charge for exchanging the dollars for the foreign money. The concept of the rate of the banking day next before the payment day is taken from Section 131 of the Province of Ontario, Canada, Courts of Justice Act (Ch. 11 Ont. Stats. (1984) as recently amended). It gives the defendant and the sheriff conducting the sale the necessary conversion rate comfortably ahead of its use. Newspaper quotations are usually said to be ‘at or near the close of business‘ on the stated date, so that phrase is used in this Act.

3. Subsection (e) provides for netting the affirmative recoveries of a defendant and plaintiff, whether in the same money or in different moneys, but preserving the quantum of each for appellate purposes. The theory is that when claims are reduced to money, they become mutual debts and should be set-off, so that a person's exchange rate fluctuation risk continues only for the surplus in its money of the claim. The set-off is made by the judge or arbitrator.

4. The form of judgment in subsection (f) should be varied appropriately where the money to be paid is measured by a foreign money. See Section 5.

§ 1C-1827. Conversions of foreign money in distribution proceedings.

The rate of exchange prevailing at or near the close of business on the day the distribution proceeding is initiated shall govern all exchanges of foreign money in a distribution proceeding. A foreign-money claimant in a distribution proceeding shall assert its claim in the named foreign money and show the amount of United States dollars resulting from a conversion as of the date the proceeding was initiated. (1995, c. 213, s. 1.)

OFFICIAL COMMENT

All claims must be in the same money when determining aliquot shares in a distribution proceeding. The Act requires use of the date the proceeding was initiated for applying the exchange rate to convert foreign-money claims into United States dollars. See *Re Lines Bros. Ltd.*, (1982) 2 All E.R. 99. A claim may be amended to show the proper conversion rate and the proper amount of United States dollars.

§ 1C-1828. Prejudgment and judgment interest.

(a) Except as provided in subsection (b) of this section, recovery of prejudgment or pre-award interest and the rate of interest to be applied in the action or distribution proceeding shall be determined by the substantive law governing the right to recovery under the conflict of laws rules of this State.

(b) The court or arbitrator shall increase or decrease the amount of prejudgment or pre-award interest otherwise payable in a judgment or award in foreign money to the extent required by the law of this State governing a failure to make or accept an offer of settlement or offer of judgment, or conduct by a party or its attorney causing undue delay or expense.

(c) A judgment or award on a foreign-money claim bears interest at the rate applicable to judgments of this State. (1995, c. 213, s. 1.)

OFFICIAL COMMENT

1. As to pre-judgment interest, the Act adopts the majority rule in the United States that pre-judgment interest follows the substantive law of the case under conflict of laws rules, both as to the right to recover and the rate. English courts use a different rule, i.e.,the borrowing

rate used by plaintiff or prevailing in the country issuing the money of the judgment. See *Helmsing Schiffarts G.M.B.H. v. Malta Drydock Corp.* (1977) 2 Lloyd's Rep. 44 (Maltese money but borrowed in West Germany; German rate); *Miliangos v. George Frank (Textiles) Ltd. (No. 2)* (1976) 1 QB 487 at 489 (Swiss money, Swiss interest rate). Although pre-judgment interest is one form of damages, provision for pre- judgment interest is not to be taken as indicating that no other damages for delay in payment can be awarded under the substantive law applicable to the determination of damages. *Cf. Isaac Naylor & Sons, Ltd. v. New Zealand Co-operative Wool Marketing Association, Ltd.* (1981) 1 N.Z.L.R. 361 (exchange loss due to delay as additional damages).

2. Allowances of pre-judgment interest in some states depend upon a party's conduct with respect to settlement or delay of the proceeding. Subsection (b) treats these state laws as either procedural in nature or expressions of a significant policy, in either case to be governed by the law of the forum state.

3. Interest on a judgment is considered to be procedural and also goes by the law of the forum. There is a problem here in that there is great discrepancy among the states in the rates for judgment interest. When a judgment is in a foreign money, United States interest rates may result in some overcompensation or undercompensation as compared to what would be awarded in the jurisdiction issuing the foreign money. But in both the United States and in foreign countries, most jurisdictions have fixed statutory rates that do not readily respond to the inflation or deflation of the value of their money in the world market. Hence it was decided to apply the usual rules of the conflict of laws.

§ 1C-1829. Enforcement of foreign judgments.

Subject to the provisions of Article 17 and 18 of this Chapter:

(a) If an action is brought to enforce a judgment of another jurisdiction expressed in a foreign money and the judgment is recognized in this State as enforceable, the enforcing judgment shall be entered as provided in G.S. 1C-1826, whether or not the foreign judgment confers an option to pay in an equivalent amount of United States dollars.

(b) A foreign judgment may be filed or docketed in accordance with any rule or statute of this State providing a procedure for its recognition and enforcement.

(c) A satisfaction or partial payment made upon the foreign judgment, on proof thereof, shall be credited against the amount of foreign money specified in the judgment, notwithstanding the entry of judgment in this State.

(d) A judgment entered on a foreign-money claim only in United States dollars in another state shall be enforced in this State in United States dollars only. (1995, c. 213, s. 1.)

OFFICIAL COMMENT

1. Some states have special acts that simply cover the recognition, entry, and enforcement of foreign judgments. Common law enforcement is by action. Subsection (a) refers to the common law method; it is subject to subsection (b) which refers to statutory procedures. Subsection (c) applies to both procedures.

2. Subsection (d) avoids constitutional issues under the full faith and credit clause by requiring that judgments of sister states be enforced as entered in the sister state.

§ 1C-1830. Determining United States dollar value of assets to be seized or restrained.

(a) Computations under this section shall not affect computation of the United States dollar equivalent of the money of the judgment for the purpose of payment.

(b) For the limited purpose of facilitating the enforcement of provisional remedies in an action, the value in United States dollars of assets to be seized or restrained pursuant to a writ of attachment, garnishment, execution, or other legal process, the amount of United States dollars at issue for assessing costs, or the amount of United States dollars involved for a surety bond or other court-required undertaking, shall be ascertained as provided in subsections (c) and (d) of this section.

(c) A party seeking process, costs, bond, or other undertaking under subsection (b) of this section shall compute in United States dollars the amount of the foreign-money claim from a bank-offered spot rate prevailing at or near the close of business on the banking day next preceding the filing of a request or application for the issuance of process or for the determination of costs, or an application for a bond or other court-required undertaking.

(d) A party seeking the process, costs, bond, or other undertaking under subsection (b) of this section shall file with each request or application an affidavit or certificate executed in good faith by its counsel or a bank officer, stating the market quotation used and how it was obtained, and setting forth the calculation. Affected court officials shall incur no liability, after a filing of the affidavit or certificate, for acting as if the judgment were in the amount of United States dollars stated in the affidavit or certificate. (1995, c. 213, s. 1.)

OFFICIAL COMMENT

This section protects those who must determine how much should be held subject to a levy or other collection process or what the dollar amount of a supersedeas or other surety bond should be. If the judgment debtor is damaged by a gross overstatement of the dollar amount in the affidavit or certificate of counsel for the judgment creditor or the bank officer, recovery should be against that person.

§ 1C-1831. Effect of currency revalorization.

(a) If, after an obligation is expressed or a loss is incurred in a foreign money, the country issuing or adopting that money substitutes a new money in place of that money, the obligation or the loss shall be treated as if expressed or incurred in the new money at the rate of conversion the issuing country established for the payment of like obligations or losses denominated in the former money.

(b) If substitution under subsection (a) of this section occurs after a judgment or award is entered on a foreign-money claim, the court or arbitrator shall amend the judgment or award by a like conversion of the former money. (1995, c. 213, s. 1.)

OFFICIAL COMMENT

1. Subsection (a) refers to situations in which a country authorizes the issue of a new money to take the place of the old money at a stated ratio. An example is Brazil's recent abolition of cruzieros for cruzados. The subsection mandates that foreign money claims should be subjected to the same ratio.

2. The Act takes no position on the effect of money repudiations or revalorizations so drastic as to be, in effect, confiscations. Remedy, if any, for these is usually found through diplomatic channels. Equally, the Act takes no position on the effect of exchange control laws. The effect, if any, on obligations to pay is left to other law.

§ 1C-1832. Supplementary general principles of law.

Unless displaced by particular provisions of this Article, the principles of law and equity, including the law merchant, and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating causes shall supplement its provisions. (1995, c. 213, s. 1.)

OFFICIAL COMMENT

The section is taken from Section 1-103 of the Uniform Commercial Code.

§ 1C-1833. Uniformity of application and construction.

This Article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Article among states enacting it. (1995, c. 213, s. 1.)

§ 1C-1834. Short title.

This Article may be cited as the North Carolina Foreign-Money Claims Act. (1995, c. 213, s. 1.)

§§ 1C-1835 through 1C-1839: Reserved for future codification purposes.

Chapter 1D.

Punitive Damages.

Sec.
1D-1. Purpose of punitive damages.
1D-5. Definitions.
1D-10. Scope of the Chapter.
1D-15. Standards for recovery of punitive damages.
1D-20. Election of extracompensatory remedies.
1D-25. Limitation of amount of recovery.

Sec.
1D-26. Driving while impaired; exemption from cap.
1D-30. Bifurcated trial.
1D-35. Punitive damages awards.
1D-40. Jury instructions.
1D-45. Frivolous or malicious actions; attorneys' fees.
1D-50. Judicial review of award.

§ 1D-1. Purpose of punitive damages.

Punitive damages may be awarded, in an appropriate case and subject to the provisions of this Chapter, to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts. (1995, c. 514, s. 1.)

Cross References. — As to cap on stay of execution bonds pending appeal with respect to noncompensatory damages, see G.S. 1-289(b).

Legal Periodicals. — For article, "North Carolina's New Punitive Damages Statute: Who's Being Punished, Anyway?," see 74 N.C.L. Rev. 2174 (1996).

For comment, "Punitive Damages in Medical Malpractice: An Economic Evaluation," see 81 N.C.L. Rev. 2371 (2003).

CASE NOTES

This section does not apply to incidents that occurred before it was enacted. Connelly v. Family Inns of Am., 141 N.C. App. 583, 540 S.E.2d 38, 2000 N.C. App. LEXIS 1408 (2000).

Deceased Defendant. — When an alleged injured party sought punitive damages against a motorist who died prior to the filing of the alleged injured party's complaint, the alleged injured party's claim for punitive damages was properly dismissed because the purpose in G.S. 1D-1 of deterring the motorist from committing similar wrongful acts could not be achieved. Harrell v. Bowen, — N.C. App. —, 635 S.E.2d 498, 2006 N.C. App. LEXIS 2155 (2006).

Text of G.S. 1D-1 provides that punitive damages could be awarded "to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts," and it was a common rule of statutory construction that when the conjunctive "and" connected words, phrases or clauses of a statutory sentence, they were to be considered jointly, so an individual was subject to punitive damages where he or she could be punished for the egregiously wrongful act and be deterred from committing such an act in the future, but this did not apply to a deceased defendant. Harrell v. Bowen, — N.C. App. —, 635 S.E.2d 498, 2006 N.C. App. LEXIS 2155 (2006).

Entitlement to Punitive Damages. — Borrowers established willful or wanton tortious activity by a bank subsidiary pursuant to G.S. 1D-5(7) because the borrowers proved facts sufficient to show that the actions of the subsidiary were in conscious and intentional disregard of and indifference to the rights of the borrowers; furthermore, the subsidiary knew or should have known that by selling unlawful insurance with mortgage loans, its actions were reasonably likely to result in injury, damage, or other harm. Richardson v. Bank of Am., N.A., — N.C. App. —, 643 S.E.2d 410, 2007 N.C. App. LEXIS 809 (2007).

Applied in Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

Cited in Food Lion, Inc. v. Capital Cities/ABC, Inc., 984 F. Supp. 923 (M.D.N.C. 1997); Ward v. Beaton, 141 N.C. App. 44, 539 S.E.2d 30, 2000 N.C. App. LEXIS 1288 (2000), cert denied, 353 N.C. 398, 547 S.E.2d 431 (2001).

§ 1D-5. Definitions.

As used in this Chapter:

(1) "Claimant" means a party, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff, seeking recovery of punitive damages. In a claim for relief in which a party seeks recovery of punitive damages related to injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes any party seeking recovery of punitive damages.
(2) "Compensatory damages" includes nominal damages.
(3) "Defendant" means a party, including a counterdefendant, cross-defendant, or third-party defendant, from whom a claimant seeks relief with respect to punitive damages.
(4) "Fraud" does not include constructive fraud unless an element of intent is present.
(5) "Malice" means a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant.
(6) "Punitive damages" means extracompensatory damages awarded for the purposes set forth in G.S. 1D-1.
(7) "Willful or wanton conduct" means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. "Willful or wanton conduct" means more than gross negligence. (1995, c. 514, s. 1.)

Legal Periodicals. — For article, "North Carolina's New Punitive Damages Statute: Who's Being Punished, Anyway?," see 74 N.C.L. Rev. 2174 (1996).

CASE NOTES

"Willful or Wanton Conduct". — Where plaintiff workers were exposed to asbestos dust and fibers at defendant's polyester manufacturing plant, the jury returned verdicts in favor of plaintiffs, awarding them compensatory damages for personal injuries; however, defendant was entitled to a directed verdict on the issue of punitive damages because the plant industrial hygienist's destruction of a memo stating the asbestos exposure was cause for concern did not constitute willful and wanton conduct by defendant. Schenk v. HNA Holdings, Inc., 167 N.C. App. 47, 604 S.E.2d 689, 2004 N.C. App. LEXIS 2059 (2004).

Directed verdict in favor of a manufacturing plant, a maintenance company, and its successor on the issue of punitive damages was upheld on appeal, because plaintiff workers failed to demonstrate any willful or wanton misconduct with regard to their exposure to asbestos when they removed insulation. The trial court's reduction of the workers' compensatory damages awards was also upheld on appeal, because the workers received prior workers' compensation claim settlements and prior third-party settlement amounts and were entitled to only one recovery for their asbestos exposure. Schenk v. HNA Holdings, Inc., 170 N.C. App. 555, 613 S.E.2d 503, 2005 N.C. App. LEXIS 1067 (2005), cert. denied, — N.C. —, 626 S.E.2d 649 (2005).

Wife of a decedent who was electrocuted on a stairwell at an amphitheater, which was operated by a subsidiary, could not recover punitive damages under G.S. 1D-5(7), 1D-15(c), and 28A-18-2 because evidence showing: (1) that the subsidiary had been informed prior to the accident that other patrons had been electrocuted on a stairwell; and (2) that the subsidiary took ineffective efforts to address electrical hazards did not demonstrate a wilful and wanton disregard for the safety of others. Faris v. Clear Channel Communs., Inc., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 63059 (W.D.N.C. Sept. 1, 2006).

In a medical malpractice suit, a trial court's entry of summary judgment in favor of the defendants as to the plaintiffs' punitive damages claims was upheld on appeal based on the plaintiffs' failure to forecast sufficient evidence to meet the standard for punitive damages set forth in G.S. 1D-15(a); the plaintiffs did not contend that either fraud or malice existed and relied upon the willful or wanton conduct aggravating factor, but their complaint and proofs only alleged reckless supervision on the part of the defendants. Foster v. Crandell, — N.C. App. —, 638 S.E.2d 526, 2007 N.C. App. LEXIS 73 (2007).

Borrowers proved sufficient facts establishing willful or wanton tortious activity by a bank subsidiary, pursuant to G.S. 1D-5(7), because the borrowers proved facts sufficient to show that the actions of the subsidiary were in conscious and intentional disregard of and indifference to the rights of the borrowers, and the subsidiary knew or should have known that by selling unlawful insurance with mortgage loans, its actions were reasonably likely to result in injury, damage, or other harm. Richardson v. Bank of Am., N.A., — N.C. App. —, 643 S.E.2d 410, 2007 N.C. App. LEXIS 809 (2007).

Cited in Collins v. St. George Physical Therapy, 141 N.C. App. 82, 539 S.E.2d 356, 2000 N.C. App. LEXIS 1286 (2000); Penn Millers Ins. Co. v. United States, 472 F. Supp. 2d 705, 2007 U.S. Dist. LEXIS 8225 (E.D.N.C. 2007).

§ 1D-10. Scope of the Chapter.

This Chapter applies to every claim for punitive damages, regardless of whether the claim for relief is based on a statutory or a common-law right of action or based in equity. In an action subject to this Chapter, in whole or in part, the provisions of this Chapter prevail over any other law to the contrary. (1995, c. 514, s. 1.)

§ 1D-15. Standards for recovery of punitive damages.

(a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:

(1) Fraud.
(2) Malice.
(3) Willful or wanton conduct.

(b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.

(c) Punitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another. Punitive damages may be awarded against a person only if that person participated in the conduct constituting the aggravating factor giving rise to the punitive damages, or if, in the case of a corporation, the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages.

(d) Punitive damages shall not be awarded against a person solely for breach of contract. (1995, c. 514, s. 1.)

Legal Periodicals. — For article, “North Carolina’s New Punitive Damages Statute: Who’s Being Punished, Anyway?,” see 74 N.C.L. Rev. 2174 (1996).

For article, “Judicial Boilerplate Language as Torts Decisional Litany: Four Problem Areas in North Carolina,” see 18 Campbell L. Rev. 359 (1996).

CASE NOTES

Pleading with Particularity Not Required. — Plaintiff’s alienation of affection complaint, which averred both malice and willful and wanton conduct as the relevant aggravating factors under this section, was not required to state with particularity the circumstances underlying these factors. Ward v. Beaton, 141 N.C. App. 44, 539 S.E.2d 30, 2000 N.C. App. LEXIS 1288 (2000), cert denied, 353 N.C. 398, 547 S.E.2d 431 (2001).

Applicability of Section. — G.S. 1D-15 is not to be applied retroactively and, therefore, applies only to cases arising after January 1, 1996. Rhone-Poulenc Agro, S.A. v. Dekalb Genetics Corp., 272 F.3d 1335, 2001 U.S. App. LEXIS 24812 (4th Cir. 2001).

Because the corporation and the stockholder carried their burden of showing there were no genuine issues of material fact and that they were entitled to judgment in their favor as a matter of law as to the former employee’s underlying claims for fraud, constructive fraud, negligent misrepresentation, and violating the North Carolina Securities Act (G.S. 78A-56(b) concerning the employee’s sale of stock to the stockholder, summary judgment was also proper as to the employee's claim for punitive damages. Sullivan v. Mebane Packaging Group, Inc., 158 N.C. App. 19, 581 S.E.2d 452, 2003 N.C. App. LEXIS 944 (2003), cert. denied, 357 N.C. 511, 588 S.E.2d 473 (2003).

When taxpayers sued county commissioners for entering into a contract that benefitted one of the commissioners, the taxpayers, under their punitive damages claim, had to prove by clear and convincing evidence one or more aggravating factors such as fraud, malice, or willful or wanton conduct. Gibbs v. Mayo, 162 N.C. App. 549, 591 S.E.2d 905, 2004 N.C. App. LEXIS 252 (2004), cert. denied, 358 N.C. 543, 599 S.E.2d 45 (2004).

On interlocutory appeal, prisoner's Eighth Amendment Bivens claim for alleged inadequate medical care did not extend to defendants, who were individual employees of a privately operated prison, because the actions of the employees were not fairly attributable to the federal government and because the prisoner had adequate remedies under state law, G. S. 1D-15, for his alleged injuries. Holly v. Scott, 434 F.3d 287, 2006 U.S. App. LEXIS 685 (4th Cir. 2006), cert. denied, — U.S. —, 126 S. Ct. 2333, 164 L. Ed. 2d 849 (2006).

Consideration of Factors as to Each Plaintiff. — In the absence of some legislative directive, it is assumed that the trier of fact should, as it did at common law, consider the factors set forth in G.S. 1D-15(a) as to each plaintiff's cause of action and not as to each defendant; it follows that, like G.S. 1D-15(a), G.S. 1D-25(b) applies to the individual jury verdict of each plaintiff. Thus, where a jury awarded compensatory and punitive damages, which exceeded the statutory cap of G.S. 1D-25(b), to two plaintiffs against one defendant, the trial court properly reduced the individual awards to both plaintiffs and entered judgment against defendant in the amount of the statutory cap for each plaintiff. Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

The aggravating factor required under this section was sufficiently alleged in complaint to support a claim for punitive damages where plaintiffs former jurors' complaint sufficiently alleged a claim for intentional infliction of emotional distress. Burgess v. Busby, 142 N.C. App. 393, 544 S.E.2d 4, 2001 N.C. App. LEXIS 146 (2001).

Punitive Damages Warranted in Alienation of Affections Where Sexual Relations Occurred. — Punitive damages award against a boyfriend in an alienation of affections claim was warranted pursuant to this section where it was shown that the boyfriend had sexual relations on at least two occasions with the husband's wife; additionally, the award was not deemed excessive where it did not go beyond the limits established by G.S. 1D-25(b), and accordingly, the trial court's denial of the boyfriend's motion for a new trial on that issue, pursuant to G.S. 1A-1, Rule 59, was proper. Oddo v. Presser, 158 N.C. App. 360, 581 S.E.2d 123, 2003 N.C. App. LEXIS 1196 (2003).

Punitive Damage Award with Comparative Ratio Greater Than Three. — G.S. 1D-15 and G.S. 1D-25, when taken together, imply that a punitive damage award with a comparative ratio greater than three, based upon a showing of fraud by only a preponderance of the evidence, will not be upheld under North Carolina law. Rhone-Poulenc Agro, S.A. v. Dekalb Genetics Corp., 272 F.3d 1335, 2001 U.S. App. LEXIS 24812 (4th Cir. 2001).

Evidence Sufficient. — Punitive damages were justified where the plaintiff presented evidence that the defendant and plaintiff's husband "had sex" at least two times and where the defendant on several occasions appeared at the marital home. Ward v. Beaton, 141 N.C. App. 44, 539 S.E.2d 30, 2000 N.C. App. LEXIS 1288 (2000), cert denied, 353 N.C. 398, 547 S.E.2d 431 (2001).

Defendant was denied partial summary judgment on plaintiffs' claim for punitive damages, where, viewed in a light most favorable to plaintiffs, the evidence tended to show defendant drove a front end loader with his field of vision completely obstructed when he should have known two trucks were in front of him; in this light, the evidence was sufficient to support a finding that this defendant acted with conscious and intentional disregard of and indifference to the rights and safety of others. Abel v. Carolina Stalite Co., Ltd. P'ship, — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 5303 (M.D.N.C. Mar. 18, 2004).

Corporation was denied partial summary judgment on two individuals' claim for punitive damages, where, viewed in a light most favorable to the individuals, the evidence was sufficient to support a finding that the corporation acted with conscious and intentional disregard of and indifference to the rights and safety of others; the individuals had contended that the corporation intentionally and repetitively disregarded several Federal Mine Safety and Health Act of 1977 (FMSHA), 30 U.S.C.S. §§ 801 et seq., health and safety regulations and that the corporation knew or reasonably should have known that its disregard of FMSHA health and safety regulations would result in injury. Abel v. Carolina Stalite Co., Ltd. P'ship, — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 5303 (M.D.N.C. Mar. 18, 2004).

Because the lessees presented evidence of the lessors' willful, wanton, and malicious conduct in breaching the parties' lease/purchase agreement, violating a temporary restraining order and preliminary injunction, and converting the lessees' property, a court properly denied the lessors' motion for a directed verdict on the issue of punitive damages under G.S. 1D-15(a). Zubaidi v. Earl L. Pickett Enters., 164 N.C. App. 107, 595 S.E.2d 190, 2004 N.C. App. LEXIS 716 (2004).

Trial court did not err in denying two corporations' motion for judgment notwithstanding the verdict as to an award of punitive damages to a patron beaten by bouncers employed by the corporations during the scope of their employment where: (1) the operations manager directed the bouncers' to check on the patron, (2) he condoned the attack, and (3) he did not intervene in the beating. Wallace v. M, M & R, Inc., 165 N.C. App. 827, 600 S.E.2d 514, 2004 N.C. App. LEXIS 1510 (2004).

Borrowers established willful or wanton tortious activity by a bank subsidiary, pursuant to G.S. 1D-5(7), because the borrowers proved facts sufficient to show that the actions of the subsidiary were in conscious and intentional disregard of and indifference to the rights of the borrowers; furthermore, the subsidiary knew or should have known that by selling unlawful insurance with mortgage loans, its actions were reasonably likely to result in injury, damage, or other harm. Richardson v. Bank of Am., N.A., — N.C. App. —, 643 S.E.2d 410, 2007 N.C. App. LEXIS 809 (2007).

Evidence Insufficient. — The defendant-physical therapist was entitled to a directed verdict on the punitive damages claim based on willful or wanton negligence where the evidence indicated that, although the defendant may have been negligent in deviating from customary standards in caring for an exercise machine, the evidence fell short of creating a reasonable inference that defendant recklessly disregarded the plaintiff's rights or safety. Collins v. St. George Physical Therapy, 141 N.C. App. 82, 539 S.E.2d 356, 2000 N.C. App. LEXIS 1286 (2000).

Where plaintiff workers were exposed to asbestos dust and fibers at defendant's polyester manufacturing plant, the jury returned verdicts in favor of plaintiffs, awarding them compensatory damages for personal injuries; however, defendant was entitled to a directed verdict on the issue of punitive damages because the plant industrial hygienist's destruction of a memo stating the asbestos exposure was cause for concern did not constitute willful and wanton conduct by defendant. Schenk v. HNA Holdings, Inc., 167 N.C. App. 47, 604 S.E.2d 689, 2004 N.C. App. LEXIS 2059 (2004).

Directed verdict in favor of a manufacturing plant, a maintenance company, and its successor on the issue of punitive damages was upheld on appeal, because plaintiff workers failed to demonstrate any willful or wanton misconduct with regard to their exposure to asbestos when they removed insulation. The trial court's reduction of the workers' compensatory damages awards was also upheld on appeal, because the workers received prior workers' compensation claim settlements and prior third-party settlement amounts and were entitled to only one recovery for their asbestos exposure. Schenk v. HNA Holdings, Inc., 170 N.C. App. 555, 613 S.E.2d 503, 2005 N.C. App. LEXIS 1067 (2005), cert. denied, — N.C. —, 626 S.E.2d 649 (2005).

Where plaintiff's complaint did not allege any facts that would have tended to show fraud, malice, or willful or wanton conduct in relation to the alleged breach of fiduciary duty, the omission strongly suggested that plaintiff's claim for punitive damages was without basis and had been asserted solely to confer jurisdiction on the court. Southstar Funding, L.L.C. v. Warren, Perry & Anthony, P.L.L.C., 445 F. Supp. 2d 583, 2006 U.S. Dist. LEXIS 61500 (E.D.N.C. 2006).

Wife of a decedent who was electrocuted on a stairwell at an amphitheater, which was operated by a subsidiary, could not recover punitive damages under G.S. 1D-5(7), 1D-15(c), and 28A-18-2 because evidence showing: (1) that the subsidiary had been informed prior to the accident that other patrons had been electrocuted on a stairwell; and (2) that the subsidiary took ineffective efforts to address electrical hazards did not demonstrate a wilful and wanton disregard for the safety of others. Faris v. Clear Channel Communs., Inc., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 63059 (W.D.N.C. Sept. 1, 2006).

In a medical malpractice suit, a trial court's entry of summary judgment in favor of the defendants as to the plaintiffs' punitive damages claims was upheld on appeal based on the plaintiffs' failure to forecast sufficient evidence to meet the standard for punitive damages set forth in G.S. 1D-15(a); the plaintiffs did not contend that either fraud or malice existed and relied upon the willful or wanton conduct aggravating factor, but their complaint and proofs only alleged reckless supervision on the part of the defendants. Foster v. Crandell, — N.C. App. —, 638 S.E.2d 526, 2007 N.C. App. LEXIS 73 (2007).

Borrower's 's claim for punitive damages was inappropriate for several reasons: because the borrower was not entitled to compensatory damages, her claim for punitive damages failed and she did not state a sufficient claim for an independent tort to accompany her breach of contract allegations; in addition, the borrower did not expressly state that any of the lender's actions included a heightened level of fault for which to allow punitive damages, nor did the borrower allege any facts showing that the lender's conduct rose to a fraudulent, malicious, or willful or wanton level. Booker v. Wash. Mut. Bank, F.A., — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 9632 (M.D.N.C. Feb. 9, 2007).

Defendants were entitled to summary judgment as to plaintiff's punitive damages claim because defendants' evidence tended to show they moved to withdraw from representation of plaintiff due to ill health and defendants asserted a proper basis and utilized proper procedures mandated by the Rules of Professional Conduct and the Rules for Superior Court Practice to move to withdraw; thus, the evidence failed to raise an inference of the existence of any of the three aggravating factors necessary to support a claim for punitive damages under G.S. 1D-15(a). Wilkins v. Safran, — N.C. App. —, 649 S.E.2d 658, 2007 N.C. App. LEXIS 1952 (2007).

Regarding Allegation of Fraudulent Misrepresentation. — Regarding a manufacturer's request for punitive damages from a seller and its president arising from the alleged breach of an agreement executed by the parties, the seller's motion for partial summary judgment as to the fraudulent misrepresentation claim and request for punitive damages under G.S. 1D-15(d) was denied because the manufacturer showed that the seller and the president knowingly and willfully concealed any breaches of the agreement so that the manufacturer, relying on the misrepresentations, would continue to offer the seller product discounts and that the president knew of the potentially breaching purchases; hence, a jury, crediting such evidence, could reasonably have found that the seller and the president committed fraudulent misrepresentation. Interstate Narrow Fabrics, Inc. v. Century USA, Inc., 218 F.R.D. 455, 2003 U.S. Dist. LEXIS 18227 (M.D.N.C. 2003).

Under this section, enacted in 1995, punitive damages may be awarded only if a plaintiff can prove willful or wanton conduct which he failed to do, thus warranting a directed verdict for the defendant. McNeill v. Holloway, 141 N.C. App. 109, 539 S.E.2d 309, 2000 N.C. App. LEXIS 1279 (2000).

Court denied an administratrix's Fed. R. Civ. P. 54(b) motion for reconsideration of the grant of summary judgment to a corporation on the administratrix's punitive damages claim, under G.S. 1D-15(c), in the administratrix's action against the corporation for the electrocution of a decedent at the corporation's amphitheater where no reasonable jury could find with clear and convincing proof that the corporation acted in a willful or wanton manner or ignored safety procedures and policies. Faris v. SFX Entm't, Inc., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 89918 (W.D.N.C. Dec. 12, 2006).

Discovery of Financial Information Where Prima Facie Showing Is Made. — Franchisees' motion to compel was granted in part, to the extent that they sought to compel three corporate officers to respond to an interrogatory by providing personal financial information about themselves, as: (1) the information was relevant because the franchisees had made a prima facie showing of their entitlement to punitive damages under G.S. 1D-15; (2) the officers were not required to produce documents under Fed. R. Civ. P. 33(d), in response to the franchisees' interrogatory; and (3) the production of the requested information, concerning the officers' financial assets, liabilities, and monthly income as of December 31, 2001, did not rise to the level of burden contemplated by Fed. R. Civ. P. 26(b)(2). Rich Food Servs. v. Rich Plan Corp., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 27791 (E.D.N.C. June 17, 2002).

Applied in Phillips v. Restaurant Mgt. of Carolina, L.P., 146 N.C. App. 203, 552 S.E.2d 686, 2001 N.C. App. LEXIS 851 (2001); Compton v. Kirby, 157 N.C. App. 1, 577 S.E.2d 905, 2003 N.C. App. LEXIS 369 (2003).

Cited in Stamm v. Salomon, 144 N.C. App. 672, 551 S.E.2d 152, 2001 N.C. App. LEXIS 555 (2001); Edens v. Estate of Streett, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 20029 (W.D.N.C. Nov. 30, 2001); Ausley v. Bishop, 150 N.C. App. 56, 564 S.E.2d 252, 2002 N.C. App. LEXIS 382 (2002); Shinn v. Greeness, 218 F.R.D. 478, 2003 U.S. Dist. LEXIS 20872 (M.D.N.C. 2003); Eli Research Inc. v. United Communs. Group, LLC, 312 F. Supp. 2d 748, 2004 U.S. Dist. LEXIS 5792 (M.D.N.C. 2004); Perkins v. Watson, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 11192 (M.D.N.C. June 3, 2005); Scarborough v. Dillard's, Inc., 179 N.C. App. 127, 632 S.E.2d 800, 2006 N.C. App. LEXIS 1652 (2006).

§ 1D-20. Election of extracompensatory remedies.

A claimant must elect, prior to judgment, between punitive damages and any other remedy pursuant to another statute that provides for multiple damages. (1995, c. 514, s. 1.)

Legal Periodicals. — For article, "North Carolina's New Punitive Damages Statute: Who's Being Punished, Anyway?," see 74 N.C.L. Rev. 2174 (1996).

§ 1D-25. Limitation of amount of recovery.

(a) In all actions seeking an award of punitive damages, the trier of fact shall determine the amount of punitive damages separately from the amount of compensation for all other damages.

(b) Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.

(c) The provisions of subsection (b) of this section shall not be made known to the trier of fact through any means, including voir dire, the introduction into evidence, argument, or instructions to the jury. (1995, c. 514, s. 1.)

Cross References. — As to cap on stay of execution bonds pending appeal with respect to noncompensatory damages, see G.S. 1-289(b).

Legal Periodicals. — For article, "North Carolina's New Punitive Damages Statute: Who's Being Punished, Anyway?," see 74 N.C.L. Rev. 2174 (1996).

CASE NOTES

Constitutionality — Separation of Powers. — G.S. 1D-25, which places a cap on punitive damages, did not unconstitutionally violate the principle of separation of powers, contrary to N.C. Const., Art. I, § 6, by exercising the power of remittitur because the cap on punitive damages is different from remittitur in that it requires an award to be limited after a proper jury trial, while remittitur is utilized only after a court has determined that a party has not received a fair and proper jury trial. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002), aff'd, 358 N.C. 160, 594 S.E.2d 1 (2004).

G.S. 1D-25 does not operate as a "legislative remittitur" because, unlike remittitur, G.S. 1D-25 does not grant the General Assembly the authority to remit excessive awards on a case-by-case basis, but rather, by enacting G.S. 1D-25, the General Assembly has imposed a limit on the recovery of punitive damages in all cases; this function is wholly distinct from that within the trial court's authority to apply fixed laws to individual controversies, and thus, G.S. 1D-25 did not violate separation of powers principles under N.C. Const. art. I, § 6. Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

G.S. 1D-25 does not represent an impermissible interference with the judiciary's constitutionally defined authority because the Constitution neither expressly nor implicitly empowers North Carolina courts to award punitive damages or to remit excessive awards thereof; rather, because punitive damages are awarded on grounds of public policy, G.S. 1D-25 is a modification of the common law within the General Assembly's policy-making authority to define legally cognizable remedies. Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

Constitutionality — Open Courts. — G.S. 1D-25, which places a cap on punitive damages, is not unconstitutional under the open courts provision in N.C. Const., Art. I, § 18, because it does not limit the recovery of actual damages. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002), aff'd, 358 N.C. 160, 594 S.E.2d 1 (2004).

Because the Open Courts Clause of N.C. Const. art. I, § 18 does not prevent the General Assembly from abolishing the recovery of punitive damages altogether, it follows that G.S. 1D-25, which limits the awards of punitive damages, does not violate the Open Courts Clause. Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

Constitutionality — Due Process. — G.S. 1D-25, placing a cap on an award of punitive damages, does not take property without just compensation, infringing on a fundamental right, contrary to N.C. Const., Art. I, § 19, because punitive damages are not property belonging to an individual. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002), aff'd, 358 N.C. 160, 594 S.E.2d 1 (2004).

The statutory limit on punitive damages in G.S. 1D-25 does not constitute an unconstitutional taking of property by denying plaintiffs of the "enjoyment of the fruits of their own labor" under N.C. Const. art. I, § 1 because (1) a jury's verdict is not "property" in which a plaintiff enjoys a vested right where the limitation on punitive damages applies prior to the entry of judgment; and (2) a litigant's participation in a trial is not a "labor" nor is a jury's verdict the "fruits" of that labor. Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

Constitutionality — Equal Protection. — G.S. 1D-25, placing a cap on an award of punitive damages, does not treat similarly situated persons differently without compelling reason or rational justification, contrary to N.C. Const., Art. I, § 19, because no fundamental right is involved and the statute makes no mention of suspect classifications, subjecting it to rational basis review, and because the statute bears a rational relationship to a legitimate governmental interest in the state's economic development. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002), aff'd, 358 N.C. 160, 594 S.E.2d 1 (2004).

Because the limitation on punitive damages contained in G.S.1D-25 bears some rational relationship to several legitimate governmental interests, G.S. 1D-25 does not violate principles of due process and equal protection as guaranteed by N.C. Cont. art. I, § 19. Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

Constitutionality — Vagueness. — G.S. 1D-25, which places a cap on punitive damages, is not unconstitutionally vague because it provides sufficient language for uniform judicial administration. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002), aff'd, 358 N.C. 160, 594 S.E.2d 1 (2004).

G.S. 1D-25 is not unconstitutionally vague because the court can apply the rules of statutory construction to discern a meaning from G.S. 1D-25 that can be uniformly administered. Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

Constitutionality — Special Legislation. — G.S. 1D-25, placing a cap on an award of punitive damages, is not unconstitutional special legislation contrary to N.C. Const., Art. II, § 24, which prohibits the enactment of any local, private or special legislation remitting fines, penalties and forfeitures, because it does not constitute remittitur. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002), aff'd, 358 N.C. 160, 594 S.E.2d 1 (2004).

G.S. 1D-25, placing a cap on an award of punitive damages, is not unconstitutional special legislation, contrary to N.C. Const., Art. I, § 32, because it applies equally to all defendants and creates no distinction between groups. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002), aff'd, 358 N.C. 160, 594 S.E.2d 1 (2004).

Constitutionality — Right to Jury Trial. — G.S. 1D-25, which places a cap on punitive damages, does not violate injured parties' rights to a jury trial, under N.C. Const., Art. I, § 25, because the right to punitive damages is not a property interest, and there is only a right to a civil jury trial concerning property. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002), aff'd, 358 N.C. 160, 594 S.E.2d 1 (2004).

Although N.C. Const. art. I, § 25 appears to embody a broad definition of the term ""property," a controversy in which punitive damages are assessed is not one which enforces a plaintiff's legal rights and, therefore, does not respect property; thus, G.S. 1D-25 in no way infringes upon plaintiffs' right to a trial by jury under N.C. Const. art. 1, § 25. Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

Application of Section Upheld. — G.S. 1D-25, which places a cap on punitive damages, was appropriately applied to limit each individual plaintiff's punitive damages award, rather than being applied per each plaintiff's claim or per defendant. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002), aff'd, 358 N.C. 160, 594 S.E.2d 1 (2004).

This section is not retroactive. Food Lion, Inc. v. Capital Cities/ABC, Inc., 984 F. Supp. 923 (M.D.N.C. 1997).

G.S. 1D-25 is not to be applied retroactively and, therefore, applies only to cases arising after January 1, 1996. Rhone-Poulenc Agro, S.A. v. Dekalb Genetics Corp., 272 F.3d 1335, 2001 U.S. App. LEXIS 24812 (4th Cir. 2001).

Cap Applies to Individual Jury Verdict of Each Plaintiff, Not Each Defendant. — In the absence of some legislative directive, it is assumed that the trier of fact should, as it did at common law, consider the factors set forth in G.S. 1D-15(a) as to each plaintiff's cause of action and not as to each defendant; it follows that, like G.S. 1D-15(a), G.S. 1D-25(b) applies to the individual jury verdict of each plaintiff. Thus, where a jury awarded compensatory and punitive damages, which exceeded the statutory cap of G.S. 1D-25(b), to two plaintiffs against one defendant, the trial court properly reduced the individual awards to both plaintiffs and entered judgment against defendant in the amount of the statutory cap for each plaintiff. Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

Punitive Damage Award with Comparative Ratio Greater Than Three. — G.S. 1D-15 and G.S. 1D-25, when taken together, imply that a punitive damage award with a comparative ratio greater than three, based upon a showing of fraud by only a preponderance of the evidence, will not be upheld under North Carolina law. Rhone-Poulenc Agro, S.A. v. Dekalb Genetics Corp., 272 F.3d 1335, 2001 U.S. App. LEXIS 24812 (4th Cir. 2001).

Award Within the Statutory Boundaries

for Punitive Damages. — Where a jury awarded lessees compensatory damages in the amount of $62,001.00 for breach of a lease/purchase agreement and conversion and punitive damages in the amount of $150,000.00, the amount of punitive damages was well within the boundaries provided in G.S. 1D-25(b) and was not excessively disproportionate to the circumstances of contumely and indignity present in the case. Zubaidi v. Earl L. Pickett Enters., 164 N.C. App. 107, 595 S.E.2d 190, 2004 N.C. App. LEXIS 716 (2004).

Illustrative Cases. — An award of punitive damages of $500,000 to the former wife against the current wife for alienation of affections and criminal conversion was not excessive, considering that the jury awarded the same amount in compensatory damages, and thus, could have awarded $1,500,000 in punitive damages. Hutelmyer v. Cox, 133 N.C. App. 364, 514 S.E.2d 554, 1999 N.C. App. LEXIS 510 (1999), cert. denied, 351 N.C. 104, 541 S.E.2d 146 (1999).

Punitive damages award against a boyfriend in an alienation of affections claim was warranted pursuant to G.S. 1D-15 where it was shown that the boyfriend had sexual relations on at least two occasions with the husband's wife; additionally, the award was not deemed excessive where it did not go beyond the limits established by subsection (b) of this section, and accordingly, the trial court's denial of the boyfriend's motion for a new trial on that issue, pursuant to G.S. 1A-1, Rule 59, was proper. Oddo v. Presser, 158 N.C. App. 360, 581 S.E.2d 123, 2003 N.C. App. LEXIS 1196 (2003).

§ 1D-26. Driving while impaired; exemption from cap.

G.S. 1D-25(b) shall not apply to a claim for punitive damages for injury or harm arising from a defendant's operation of a motor vehicle if the actions of the defendant in operating the motor vehicle would give rise to an offense of driving while impaired under G.S. 20-138.1, 20-138.2, or 20-138.5. (1995, c. 514, s. 1.)

Legal Periodicals. — For article, "North Carolina's New Punitive Damages Statute: Who's Being Punished, Anyway?," see 74 N.C.L. Rev. 2174 (1996).

§ 1D-30. Bifurcated trial.

Upon the motion of a defendant, the issues of liability for compensatory damages and the amount of compensatory damages, if any, shall be tried separately from the issues of liability for punitive damages and the amount of punitive damages, if any. Evidence relating solely to punitive damages shall not be admissible until the trier of fact has determined that the defendant is liable for compensatory damages and has determined the amount of compensatory damages. The same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to punitive damages. (1995, c. 514, s. 1.)

CASE NOTES

Section Not Retroactive. — This section did not apply where the cause of action was initiated prior to the enactment of this statute. Watson v. Dixon, 132 N.C. App. 329, 511 S.E.2d 37, 1999 N.C. App. LEXIS 121 (1999), cert. denied, 351 N.C. 191 (1999).

The defendant's failure to request a bifurcated trial under this section rendered evidence relating solely to punitive damages admissible at any time during plaintiff's case-in-chief. Ward v. Beaton, 141 N.C. App. 44, 539 S.E.2d 30, 2000 N.C. App. LEXIS 1288 (2000), cert denied, 353 N.C. 398, 547 S.E.2d 431 (2001).

Remand for New Trial. — Where jury awarded compensatory damages, but not punitive damages, the appellate court was required to remand the entire case for retrial of all issues, following juror misconduct during punitive deliberation phase of bifurcated trial, since the same jury was required to hear and determine all issues. Lindsey v. Boddie-Noell Enters., Inc., 147 N.C. App. 166, 555 S.E.2d 369, 2001 N.C. App. LEXIS 1145 (2001), cert. denied, 355 N.C. 213, 559 S.E.2d 803 (2002).

When taxpayers' punitive damages claim was bifurcated in their suit against county commissioners for entering into a contract that benefitted one of the commissioners, evidence relating only to punitive damages was not admissible in the compensatory damages portion of the trial, but nothing prevented them from presenting all of their evidence of liability for punitive damages. Gibbs v. Mayo, 162 N.C. App. 549, 591 S.E.2d 905, 2004 N.C. App. LEXIS 252 (2004), cert. denied, 358 N.C. 543, 599 S.E.2d 45 (2004).

Cited in Ausley v. Bishop, 150 N.C. App. 56, 564 S.E.2d 252, 2002 N.C. App. LEXIS 382 (2002); Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

§ 1D-35. Punitive damages awards.

In determining the amount of punitive damages, if any, to be awarded, the trier of fact:

(1) Shall consider the purposes of punitive damages set forth in G.S. 1D-1; and

(2) May consider only that evidence that relates to the following:
  a. The reprehensibility of the defendant's motives and conduct.
  b. The likelihood, at the relevant time, of serious harm.
  c. The degree of the defendant's awareness of the probable consequences of its conduct.
  d. The duration of the defendant's conduct.
  e. The actual damages suffered by the claimant.
  f. Any concealment by the defendant of the facts or consequences of its conduct.
  g. The existence and frequency of any similar past conduct by the defendant.
  h. Whether the defendant profited from the conduct.
  i. The defendant's ability to pay punitive damages, as evidenced by its revenues or net worth. (1995, c. 514, s. 1.)

CASE NOTES

Applicability. — This section is not applicable to claims arising before January 1, 1996. Food Lion, Inc. v. Capital Cities/ABC, Inc., 984 F. Supp. 923 (M.D.N.C. 1997).

Relevance of Ability to Pay. — Where plaintiff asserted a claim for punitive damages against defendant, and the claim survived a motion for summary judgment, defendant's individual tax return became relevant for purposes of discovery under Fed. R. Civ. P. 26 because defendant's ability to pay punitive damages, as evidenced by his revenues or net worth, could be considered by the jury when it determined the amount of punitive damages to award. Interstate Narrow Fabrics, Inc. v. Century United States, Inc., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 3839 (M.D.N.C. Feb. 24, 2004).

The defendant's failure to request a bifurcated trial under G.S. 1D-30 rendered evidence relating solely to punitive damages admissible at any time during plaintiff's case-in-chief. Ward v. Beaton, 141 N.C. App. 44, 539 S.E.2d 30, 2000 N.C. App. LEXIS 1288 (2000), cert denied, 353 N.C. 398, 547 S.E.2d 431 (2001).

Cited in Hutelmyer v. Cox, 133 N.C. App. 364, 514 S.E.2d 554, 1999 N.C. App. LEXIS 510 (1999), cert. denied, 351 N.C. 104, 541 S.E.2d 146 (1999); Lindsey v. Boddie-Noell Enters., Inc., 147 N.C. App. 166, 555 S.E.2d 369, 2001 N.C. App. LEXIS 1145 (2001), cert. denied, 355 N.C. 213, 559 S.E.2d 803 (2002); Lindsey v. Boddie-Noell Enters., Inc., 147 N.C. App. 166, 555 S.E.2d 369, 2001 N.C. App. LEXIS 1145 (2001), cert. denied, 355 N.C. 213, 559 S.E.2d 803 (2002); Rosero v. Blake, 150 N.C. App. 250, 563 S.E.2d 248, 2002 N.C. App. LEXIS 509 (2002), cert. granted, 356 N.C. 166, 568 S.E.2d 610 (2002); Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

§ 1D-40. Jury instructions.

In a jury trial, the court shall instruct the jury with regard to subdivisions (1) and (2) of G.S. 1D-35. (1995, c. 514, s. 1.)

Legal Periodicals. — For article, "North Carolina's New Punitive Damages Statute: Who's Being Punished, Anyway?," see 74 N.C.L. Rev. 2174 (1996).

§ 1D-45. Frivolous or malicious actions; attorneys' fees.

The court shall award reasonable attorneys' fees, resulting from the defense against the punitive damages claim, against a claimant who files a claim for punitive damages that the claimant knows or should have known to be frivolous or malicious. The court shall award reasonable attorney fees against a defendant who asserts a defense in a punitive damages claim that the defendant knows or should have known to be frivolous or malicious. (1995, c. 514, s. 1.)

Legal Periodicals. — For an article discussing "reverse bad faith," the concept of allowing an insurer to assert a counterclaim for affirmative relief against an insured who brings a frivolous, bad faith action, see 19 Campbell L. Rev. 43 (1996).

CASE NOTES

Cited in Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc., 160 N.C. App. 520, 586 S.E.2d 507, 2003 N.C. App. LEXIS 1825 (2003); Blyth v. McCrary, — N.C. App. —, 646 S.E.2d 813, 2007 N.C. App. LEXIS 1626 (2007).

§ 1D-50. Judicial review of award.

When reviewing the evidence regarding a finding by the trier of fact concerning liability for punitive damages in accordance with G.S. 1D-15(a), or regarding the amount of punitive damages awarded, the trial court shall state in a written opinion its reasons for upholding or disturbing the finding or award. In doing so, the court shall address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages, in light of the requirements of this Chapter. (1995, c. 514, s. 1.)

Cross References. — As to cap on stay of execution bonds pending appeal with respect to noncompensatory damages, see G.S. 1-289(b).

Legal Periodicals. — For article, "North Carolina's New Punitive Damages Statute: Who's Being Punished, Anyway?," see 74 N.C.L. Rev. 2174 (1996).

CASE NOTES

Remand for Compliance with this Section. — Action was remanded because the trial court's order granting the former employer's motion for judgment notwithstanding verdict contained no reasons as to why the trial court set aside the jury's verdict on the former employee's punitive damages claim. Scarborough v. Dillard's, Inc., 179 N.C. App. 127, 632 S.E.2d 800, 2006 N.C. App. LEXIS 1652 (2006).

Chapter 1E.

Eastern Band of Cherokee Indians.

Article 1.

Full Faith and Credit.

Sec.
1E-1. Full faith and credit.

Article 1.

Full Faith and Credit.

§ 1E-1. Full faith and credit.

(a) The courts of this State shall give full faith and credit to a judgment, decree, or order signed by a judicial officer of the Eastern Band of Cherokee Indians and filed in the Cherokee Tribal Court to the same extent as is given a judgment, decree, or order of another state, subject to the provisions of subsection (b) of this section; provided that the judgments, decrees, and orders of the courts of this State are given full faith and credit by the Tribal Court of the Eastern Band of Cherokee Indians.

(b) Judgments, decrees, and orders specified in subsection (a) of this section shall be given full faith and credit subject to the provisions of G.S. 1C-1705, G.S. 1C-1708, G.S. 1C-1804, and G.S. 1C-1805 and shall be considered a foreign judgment for purposes of these statutes. (2001-456, s. 1.)

Chapter 2.

Clerk of Superior Court.

§§ 2-1 through 2-60: Repealed and transferred by Session Laws 1971, c. 363.

Editor's Note. — G.S. 2-2, 2-5, 2-6, 2-10, 2-12, 2-13, 2-15, 2-16, 2-17, 2-19 to 2-22, 2-24, 2-25, 2-42, 2-45, 2-52 to 2-56, and 2-60 were transferred to G.S. 7A-100, 7A-102 to 7A-104, 7A-106, and 7A-109 to 7A-112 by Session Laws 1971, c. 363.

Session Laws 1971, c. 363, s. 11, as amended by Session Laws 1971, c. 518, s. 1, provides: "Repeal of any curative or validating laws by this section shall not be construed to invalidate any acts validated by the curative or validating laws."

Chapter 3.

Commissioners of Affidavits and Deeds.

§§ **3-1 through 3-8:** Repealed by Session Laws 1971, c. 202.

Chapter 4.

Common Law.

Sec.
4-1. Common law declared to be in force.

§ 4-1. Common law declared to be in force.

All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State. (1715, c. 5, ss. 2, 3, P.R.; 1778, c. 133, P.R.; R.C., c. 22; Code, s. 641; Rev., s. 932; C.S., s. 970.)

Legal Periodicals. — For note on the role of the judiciary in the abrogation of the municipal tort immunity rule, see 5 Wake Forest Intra. L. Rev. 383 (1969).

For article, "The Rule in Wild's Case in North Carolina," see 55 N.C.L. Rev. 751 (1977).

For article, "The Common Law Powers of the Attorney General of North Carolina," see 9 N.C. Cent. L.J. 1 (1977).

For article discussing the influence, past and future, of civil law on common law jurisdictions, see 1990 Duke L.J. 1207.

For note, "Its Days were Numbered: The Year and a Day Rule Falls in North Carolina — State v. Vance," see 14 Campbell L. Rev. 235 (1992).

For note, "Searching for Limits on a Municipality's Retention of Governmental Immunity," see 76 N.C.L. Rev. 269 (1997).

For note, "Not-So-Secrets? The State of the Attorney-Client Privilege in North Carolina in the Wake of In re Investigation of Death of Eric Miller and Crawford v. Washington," see 83 N.C. L. Rev. 1591 (2005).

CASE NOTES

I. General Consideration.
II. Illustrative Cases.
  A. Civil.
  B. Criminal.

I. GENERAL CONSIDERATION.

Historical Background. — See Resort Dev. Co. v. Parmele, 235 N.C. 689, 71 S.E.2d 474 (1952), overruled in part, Gwathmey v. State ex rel. Dep't of Env't, Health & Natural Resources, 342 N.C. 287, 464 S.E.2d 674 (1995).

Since the American Revolution and our independence, the common law has continued to apply in North Carolina. Hall v. Post, 323 N.C. 259, 372 S.E.2d 711 (1988).

The term "common law" refers to the common law of England. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961); State v. Lackey, 271 N.C. 171, 155 S.E.2d 465 (1967); State ex rel. Bruton v. Flying "W" Enters., Inc., 273 N.C. 399, 160 S.E.2d 482 (1968).

Common Law Adopted as of Date of Signing of Declaration of Independence. — This section adopted the common law of England as of the date of the signing of the Declaration of Independence. Steelman v. City of New Bern, 279 N.C. 589, 184 S.E.2d 239 (1971).

Extent of Common Law in Force and Effect. — So much of the common law as is not destructive of, repugnant to, or inconsistent with our form of government, and which has not been repealed or abrogated by statute or become obsolete, is in full force and effect in this jurisdiction. State v. Hampton, 210 N.C. 283, 186 S.E. 251 (1936).

So much of the common law as has not been abrogated or repealed by statute is in full force and effect in this State. Hoke v. Atlantic Greyhound Corp., 226 N.C. 332, 38 S.E.2d 105 (1946); Scholtens v. Scholtens, 230 N.C. 149, 52 S.E.2d 350 (1949), overruled on other grounds, Foster v. Foster, 264 N.C. 694, 142 S.E.2d 638 (1965); Hensen v. Thomas, 231 N.C. 173, 56 S.E.2d 432, 12 A.L.R.2d 1171 (1949); Friendly Fin. Corp. v. Quinn, 232 N.C. 407, 61 S.E.2d 192 (1950); Ionic Lodge No. 72 F.A. & A.M. v. Ionic Lodge F.A. & A.M. No. 72 Co., 232 N.C.

648, 62 S.E.2d 73 (1950); Cooperative Warehouse v. Lumberton Tobacco Bd. of Trade, Inc., 242 N.C. 123, 87 S.E.2d 25.

A common-law rule which has not been abrogated or repealed by statute in North Carolina is still in effect under the terms of this section. Elliott v. Elliott, 235 N.C. 153, 69 S.E.2d 224 (1952); Redding v. Redding, 235 N.C. 638, 70 S.E.2d 676 (1952); McMichael v. Proctor, 243 N.C. 479, 91 S.E.2d 231 (1956); Mullen v. Sawyer, 8 N.C. App. 458, 174 S.E.2d 646 (1970), rev'd on other grounds, 277 N.C. 623, 178 S.E.2d 425 (1971). See note in 30 N.C.L. Rev. 417 (1952).

The "common law" to be applied in North Carolina is the common law of England to the extent it was in force and use within this State at the time of the Declaration of Independence; is not otherwise contrary to the independence of this State or the form of government established therefor; and is not abrogated, repealed, or obsolete. Gwathmey v. State ex rel. Dep't of Env't, Health & Natural Resources, 342 N.C. 287, 464 S.E.2d 674 (1995); Conley v. Emerald Isle Realty, Inc., 350 N.C. 293, 513 S.E.2d 556 (1999).

Extent to Which Common Law May Be Modified. — So much of the common law as is in force by virtue of this section may be modified or repealed, but those parts of the common law which are imbedded in the Constitution are not subject to control. State v. Mitchell, 202 N.C. 439, 163 S.E. 581 (1932).

Effect of Legislation with Respect to Subject Matter of Common-Law Rule. — Where the North Carolina General Assembly has legislated with respect to the subject matter of a common-law rule, the statute supplants the common law with respect to the particular rule, but so much of the common law as has not been abrogated or repealed by statute is in full force and effect. Allen v. Standard Crankshaft & Hydraulic Co., 210 F. Supp. 844 (W.D.N.C. 1962), aff'd, 323 F.2d 29 (4th Cir. 1963).

When the General Assembly legislates in respect to the subject matter of a common law rule, the statute supplants the common law rule in regard to that matter. State v. Green, 124 N.C. App. 269, 477 S.E.2d 182 (1996), cert. denied and appeal denied, 345 N.C. 644, 483 S.E.2d 714 (1997), aff'd, 348 N.C. 588, 502 S.E.2d 819 (1998), cert. denied, 525 U.S. 1111, 119 S. Ct. 883, 142 L. Ed. 2d 783 (1999).

Statutes Construed According to Common-Law Definition. — When a statute punishes an act, giving it a name known to the common law without otherwise defining it, the statute is construed according to the common-law definition. State v. England, 278 N.C. 42, 178 S.E.2d 577 (1971); State v. Roberts, 286 N.C. 265, 210 S.E.2d 396 (1974).

Presumption as to Common Law in Sister States. — Where there is no evidence to the contrary, the presumption is that the common law is in force in a sister state. Hipps v. Southern Ry., 177 N.C. 472, 99 S.E. 335 (1919).

Applied in Wells v. Guardian Life Ins. Co., 213 N.C. 178, 195 S.E. 394, 116 A.L.R. 130 (1938); State v. Sullivan, 229 N.C. 251, 49 S.E.2d 458 (1948); State v. Crawford, 329 N.C. 466, 406 S.E.2d 579 (1991); Burgess v. Busby, 142 N.C. App. 393, 544 S.E.2d 4, 2001 N.C. App. LEXIS 146 (2001); Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41, 2003 N.C. LEXIS 605 (2003), cert. denied, 540 U.S. 1177, 124 S. Ct. 1407, 158 L. Ed. 2d 78 (2004).

Cited in Hinton v. Hinton, 196 N.C. 341, 145 S.E. 615 (1928); Rhodes v. Collins, 198 N.C. 23, 150 S.E. 492 (1929); Grantham v. Grantham, 205 N.C. 363, 171 S.E. 331 (1933); State v. Emery, 224 N.C. 581, 31 S.E.2d 858 (1944); Lutz Indus., Inc. v. Dixie Home Stores, 242 N.C. 332, 88 S.E.2d 333 (1955); State v. Lowry, 263 N.C. 536, 139 S.E.2d 870 (1965); In re Johnston, 16 N.C. App. 38, 190 S.E.2d 879 (1972); State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977); State v. Sneed, 38 N.C. App. 230, 247 S.E.2d 658 (1978); Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027 (E.D.N.C. 1978); Robinson v. King, 68 N.C. App. 86, 314 S.E.2d 768 (1984); Southern Ry. v. O'Boyle Tank Lines, 70 N.C. App. 1, 318 S.E.2d 872 (1984); City Nat'l Bank v. American Commonwealth Fin. Corp., 608 F. Supp. 941 (W.D.N.C. 1985); Hendon v. North Carolina State Bd. of Elections, 633 F. Supp. 454 (W.D.N.C. 1986); State v. Mann, 317 N.C. 164, 345 S.E.2d 365 (1986); Cheape v. Town of Chapel Hill, 320 N.C. 549, 359 S.E.2d 792 (1987); State v. Beale, 324 N.C. 87, 376 S.E.2d 1 (1989); Hatcher v. Rose, 329 N.C. 626, 407 S.E.2d 172 (1991); State v. Lane, 115 N.C. App. 25, 444 S.E.2d 233 (1994); State v. Pope, 122 N.C. App. 89, 468 S.E.2d 552 (1996); State v. Mathis, 349 N.C. 503, 509 S.E.2d 155 (1998); Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 515 S.E.2d 675, 1999 N.C. App. LEXIS 432 (1999), cert. denied, 529 U.S. 1033, 120 S. Ct. 1452, 146 L. Ed. 2d 337 (2000); Rosero v. Blake, 150 N.C. App. 250, 563 S.E.2d 248, 2002 N.C. App. LEXIS 509 (2002), cert. granted, 356 N.C. 166, 568 S.E.2d 610 (2002).

II. ILLUSTRATIVE CASES.

A. Civil.

Sovereign Immunity. — The concept of sovereign immunity, extant in the English common law, made its way into the common law of colonial North Carolina and remains in force in this State. Teachy v. Coble Dairies, Inc., 306 N.C. 324, 293 S.E.2d 182 (1982).

The common-law rights and disabilities of husband and wife are in force in this State, except insofar as they have been abrogated or repealed by statute. Scholtens v. Scholtens, 230

N.C. 149, 52 S.E.2d 350 (1949), overruled on other grounds, Foster v. Foster, 264 N.C. 694, 142 S.E.2d 638 (1965).

The common-law doctrine of survivorship between husband and wife as tenants by entireties has not been changed by statute and is in force in this State. Dorsey v. Kirkland, 177 N.C. 520, 99 S.E. 407 (1919).

Because the historical purposes underlying the separation exception to the necessaries doctrine are incompatible with current mores and laws governing modern marital relationships in North Carolina, the separation exception as previously applied in the courts is "obsolete" within the meaning of this section. Being obsolete, that exception has no place in the common law and must be modified. Forsyth Mem. Hosp. v. Chisholm, 342 N.C. 616, 467 S.E.2d 88 (1996).

Presumption of Death. — The doctrine of the common law as to presumptive death is not repealed or affected by statute, and obtains in our courts. Steele v. Metropolitan Life Ins. Co., 196 N.C. 408, 145 S.E. 787 (1928).

Obligation of Father to Support Child. — At common law it is the duty of a father to support his minor children. The common-law obligation of a father to support his child is not a debt in the legal sense, but an obligation imposed by law. It is not a property right of the child, but is a personal duty of the father, which is terminated by his death. These common-law principles have not been abrogated or modified by statute and are in full force and effect in this jurisdiction. Mullen v. Sawyer, 277 N.C. 623, 178 S.E.2d 425 (1971).

The North Carolina Legislature has no explicit intention to overrule or abrogate the Fuchs-Williams principles. Pataky v. Pataky, 160 N.C. App. 289, 585 S.E.2d 404, 2003 N.C. App. LEXIS 1797 (2003), aff'd, 359 N.C. 65, 602 S.E.2d 360 (2004).

Right of Father of Illegitimate Child to Visitation Privileges. — The common law principle that the father of an illegitimate child is not entitled to visitation privileges absent consent of the mother has been abrogated by statutes as well as case law. Conley v. Johnson, 24 N.C. App. 122, 210 S.E.2d 88 (1974).

Tort Action by Child Against Parent. — The common-law rule that an unemancipated, minor child, living in the household of its parents, cannot maintain an action in tort against its parents or either of them, still prevails in North Carolina. Redding v. Redding, 235 N.C. 638, 70 S.E.2d 676 (1952).

Exemption of Nonresidents from Civil Process. — The common-law privilege of the exemption of nonresidents from service of civil process while attending upon litigation in the courts of this State, as suitors or witnesses, was not repealed by implication by G.S. 8-64, 9-18. Cooper v. Wyman, 122 N.C. 784, 29 S.E. 947 (1898).

Limitation Over in Personal Property. — The common-law rule that there can be no limitation over in personal property after reservation of a life estate therein is in force in this State, under this section, and has been recognized by judicial decision and by statutory implication. Speight v. Speight, 208 N.C. 132, 179 S.E. 461 (1935).

The common-law rule that future interests in personal property may be created by will but not by deed prevails in this State, since it has not been abrogated or repealed by statute or become obsolete, and is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State. Woodard v. Clark, 236 N.C. 190, 72 S.E.2d 433 (1952).

Trademarks. — State statutes providing for registration of trademarks are in affirmance of the common law. Allen v. Standard Crankshaft & Hydraulic Co., 210 F. Supp. 844 (W.D.N.C. 1962), aff'd, 323 F.2d 29 (4th Cir. 1963).

The remedies given by statutes providing for registration of trademarks are either declaratory of or are cumulative and additional to those recognized by the common law. Allen v. Standard Crankshaft & Hydraulic Co., 210 F. Supp. 844 (W.D.N.C. 1962), aff'd, 323 F.2d 29 (4th Cir. 1963).

Implied Warranty in Sale of Food. — The common-law rule of implied warranty in the sale of food by a retailer to a consumer, even though the food may be sold in a sealed container, has not been rendered obsolete by the changes in the manner and method of the manufacture, preparation and distribution of food. Rabb v. Covington, 215 N.C. 572, 2 S.E.2d 705 (1939).

Survival of Actions. — Since at common law, causes of action for wrongful injury, whether resulting in death or not, did not survive the injured party, the survival of such actions is solely by virtue of statute. Hoke v. Atlantic Greyhound Corp., 226 N.C. 332, 38 S.E.2d 105 (1946).

Tortious Killing. — The common law, adopted as the law of North Carolina in this section, gave no right of action for the tortious killing of a human being. Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

Short-Form Murder Indictments. — Prisoner's short-form murder indictment did not omit an element of the offense because the indictment stated every element of the charged offense of common law murder, as codified in 1893 N.C. Sess. Laws 76 since, under North Carolina law, murder by torture was just another means of committing the single common law crime of murder. Stroud v. Polk, 466 F.3d 291, 2006 U.S. App. LEXIS 26216 (4th Cir. 2006).

Preference to Debts Due to State Abrogated. — The English common law, which gave a debt due to the sovereign a preference over the debts due to others, is not in force as applied to a debt due to this State, since the rule as it existed at common law is antagonistic to the spirit of our governmental institutions. North Carolina Corp. Comm'n v. Citizens Bank & Trust Co., 193 N.C. 513, 137 S.E. 587 (1927).

Exemption of Attorneys from Arrest. — The common law exemption of an attorney from arrest in a civil action should, under our institutions and because of obsoleteness by nonusage, not prevail, except where the attorneys are actually in attendance upon court in the due course of their employment as attorneys. Greenleaf v. People's Bank, 133 N.C. 292, 45 S.E. 638 (1903).

Attorney-Client Privilege. — Because the North Carolina General Assembly had not enacted a statutory provision concerning the attorney-client privilege, it was necessary to look solely to the common law for the privilege's proper application. In re Investigation of the Death of Miller, 357 N.C. 316, 584 S.E.2d 772, 2003 N.C. LEXIS 831 (2003).

The determination of the navigability of waters by whether they were subject to the ebb and flow of the tides, the lunar tides test, had never been part of the English common law applied in this State before or after the Revolution and that test was "obsolete," as it was inapplicable to the conditions of the waters within this State. For these reasons, the lunar tides test is not a part of the common law as it applies in North Carolina. Gwathmey v. State ex rel. Dep't of Env't, Health & Natural Resources, 342 N.C. 287, 464 S.E.2d 674 (1995).

B. Criminal.

The year and a day rule has become "obsolete," within the meaning of that term as used in this section, and is no longer part of the common law of North Carolina for any purpose. State v. Vance, 328 N.C. 613, 403 S.E.2d 495 (1991).

Punishment When No Penalty Expressly Provided. — The common-law rule obtains in this State that where a statute enacted in the public interest commands an act to be done or proscribes the commission of an act, and no penalty is expressly provided for its breach, its violation may be punished as for a misdemeanor. State v. Bishop, 228 N.C. 371, 45 S.E.2d 858 (1947).

The solicitation of another to commit a felony is a crime, although the solicitation is of no effect, and the crime is not committed, the common-law rule being in effect and controlling. State v. Hampton, 210 N.C. 283, 186 S.E. 251 (1936); State v. Furr, 292 N.C. 711, 235 S.E.2d 193, cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977); State v. Tyner, 50 N.C. App. 206, 272 S.E.2d 626 (1980), cert. denied, 302 N.C. 633, 280 S.E.2d 451 (1981).

The offense of solicitation of another to commit a felony has been cognizable at common law at least since Rex v. Higgins, 2 East 5, 102 Eng. Rep. 269 (1801) and still an indictable offense under the common law in this State. State v. Furr, 292 N.C. 711, 235 S.E.2d 193, cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977).

Solicitation to commit a felony was a misdemeanor at common law. United States v. MacCloskey, 682 F.2d 468 (4th Cir. 1982).

Obstruction of justice is a common-law offense in North Carolina. Article 30 of Chapter 14 does not abrogate this offense. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

False Imprisonment. — North Carolina does not have a criminal statute making false imprisonment a crime, and therefore, the common law with respect to false imprisonment is the law of this State. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Kidnapping. — Since this section adopted the common law as the law of this State, the common law with respect to kidnapping and false imprisonment was the law of this State. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

The failure of G.S. 14-39, prior to its 1975 amendment, to define kidnapping did not render the statute vague or uncertain, and the common-law definition of the offense was incorporated into the statute by construction. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Since G.S. 14-39, prior to its 1975 amendment, did not define kidnapping, the common-law definition of that crime was the law of this State. State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971); State v. Hudson, 281 N.C. 100, 187 S.E.2d 756 (1972), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

Rape. — By this section the common-law death penalty for rape was adopted in North Carolina. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

Common law attempted murder was not abrogated by G.S. 14-32(a), prohibiting assault with a deadly weapon with intent to kill inflicting serious injury, because while a person could attempt to murder another person by assaulting that person, with the intent to kill, using a deadly weapon and thereby inflict serious injury, a person did not have to do so to commit attempted murder, and attempted murder could occur through a multitude of circumstances, requiring simply (1) intent to kill and (2) an overt act which was more than mere preparation and committed with malice, premeditation, and deliberation. State v. Ramirez, 156 N.C. App. 249, 576 S.E.2d 714, 2003 N.C. App. LEXIS 117 (2003), cert. denied, 357 N.C.

255, 583 S.E.2d 286 (2003), cert. denied, 540 U.S. 991, 124 S. Ct. 487, 157 L. Ed. 2d 388 (2003).

Burglary. — Since 1889, burglary has been divided into two degrees by G.S. 14-51. If the burglarized dwelling is occupied, it is burglary in the first degree; if unoccupied, it is burglary in the second degree. To constitute burglary in either degree, however, the common law required the felonious breaking and entering to occur in the nighttime, and this common law requirement is still the law in North Carolina. State v. Jones, 294 N.C. 642, 243 S.E.2d 118 (1978).

The common-law definition of arson is still in force in this State. State v. Long, 243 N.C. 393, 90 S.E.2d 739 (1956); State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974).

Attempt to Commit Arson. — The common-law rule that an attempt to commit arson is a misdemeanor was changed by G.S. 14-67, which made an attempt to commit arson a felony. State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974).

Champerty is an offense at common law, and prevails in this State, being retained under this section. Merrell v. Stuart, 220 N.C. 326, 17 S.E.2d 458 (1941).

Barratry. — The common-law offense of barratry obtains in this State, since it has never been the subject of legislation in North Carolina and is not repugnant to nor inconsistent with our form of government. State v. Batson, 220 N.C. 411, 17 S.E.2d 511, 139 A.L.R. 614 (1941).

Stop and Frisk. — The absence of a stop and frisk statute is not fatal to the authority of law-enforcement officers in North Carolina to stop suspicious persons for questioning and to search those persons for dangerous weapons, since those practices are valid under the common law. State v. Streeter, 283 N.C. 203, 195 S.E.2d 502 (1973).

Right of Bail in Capital Cases. — At common law bail might be granted in capital cases only by a high judicial officer upon thorough scrutiny of the facts and great caution. This right, though once modified by former statutes against its existence in capital offenses where the proof was evident and the presumption was great, now prevails in this State as it existed at common law. State v. Herndon, 107 N.C. 934, 12 S.E. 268 (1890). See G.S. 15A-533.

Habeas Corpus. — It is an admitted principle of common law that every court of record of superior jurisdiction has the power to issue the writ of habeas corpus. This power is preserved in this State and can be exercised by all courts of record of superior jurisdiction. In re Bryan, 60 N.C. 1 (1863).

The common-law writ of error coram nobis to challenge the validity of petitioner's conviction for matters extraneous to the record is available under our procedure. In re Taylor, 230 N.C. 566, 53 S.E.2d 857 (1949), overruled on other grounds, Dantzic v. State, 279 N.C. 212, 182 S.E.2d 563 (1971); State v. Daniels, 231 N.C. 17, 56 S.E.2d 2 (1949), aff'd and appeal dismissed, 231 N.C. 509, 57 S.E.2d 653, cert. denied, 339 U.S. 954, 70 S. Ct. 837, 94 L. Ed. 2d 1366 (1950), overruled on other grounds, Dantzic v. State, 279 N.C. 571, 182 S.E.2d 571 (1971).

The availability of a writ of error coram nobis in this State stems from this section, which adopts the common law as the law of this State, and authority for the writ stems from N.C. Const., Art. IV, § 12, which gives the Supreme Court authority to exercise supervision over the inferior courts of the State. State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970).

There is no requirement that in every instance the approval of the Supreme Court must first be obtained before application can be made to the trial court for issuance of a writ of error coram nobis. Prior to In re Taylor, 229 N.C. 297, 49 S.E.2d 749 (1948), it does not appear that authority for the issuance of the writ, long recognized as an available common-law writ, was derived from the supervisory powers granted in the Constitution, but rather from this section, which, with certain exceptions, adopted the common law as the law of this State. Dantzic v. State, 279 N.C. 212, 182 S.E.2d 563, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

Forfeiture for felony, which was the established rule at common law, has had no force in this State since 1778. White v. Fort, 10 N.C. 251 (1824).

OPINIONS OF ATTORNEY GENERAL

As to venue at common law for offense of purchasing pistol without a permit, see opinion of Attorney General to Mr. J.B. Roberts, Sheriff of Cabarrus County, 40 N.C.A.G. 195 (1969).

Chapter 5.

Contempt.

§§ 5-1 through 5-9: Repealed by Session Laws 1977, c. 711, s. 33.

Cross References. — For present provisions relating to contempt, see Chapter 5A.

Chapter 5A.

Contempt.

Article 1.

Criminal Contempt.

Sec.
5A-1 through 5A-10. [Reserved.]
5A-11. Criminal contempt.
5A-12. Punishment; circumstances for fine or imprisonment; reduction of punishment; other measures.
5A-13. Direct and indirect criminal contempt; proceedings required.
5A-14. Summary proceedings for contempt.
5A-15. Plenary proceedings for contempt.
5A-16. Custody of person charged with criminal contempt.
5A-17. Appeals.
5A-18 through 5A-20. [Reserved.]

Article 2.

Civil Contempt.

Sec.
5A-21. Civil contempt; imprisonment to compel compliance.
5A-22. Release when civil contempt no longer continues.
5A-23. Proceedings for civil contempt.
5A-24. Appeals.
5A-25. Proceedings as for contempt and civil contempt.
5A-26 through 5A-30. [Reserved.]

Article 3.

Contempt by Juveniles.

5A-31. Contempt by a juvenile.
5A-32. Direct contempt by a juvenile.
5A-33. Indirect contempt by a juvenile.
5A-34. When minor can be in contempt.

OFFICIAL COMMENTARY

This Chapter replaces Chapter 5 of the North Carolina General Statutes. The Commission deals with the full range of contempt, both criminal and civil, for two reasons. First, criminal contempt is clearly within the subject matter which the Commission was charged to study, and many aspects of civil contempt are necessary to the enforcement of orders in criminal cases. Second, once the Commission began to deal with criminal contempt, it became necessary also to deal with civil contempt since the two are inextricably bound together in Chapter 5. The provisions in Chapter 5A are not directly drawn from any other statute, but they are drafted in light of Chapter 5 and of the American Bar Association's standards on the function of the trial judge. This Chapter does not carry forward the provisions of Chapter 5 which grant contempt powers to boards of county commissioners and the Utilities and Industrial Commissions. The application of those powers was sufficiently unclear under Chapter 5 that the Commission thought it best that those bodies either initiate statutes specifically dealing with that authority or that those bodies rely on court orders or criminal statutes dealing with the disruption of meetings.

Editor's Note. — The "Official Commentary" under this Chapter is reprinted from the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly.

ARTICLE 1.

Criminal Contempt.

OFFICIAL COMMENTARY

The establishment of this Article represents one of the basic purposes of the Commission in drafting the Chapter on contempt — to draw a sharp distinction between proceedings for criminal contempt and the proceedings for civil contempt (or "as for contempt"). This Article deals with those matters for which a sanction is imposed purely as punishment. The sanction occurs without regard to what the contemnor will do after imposition of the sanction.

§§ 5A-1 through 5A-10: Reserved for future codification purposes.

§ 5A-11. Criminal contempt.

(a) Except as provided in subsection (b), each of the following is criminal contempt:

(1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.

(2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.

(3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

(4) Willful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, willful refusal to answer any legal and proper question when the refusal is not legally justified.

(5) Willful publication of a report of the proceedings in a court that is grossly inaccurate and presents a clear and present danger of imminent and serious threat to the administration of justice, made with knowledge that it was false or with reckless disregard of whether it was false. No person, however, may be punished for publishing a truthful report of proceedings in a court.

(6) Willful or grossly negligent failure by an officer of the court to perform his duties in an official transaction.

(7) Willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court.

(8) Willful refusal to testify or produce other information upon the order of a judge acting pursuant to Article 61 of Chapter 15A, Granting of Immunity to Witnesses.

(9) Willful communication with a juror in an improper attempt to influence his deliberations.

(9a) Willful refusal by a defendant to comply with a condition of probation.

(10) Any other act or omission specified elsewhere in the General Statutes of North Carolina as grounds for criminal contempt.

The grounds for criminal contempt specified here are exclusive, regardless of any other grounds for criminal contempt which existed at common law.

(b) No person may be held in contempt under this section on the basis of the content of any broadcast, publication, or other communication unless it presents a clear and present danger of an imminent and serious threat to the administration of criminal justice.

(c) This section is subject to the provisions of G.S. 7A-276.1, Court orders prohibiting publication or broadcast of reports of open court proceedings or reports of public records banned. (1977, c. 711, s. 3; 1994, Ex. Sess., c. 19, s. 1.)

OFFICIAL COMMENTARY

This section is based on Section 5-1. Generally this section merely compresses the existing statement of grounds for criminal contempt, including the consolidation of previously separate grounds. Under subdivision (4), refusal to answer a question when that answer is privileged would not be contempt since the refusal would be "legally justified." Subdivision (5) adds the clause "made with knowledge that it was false …" thus engrafting the standard of

New York Times v. Sullivan, 376 U.S. 254 (1964), onto cases of alleged contempt in publishing reports of proceedings. Subdivision (7) does not have a counterpart in Chapter 5; it was added to make clear, for example, that the failure to appear in court at the proper time by one, including counsel, whose nonappearance would interfere with the court's schedule, could be subject to criminal contempt. Subdivision (9) is new and gives the court authority to step in immediately in cases of improper communication with jury. It is intended to complement the provision of a new G.S. 14-225.1, enlarging the Chapter 14 provisions dealing with jury tampering. The provisions of G.S. 5A-12(e) dictate the relationship between the two sanctions for jury tampering. Subdivision (10) is also new and is intended to insure that this Chapter does not reject attempts elsewhere in the General Statutes to make certain acts criminal contempt. The final sentences of this section are intended to effect the same purpose as the final two sentences of G.S. 5-1. Subsection (b) supplements or clarifies G.S. 5A-11(a)(4) by prohibiting as punishment as contempt for a communication which does not pose a "clear and present danger" to justice. Subsection (c) operates as a reminder of the existence of another new provision, G.S. 7A-276.1, which prohibits "gag orders" of reports of open-court proceedings or of records required to be open to public inspection. Especially important is the final sentence of the section making such an order void, thus overcoming the usual rule that a person subject to an order must comply with that order, even though it may be illegal, until a higher court declares its illegality.

Cross References. — As to failure to obey judgment, see G.S. 1-302. As to failure to obey a court order in supplementary proceedings, see G.S. 1-368.

Legal Periodicals. — For note on criminal and civil contempt proceedings, see 34 N.C.L. Rev. 221 (1956).

For comment on dealing with unruly persons in the courtroom, see 48 N.C.L. Rev. 878 (1970).

For note on right to jury trial in criminal contempt proceedings, see 6 Wake Forest Intra. L. Rev. 356 (1970).

For note on the right of an individual to freedom of speech, and the right of the State to carry out normal functions of the judiciary, a balancing of interests, see 6 Wake Forest Intra. L. Rev. 491 (1970).

For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For article, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For article, "Contempt, Order in the Courtroom, Mistrials," see 14 Wake Forest L. Rev. 909 (1978).

For note on specific performance of separation agreements, see 58 N.C.L. Rev. 867 (1980).

For note on enforcement of separation agreements by specific performance, see 16 Wake Forest L. Rev. 117 (1980).

For article, "The Distinction Between Civil and Criminal Contempt in North Carolina," see 67 N.C.L. Rev. 1281 (1989).

CASE NOTES

I. General Consideration.
II. Nature and Purpose of Proceedings.
III. Rights of Accused.
IV. Acts Constituting Contempt.
  A. In General.
  B. Disruptive Conduct.
  C. Disobedience of Orders.
  D. Recalcitrant Witnesses.
  E. Inaccurate Publications.
  F. Failure of Officer to Perform Duties.
  G. Failure to Comply with Schedules.
V. Practice and Procedure.

I. GENERAL CONSIDERATION.

Editor's Note. — *Many of the annotations under this section are from cases decided under former statutory provisions.*

This section should be strictly construed as a criminal statute. West v. West, 199 N.C. 12, 153 S.E. 600 (1930). See In re Hege, 205 N.C. 625, 172 S.E. 345 (1934); North Carolina v. Carr, 264 F. Supp. 75 (W.D.N.C. 1967), appeal dismissed, 386 F.2d 129 (4th Cir. 1967).

The power to punish for contempt is inherent in all courts. Ex parte Terry, 128 U.S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888).

Statutory provisions regulating proceedings for contempt confer on the courts all the inherent powers to attach for contempt that were recognized by the common law as essential to the due and orderly exercise of their jurisdiction and functions. State v. Little, 175 N.C. 743, 94 S.E. 680 (1917).

For discussions of the history, nature, and extent of the power of courts to punish for contempt, see Ex parte McCown, 139 N.C. 95, 51 S.E. 957 (1905); In re Brown, 168 N.C. 417, 84 S.E. 690 (1915). See also 12 N.C.L. Rev. 260.

And Courts Cannot Be Deprived of Such Power. — It is essential for an effective administration of justice in an orderly and efficient way that the court possess certain powers to enforce its mandate. A legislative interference to the extent of depriving the courts of these powers is tantamount to depriving the judicial department of the means of self-preservation and cannot be constitutionally justified. See Ex parte McCown, 139 N.C. 95, 51 S.E. 957 (1905); Snow v. Hawkes, 183 N.C. 365, 111 S.E. 621 (1922).

The power to punish for a contempt committed in the presence of the court, or near enough to impede its business, is essential to the existence of every court. In re Hennis, 6 N.C. App. 683, 171 S.E.2d 211 (1969), rev'd on other grounds, 276 N.C. 571, 173 S.E.2d 785 (1970).

But Legislature May Regulate Same. — Contempt powers, as they existed at common law, while they may not be abrogated, may be reasonably regulated by legislation. Thus, statutes such as those in former Chapter 5 were regulatory legislation upon the subject, and being in accord with modern doctrine, could not be assailed on the grounds of unconstitutionality. See In re Oldham, 89 N.C. 23 (1883); In re Robinson, 117 N.C. 533, 23 S.E. 453 (1895); In re Brown, 168 N.C. 417, 84 S.E. 690 (1915).

Limit of District Court's Authority. — A judge of the district court has no authority, except in his own district, to punish for contempt. In re Rhodes, 65 N.C. 518 (1871); Morris v. Whitehead, 65 N.C. 637 (1871).

Acts constituting contempt committed before a referee in supplementary proceedings are to be punished by the court making the reference. LaFontaine v. Southern Underwriters Ass'n, 83 N.C. 132 (1880).

Authority of Commissioner Not Exclusive. — The power of a commissioner, appointed by the court, to commit for refusal to testify is not given exclusively, if at all; but he may invoke the power of the judge, even though he may be given concurrent authority, under statute. Bradley Fertilizer Co. v. Taylor, 112 N.C. 141, 17 S.E. 69 (1893).

Authority of Nisi Prius Judge. — The right of a nisi prius judge to order a witness or anyone else into immediate custody for a contempt committed in the presence of the court in session is unquestioned. State v. Dick, 60 N.C. 440 (1864); State v. Ownby, 146 N.C. 677, 61 S.E. 630 (1908); State v. Swink, 151 N.C. 726, 66 S.E. 448 (1909).

Contempt of Subordinate Officer Regarded as Contempt of Appointing Court. — A contempt against a subordinate officer appointed by a court, such as a commissioner, ordinarily is regarded as contempt of the authority of the appointing court, and the appointing court has power to punish such contempt. This is true even where such subordinate officer is vested with the power to punish. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

Notice of Charges and Opportunity to Be Heard. — The principles of due process require that before an attorney is finally adjudicated in contempt and sentenced after a trial for conduct during the trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. In re Paul, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987), 484 U.S. 1004, 108 S. Ct. 694, 98 L. Ed. 2d 646 (1988).

The superior court judge was well within the bounds of the court's inherent authority to manage the case docket when he struck defendant's answer as sanction for willful failure to execute agreed settlement because defendants offered no plausible excuse as to why they did not execute the two paragraph consent judgment, saying only that they did not understand it and in addition judge gave notice that failure to file consent order would result in the imposition of sanctions. Lomax v. Shaw, 101 N.C. App. 560, 400 S.E.2d 97 (1991).

Failure to Comply with Schedules. — The trial judge has the power to hold a party in contempt for willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court. Lomax v. Shaw, 101 N.C. App. 560, 400 S.E.2d 97 (1991).

Applied in Osmar v. Crosland-Osmar, Inc., 43 N.C. App. 721, 259 S.E.2d 771 (1979); Atassi v. Atassi, 122 N.C. App. 356, 470 S.E.2d 59 (1996); State v. Reaves, 142 N.C. App. 629, 544 S.E.2d 253, 2001 N.C. App. LEXIS 170 (2001); In re Contempt Proceedings Against Cogdell, — N.C. App. —, 644 S.E.2d 261, 2007 N.C. App. LEXIS 1044 (2007).

Cited in Faught v. Faught, 67 N.C. App. 37, 312 S.E.2d 504 (1984); Mather v. Mather, 70 N.C. App. 106, 318 S.E.2d 548 (1984); Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260 (1985); Wilson v. Wilson, 73 N.C. App. 96, 325 S.E.2d 668 (1985); Michael v. Michael, 77 N.C. App.

841, 336 S.E.2d 414 (1985); In re Nakell, 104 N.C. App. 638, 411 S.E.2d 159 (1991); State v. Brown, 110 N.C. App. 658, 430 S.E.2d 433 (1993); State v. Pierce, 134 N.C. App. 148, 516 S.E.2d 916 (1999); Hodges v. Hodges, 156 N.C. App. 404, 577 S.E.2d 121, 2003 N.C. App. LEXIS 105 (2003); State v. Dammons, 159 N.C. App. 284, 583 S.E.2d 606, 2003 N.C. App. LEXIS 1539 (2003), cert. denied, 357 N.C. 579, 589 S.E.2d 133 (2003), cert. denied, 541 U.S. 951, 124 S. Ct. 1691, 158 L. Ed. 2d 382 (2004); State v. Matthews, 358 N.C. 102, 591 S.E.2d 535, 2004 N.C. LEXIS 15 (2004).

II. NATURE AND PURPOSE OF PROCEEDINGS.

Nature of Proceedings. — The fact that contemptuous conduct arises in a civil action does not alter the fact that contempt proceedings are criminal in nature. Blue Jeans Corp. of Am. v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Although contempt of court, in its essential character, is divided into various kinds, such as direct or constructive, and civil or criminal, nevertheless in every species of contempt there is said to be necessarily inherent an element of offense against the majesty of the law savoring more or less of criminality. Therefore it is said that the process by which the party charged is reached and tried is essentially criminal or quasi-criminal. Blue Jeans Corp. of Am. v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

A contempt proceeding is sui generis. It is criminal in its nature in that the party is charged with doing something forbidden, and if found guilty, is punished. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

A contempt proceeding under this section is sui generis, criminal in its nature, which may be resorted to in civil or criminal actions. Blue Jeans Corp. v. Amalgamated Clothing Workers, 4 N.C. App. 245, 166 S.E.2d 698, aff'd, 275 N.C. 503, 169 S.E.2d 867 (1969).

Although labeled "civil" contempt, the proceeding formerly designated "as for contempt" was by no means a civil action or proceeding to which G.S. 6-18 (when costs shall be allowed to plaintiff as a matter of course), or G.S. 6-20 (allowance of costs in discretion of court) would apply. United Artists Records, Inc. v. Eastern Tape Corp., 18 N.C. App. 183, 196 S.E.2d 598, cert. denied, 283 N.C. 666, 197 S.E.2d 880 (1973).

Contempt proceedings may be resorted to in civil or criminal actions. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

Purpose. — Punishments for contempt of court have two aspects, namely: (1) To vindicate the dignity of the court from disrespect shown to it or its orders; and (2) To compel the performance of some order or decree of the court which it is in the power of the party to perform and which he refuses to obey. See In re Chiles, 89 U.S. 157, 22 L. Ed. 819 (1874); Bessette v. W.B. Conkey Co., 194 U.S. 324, 24 S. Ct. 665, 48 L. Ed. 997 (1904).

Contempt Proceeding as Part of Original Injunction Suit. — While some jurisdictions hold that a criminal contempt proceeding is independent and not a part of the case out of which the alleged contempt arose, there is authority that a contempt proceeding based on the violation of an injunction, regardless of whether the proceeding is civil or criminal in nature, is a part of the original injunction suit and properly triable as such. Blue Jeans Corp. of Am. v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Criminal and Civil Contempt Distinguished. — Proceedings for contempt are of two classes, criminal and civil. Criminal proceedings are those brought to preserve the power and to vindicate the dignity of the court and to punish for disobedience of its processes or orders. Civil proceedings are those instituted to preserve and enforce the rights of the parties to actions and to compel obedience to orders and decrees made for the benefit of the suitors. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

Criminal contempt is a term applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966); Blue Jeans Corp. v. Amalgamated Clothing Workers, 4 N.C. App. 245, 166 S.E.2d 698, aff'd, 275 N.C. 503, 169 S.E.2d 867 (1969); O'Briant v. O'Briant, 313 N.C. 432, 329 S.E.2d 370 (1985).

Contempt proceedings are of two classes: those brought to vindicate the dignity and authority of the court; and those brought to enforce the rights of private parties. The former are as a rule held criminal in their nature and are generally governed by the rules applicable to criminal cases. North Carolina v. Carr, 264 F. Supp. 75 (W.D.N.C. 1967), appeal dismissed, 386 F.2d 129 (4th Cir. 1967).

Criminal proceedings, involving as they do offenses against the courts and organized society, are punitive in their nature, and the government, the courts, and the people are interested in their prosecution. Whereas civil proceedings, having as their underlying purpose the preservation of private rights, are primarily remedial and coercive in their nature, and are usually prosecuted at the instance of an aggrieved suitor. Galyon v. Stutts, 241

N.C. 120, 84 S.E.2d 822 (1954).

Criminal contempt is the commission of an act tending to interfere with the administration of justice, while civil contempt is the remedy for the enforcement of orders in the equity jurisdiction of the court, and the willful refusal to pay alimony as ordered by the court is civil contempt. Dyer v. Dyer, 213 N.C. 634, 197 S.E. 157 (1938).

A major factor in determining whether contempt is civil or criminal is the purpose for which the power is exercised. Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. O'Briant v. O'Briant, 313 N.C. 432, 329 S.E.2d 370 (1985).

Punishment for Both Criminal and Civil Contempt. — There are certain instances where contemners may be punished for both criminal contempt and for civil contempt. Blue Jeans Corp. v. Amalgamated Clothing Workers, 4 N.C. App. 245, 166 S.E.2d 698, aff'd, 275 N.C. 503, 169 S.E.2d 867 (1969).

When Criminal Contempt Sanctions Are Applied. — Criminal contempt or punishment for contempt is applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 320 (1967); Blue Jeans Corp. of Am. v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Conditioning of Probation or Suspended Sentence on Contemnor's Purging Himself. — The imposition of probationary conditions under G.S. 15A-1343 and the possibility of early termination under G.S. 15A-1342(b) do not transform probationary or suspended sentences into civil relief. However, specifically conditioning the imposition or effect of the probationary or suspended sentence upon the contemnor's purging himself would constitute civil relief. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Order Allowing Defendant to Avoid Confinement by Paying Arrearages Held Remedial Relief. — Where the court ordered defendant confined in jail for a period of 29 days, but it allowed defendant to avoid that punishment altogether by paying the entire amount of child support arrearages, this constituted remedial relief and therefore required that the court's order be construed as adjudicating defendant in civil contempt. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

III. RIGHTS OF ACCUSED.

Criminal contempts are crimes. North Carolina v. Carr, 264 F. Supp. 75 (W.D.N.C. 1967), appeal dismissed, 386 F.2d 129 (4th Cir. 1967); O'Briant v. O'Briant, 313 N.C. 432, 329 S.E.2d 370 (1985).

Accordingly, accused is entitled to benefits of all constitutional safeguards. North Carolina v. Carr, 264 F. Supp. 75 (W.D.N.C. 1967), appeal dismissed, 386 F.2d 129 (4th Cir. 1967); O'Briant v. O'Briant, 313 N.C. 432, 329 S.E.2d 370 (1985).

Summary Proceedings Not Repugnant to Principles of Due Process. — Summary proceedings for contempt are not within the constitutional prohibition contained in the due process clause. The power to punish summarily for contempt has existed at common law "as far as the annals of the law extend." State v. Little, 175 N.C. 743, 94 S.E. 680 (1917).

But Safeguards Are Required Where Adjudication and Sentencing Are Delayed. — Due process safeguards must be extended to persons cited for direct contempt of court in cases where final adjudication and sentencing for the contemptuous conduct is delayed until after trial. In re Paul, 28 N.C. App. 610, 222 S.E.2d 479, appeal dismissed, 289 N.C. 614, 223 S.E.2d 767 (1976).

Notice of Charges and Opportunity to Be Heard. — Before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. This is not to say, however, that a full scale trial is appropriate. In re Paul, 28 N.C. App. 610, 222 S.E.2d 479, appeal dismissed, 289 N.C. 614, 223 S.E.2d 767 (1976).

The principles of due process require that before an attorney is finally adjudicated in contempt and sentenced after a trial for conduct during the trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. In re Paul, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 484 U.S. 1004, 108 S. Ct. 694, 98 L. Ed. 2d 646 (1988).

When Notice and Hearing Are Required. — Summary proceedings are appropriate for punishing direct contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt; however, in cases where a court does not act immediately to punish acts constituting direct contempt or where the contempt is indirect, notice and a hearing are required. O'Briant v. O'Briant, 313 N.C. 432, 329 S.E.2d 370 (1985).

In contempt actions where the defendant is not punished summarily or where the contemptuous act does not occur in the presence of the judge or legislative body, principles of due process require reasonable notice of a charge and opportunity to be heard in defense before punishment is imposed. O'Briant v. O'Briant, 313 N.C. 432, 329 S.E.2d 370 (1985).

Notice Held Inadequate. — Notice afforded plaintiff mother in custody and support proceedings was inadequate to inform her that she should be prepared to defend herself, for her failure to attend court hearings, on charges of contempt at custody trial. O'Briant v. O'Briant, 313 N.C. 432, 329 S.E.2d 370 (1985).

Right to Jury Trial. — The United States Supreme Court has held that serious contempts are so merely like other serious crimes that they are subject to the jury trial provisions of U.S. Const., Art. 3, § 2 and of Amend. VI thereto, which is binding upon the states by virtue of the due process clause of Amend. XIV. Blue Jeans Corp. of Am. v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

The maximum punishment authorized for criminal contempt under former G.S. 5-1 and 5-4 was a fine of $250 or imprisonment for 30 days, or both. This made it a petty offense with no constitutional right to a jury trial. Blue Jeans Corp. of Am. v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

The possibilities that striking workers adjudged guilty of criminal contempt under former G.S. 5-1 might be denied the right to return to work or might be disqualified from drawing unemployment benefits for as long as 12 weeks were held irrelevant on the issue of whether the strikers were entitled to trial by jury in the contempt proceedings, since the possibilities were no part of the punishment which the court could impose for criminal contempt. Blue Jeans Corp. of Am. v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Contempt proceedings may be resorted to in civil or criminal actions, and though contempt is criminal in its nature, respondents therein are not entitled to trial by jury. Safie Mfg. Co. v. Arnold, 228 N.C. 375, 45 S.E.2d 577 (1947).

In a North Carolina contempt proceeding, the contemnor is not entitled to a jury trial. Blue Jeans Corp. v. Amalgamated Clothing Workers, 4 N.C. App. 245, 166 S.E.2d 698, aff'd, 275 N.C. 503, 169 S.E.2d 867 (1969).

Due Process Requirements Met. — Due process requirements of notice and opportunity to be heard on a contempt charge were adequately met where petitioner received actual notice, including the time and place, that he would be cited for contempt, and a written transcript provided formal notice of the specific actions for which petitioner was being cited. In re Paul, 28 N.C. App. 610, 222 S.E.2d 479, appeal dismissed, 289 N.C. 614, 223 S.E.2d 767 (1976).

Right to Confront Witnesses. — A person denying his asserted violation of a restraining order in contempt proceedings has the right under the provisions of N.C. Const., Art. I, § 19, synonymous with due process of law under the United States Constitution, to confront and cross-examine witnesses by whose testimony the asserted violation is to be established. Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980), aff'd in part and rev'd in part on other grounds, 301 N.C. 561, 273 S.E.2d 247 (1981).

The North Carolina Constitution preserves the right of confrontation of the witnesses against an accused, and this right is applicable to contempt proceedings, so that an adjudication of contempt against defendant based on the affidavit of the receiver of a corporation was invalid. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

Such Right Is Waivable. — See Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980), aff'd in part and rev'd in part on other grounds, 301 N.C. 561, 273 S.E.2d 247 (1981).

Self-Incrimination. — Where defendant was accused of mismanaging, diverting, converting and wasting corporate assets, and he was ordered by the trial court to produce his tax returns, the production of the returns did not amount to such authentication as to be compelled testimonial self-incrimination which would support a claim of Fifth Amendment privilege; thus, defendant could be found in contempt. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

IV. ACTS CONSTITUTING CONTEMPT.

A. In General.

Grounds Exhaustive. — The enumeration of the acts punishable for contempt is exhaustive; hence no other act than those specifically designated may be the subject matter of contempt proceedings. See In re Odum, 133 N.C. 250, 45 S.E. 569 (1903).

A person guilty of any of the acts or omissions enumerated in this section may be punished for contempt, because such acts or omissions have a direct tendency to interrupt the proceedings of the court or to impair the respect due to its authority. Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951); Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 206, 154 S.E.2d 313 (1967).

The acts and omissions enumerated in this section correspond to criminal contempt and involve offenses against the court and organized society, punishable for contempt for the purpose of preserving the power and vindicating the dignity of the court. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

"Willful" and "Unlawful" Distinguished. — The word "willful", when used in a statute creating an offense, implies the doing of the act purposely and deliberately in violation of law.

The term "unlawfully" implies that an act is done or not done as the law allows or requires, while the term "willfully" implies that the act is done knowingly and of stubborn purpose. In re Hege, 205 N.C. 625, 172 S.E. 345 (1934); Clayton v. Clayton, 54 N.C. App. 612, 284 S.E.2d 125 (1981).

In order for an act to be "willful," as the term is used in criminal law, it must be done deliberately and purposefully in violation of law, and without authority, justification or excuse. State v. Chriscoe, 85 N.C. App. 155, 354 S.E.2d 289 (1987).

"Grossly negligent," for purposes of criminal culpability, implies recklessness or carelessness that shows a thoughtless disregard of consequences or a heedless indifference to the rights of others. State v. Chriscoe, 85 N.C. App. 155, 354 S.E.2d 289 (1987).

Willfulness or Gross Negligence Not Shown. — Where evidence showed that defendant's short delay of an hour or an hour and a quarter in arriving at court was due, not merely to an absence of transportation, but also to her concern for her mother's safety brought about by her mother's failure to arrive on time or to answer the telephone, defendant's behavior did not rise to the level of willfulness or gross negligence. State v. Chriscoe, 85 N.C. App. 155, 354 S.E.2d 289 (1987).

Trial courts must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice. In re Little, 404 U.S. 553, 92 S. Ct. 659, 30 L. Ed. 2d 708 (1972).

The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil. In re Little, 404 U.S. 553, 92 S. Ct. 659, 30 L. Ed. 2d 708 (1972).

Accused Conducting His Own Defense. — Where the accused was defending himself at his criminal trial when his motion for continuance, by reason of another trial engagement of his retained counsel, was denied, and he was adjudged in contempt for stating in summation after the close of evidence that the court was biased and had prejudged his case, and that he was a political prisoner, the court held that he was entitled to as much latitude in conducting his defense as is enjoyed by counsel vigorously espousing a client's cause, and that his statements did not constitute criminal contempt, as they were not uttered in a boisterous tone, and did not actually disrupt the court proceeding or constitute an imminent threat to the administration of justice. In re Little, 404 U.S. 553, 92 S. Ct. 659, 30 L. Ed. 2d 708 (1972).

A contempt citation delivered to a drunk who had been put into a holding cell at the far end of the room from the booking area, and who was behaving in a boisterous, rude, profane and obscene manner, by a magistrate who never engaged in any work on the drunk's warrant, was an unconstitutional and fundamentally unfair act which violated due process of law. Thompson v. Stahl, 346 F. Supp. 401 (W.D.N.C. 1972).

B. Disruptive Conduct.

Disturbances Calculated to Interrupt Proceedings. — Acts which are punishable under this section include all cases of disorderly conduct, breaches of the peace, noise and other disturbance near enough, designed and reasonably calculated to interrupt the proceedings of the court then engaged in the administration of justice and the dispatch of the business presently before it. State v. Little, 175 N.C. 743, 94 S.E. 680 (1917).

Employment of Individual to Disrupt Criminal Trial. — Evidence held sufficient to support the trial judge's finding that respondent attorney solicited an individual to disrupt the criminal trial of his client, thereby committing willful behavior during the sitting of a court which tended to interrupt its proceedings, in violation of subsection (a) of this section. In re Paul, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987), 484 U.S. 1004, 108 S. Ct. 694, 98 L. Ed. 2d 646 (1988).

Assaulting Judge During Recess of Court. — Where the respondent visited the judge at his boardinghouse during a recess of the court, before the adjournment of the term and assaulted the judge, it was held that this conduct was a direct contempt of the court as much as if the assault had been committed in the court during trial. Ex parte McCown, 139 N.C. 95, 51 S.E. 957 (1905).

Protection Extended to Officers of Court, Witnesses, etc. — It is an act of contempt to interfere with the functioning of the business not only of the judge but also of all the officers of the court, and persons such as attorneys, jurors and witnesses, who in the line of their duty are assisting the court in the dispatch of its business. State v. Little, 175 N.C. 743, 94 S.E. 680 (1917); Snow v. Hawkes, 183 N.C. 365, 111 S.E. 621 (1922).

Fighting in Courthouse Yard. — Fighting in the yard of the courthouse, before the courthouse door, constituted the basis of the offense of contempt. State v. Woodfin, 27 N.C. 199 (1844).

C. Disobedience of Orders.

Willful disobedience of an order lawfully issued by the court is contemptuous conduct. Blue Jeans Corp. of Am. v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Deliberate Disobedience Irrespective of Intent. — Attorney willfully disobeyed a lawful order of the court in a manner that was likely to interrupt the matters before the court where he deliberately disobeyed the judge's repeated orders to sit down and be quiet, and while it was unlikely that he intended any insult or injury to the court, he consciously disobeyed direct orders and was properly convicted of criminal contempt. Nakell v. Attorney Gen., 15 F.3d 319 (4th Cir.), cert. denied, 513 U.S. 866, 115 S. Ct. 184, 130 L. Ed. 2d 118 (1994).

In the absence of an order to be present, defendant may not be held in contempt for violation of such an order. State v. Chriscoe, 85 N.C. App. 155, 354 S.E.2d 289 (1987).

Conditioning of Probation or Suspended Sentence on Contemnor's Purging Himself. — The imposition of probationary conditions under G.S. 15A-1343 and the possibility of early termination under G.S. 15A-1342(b) do not transform probationary or suspended sentences into civil relief. However, specifically conditioning the imposition or effect of the probationary or suspended sentence upon the contemnor's purging himself would constitute civil relief. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Failure to obey a court order cannot be punished for contempt unless the disobedience is willful, which imports knowledge and a stubborn purpose. Lamm v. Lamm, 229 N.C. 248, 49 S.E.2d 403 (1948); Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

Impossibility to Comply with Order or Process. — Where disobedience to process or order is due to circumstances which make it impossible for the contemnor to obey such order or process, he may not be punished for contempt. Thus where the clerk issued a notice to the respondent to produce a certain will which was in the custody of some other clerk, it was held that the order to adjudge the respondent guilty of contempt was reversible on appeal. In re Scarborough's Will, 139 N.C. 423, 51 S.E. 931 (1905).

The defendant must have been able to obey the order, and in spite of his ability must have disobeyed it. Inability to obey is a good excuse. Kane v. Haywood, 66 N.C. 1 (1872); Boyett v. Vaughan, 89 N.C. 27 (1883); Smith v. Smith, 92 N.C. 304 (1885).

One does not act willfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

Inability to Pay Money. — The excuse is sufficient where the defendant has been unable to pay money according to an order. Kane v. Haywood, 66 N.C. 1 (1872); Boyett v. Vaughan, 89 N.C. 27 (1883); Smith v. Smith, 92 N.C. 304 (1885).

Order Allowing Defendant to Avoid Confinement by Paying Arrearages Held Remedial Relief. — Where the court ordered defendant confined in jail for a period of 29 days, but it allowed defendant to avoid that punishment altogether by paying the entire amount of child support arrearages, this constituted remedial relief and therefore required that the court's order be construed as adjudicating defendant in civil contempt. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Alimony and Support Payments. — Where defendant testified that his failure after knowledge to obey a court order for the payment of alimony pendente lite was due to his lack of financial means, and no evidence was presented at the hearing tending to negative the truth of defendant's explanation or to establish as an affirmative fact that he possessed the means wherewith to comply with the order, the court's finding that defendant willfully disobeyed the order was not supported by the record, and judgment committing him to imprisonment for contempt would be set aside. Lamm v. Lamm, 229 N.C. 248, 49 S.E.2d 403 (1948).

As to failure to pay alimony, see also Zimmerman v. Zimmerman, 113 N.C. 432, 18 S.E. 334 (1893).

Where the husband, in proceedings against him for contempt for disobeying an order to pay moneys for the support of his child, showed by the uncontradicted testimony of himself and a witness that he had no property nor income except what he could earn, and that he had been unable to obtain employment and was therefore unable to comply with the terms of the order, the evidence failed to show that the disobedience was willful, and he could not be adjudged in contempt of court. West v. West, 199 N.C. 12, 153 S.E. 600 (1930).

The mere fact that defendant, ordered to pay a certain sum monthly for the necessary subsistence of his wife and child, has a right to move at any time for modification of the order does not support the conclusion that defendant's failure to comply with the order is willful. Smithwick v. Smithwick, 218 N.C. 503, 11 S.E.2d 455 (1940).

Failure to Comply with Separation Agreement. — Husband could not be adjudged in contempt for failure to comply with separation agreement entered into prior to the institution of divorce action, judgment in which provided that it should not affect or invalidate the separation agreement. Brown v. Brown, 224 N.C. 556, 31 S.E.2d 529 (1944).

Where the impossible circumstances are removed prior to the arrest for contempt the defendant will not be excused. Thomasville

Shooting Club v. Thomas, 120 N.C. 334, 26 S.E. 1007 (1897).

Disavowal of Disrespectful Intent. — The willful disobedience of a restraining order by the party on whom it had been served, and who was aware of its meaning and import, is in itself an act of contempt, from which he may not purge himself by disavowing a disrespectful intent. In re Parker, 177 N.C. 463, 99 S.E. 342 (1919).

Advice of Counsel No Excuse. — The failure to obey the order of the court placing property in possession of a receiver is contempt, even though the contemnor acted under an advice of counsel. Such advice is no protection to the intentional violation of the order. Delozier v. Bird, 123 N.C. 689, 31 S.E. 834 (1898).

In such a case the counsel himself may be subjected to contempt proceedings. This fact, however, will be considered by the judge in imposing the punishment. Weston v. John L. Roper Lumber Co., 158 N.C. 270, 73 S.E. 799 (1912). See Green v. Griffin, 95 N.C. 50 (1886).

An order of court not lawfully issued may not be the basis on which to found a proceeding for contempt. Patterson v. Patterson, 230 N.C. 481, 53 S.E.2d 658 (1949); State v. Black, 232 N.C. 154, 59 S.E.2d 621 (1950).

Where an order is void ab initio, one may not be held for contempt for disobeying such order, and the fact that he did not appeal from the granting of the order does not affect his liability, the order not being one lawfully issued. In re Longley, 205 N.C. 488, 171 S.E. 788 (1933).

Where a subpoena issued by a municipal-county court and running outside the county was a nullity because not attested by the seal of the court, neither service of the process nor voluntary appearance thereunder could waive the defect or vitalize the process so as to make the willful disobedience of the subpoena a basis for contempt proceedings. State v. Black, 232 N.C. 154, 59 S.E.2d 621 (1950).

Thus, disobeying an order entered by a court without jurisdiction is not contempt. Harding v. Harding, 46 N.C. App. 62, 264 S.E.2d 131 (1980).

Upon application for custody of children after decree of divorce, the resident judge entered a temporary order awarding the custody to the father, and issued an order to defendant wife to appear outside the county and outside the district to show cause why the temporary order should not be made permanent. It was held that the judge was without jurisdiction to hear the matter outside the district, and an order issued upon the hearing of the order to show cause was void ab initio. Patterson v. Patterson, 230 N.C. 481, 53 S.E.2d 658 (1949).

Failure to Comply with Discovery Order Punishable for Both Civil and Criminal Contempt. — One act may be punishable both for civil contempt and for criminal contempt. This kind of duality particularly inheres in a party litigant's willful failure to comply with a discovery order. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

Where defendant was accused of mismanaging, diverting and wasting corporate assets and the trial court ordered him to cooperate with receivers of the corporation and to provide them and plaintiffs with copies of his tax returns and a list of his assets, defendant's contempt, if any, in failing to provide the required materials could be criminal or civil, and contemnor waived procedural requirements when he came into court to answer charges of the trial court's show cause order. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

Disobeying Order of Clerk. — Where, in supplementary proceedings, the defendant has willfully disobeyed an order of the clerk of the superior court having jurisdiction, in disposing of his property, he is guilty of contempt of court. Bank of Zebulon v. Chamblee, 188 N.C. 417, 124 S.E. 741 (1924).

Urging Witness to Disobey Subpoena. — Where there was evidence that defendant telephoned a witness in a civil action and tried to get her not to obey a subpoena to be issued by the court, defendant was held to be in indirect contempt of court in accordance with G.S. 5A-13. State v. Wall, 49 N.C. App. 678, 272 S.E.2d 152 (1980).

Noncompliance with Order to Produce Records of Business. — Where, in response to an order to produce records of his business for a designated period, defendant appeared and testified that the only business records kept by him were the cash register tapes, that these had been destroyed by rats, and that therefore he had no records or documents with which to comply with the order, and there was no evidence to the contrary, it was error for the court to find and conclude that defendant was in contempt within the purview of this section for noncompliance with the order. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

Willfully Preventing Receiver from Taking Possession. — A judgment debtor, fixed with knowledge as a party upon whom notice was served, is guilty of contempt of court in willfully preventing the receiver from taking possession of the property in conformity with a lawful order of the court, even though the order may be erroneous, if no appeal therefrom was perfected by him. Nobles v. Roberson, 212 N.C. 334, 193 S.E. 420 (1937).

Violation of Injunction. — Where courts of competent jurisdiction successively issued three injunctive orders for the purpose of protecting persons who desired to work, and who had a right to work, if they so desired, in plaintiff's plant, while the orders were by their terms temporary and effective only until final trial of the cause, they were lawful orders of a court of competent jurisdiction. Any person guilty of willful disobedience of such orders could be punished for contempt of court. Blue Jeans Corp. v. Amalgamated Clothing Workers, 4 N.C. App. 245, 166 S.E.2d 698, aff'd, 275 N.C. 503, 169 S.E.2d 867 (1969).

As to disobeying an injunction or restraining order such as cutting timber after injunction against the same, see Fleming v. Patterson, 99 N.C. 404, 6 S.E. 396 (1888); In re Carolina, C. & O. Ry., 151 N.C. 467, 66 S.E. 438 (1909); Weston v. John L. Roper Lumber Co., 158 N.C. 270, 73 S.E. 799 (1912).

Defendant Not Subjected to Improper Burden of Proof. — Defendant was not subjected to an improper burden of proof under G.S. 5A-15(f) in finding that defendant was in criminal contempt under G.S. 5A-11(a)(3), as defendant admitted that defendant was ordered to stay out of the judges' offices and that defendant entered an area of the courthouse marked "Judges Offices" to file an emergency motion with the trial court administrator; there was no issue of fact to be decided, and thus no burden of proof was placed on defendant, as the trial court properly required proof beyond a reasonable doubt of defendant's contempt of court. State v. Simon, — N.C. App. —, 648 S.E.2d 853, 2007 N.C. App. LEXIS 1734 (2007).

Cases Involving Violations of Order Restraining Strikers. — For a series of cases involving violations of a restraining order which sought to prohibit violence and mass picketing on the part of strikers, see Harriet Cotton Mills v. Local No. 578, Textile Workers Union, 251 N.C. 218, 111 S.E.2d 457 (1959), cert. denied, 362 U.S. 941, 80 S. Ct. 806, 4 L. Ed. 2d 770 (1960); Harriet Cotton Mills v. Local No. 578, Textile Workers Union, 251 N.C. 231, 111 S.E.2d 465 (1959), cert. denied, 362 U.S. 941, 80 S. Ct. 806, 4 L. Ed. 2d 770 (1960); Henderson Cotton Mills v. Local No. 584, Textile Workers Union, 251 N.C. 234, 111 S.E.2d 476 (1959); Henderson Cotton Mills v. Local No. 584, Textile Workers Union, 251 N.C. 240, 111 S.E.2d 471 (1959); Harriet Cotton Mills v. Local No. 578, Textile Workers Union, 251 N.C. 248, 111 S.E.2d 467 (1959), cert. denied, 362 U.S. 941, 80 S. Ct. 806, 4 L. Ed. 2d 770 (1960); Henderson Cotton Mills v. Local No. 584, Textile Workers Union, 251 N.C. 254, 111 S.E.2d 480 (1959), cert. denied, 362 U.S. 941, 80 S. Ct. 806, 4 L. Ed. 2d 770 (1960).

As to failure of clerk to make transcript of record, see Worth v. Piedmont Bank, 121 N.C. 343, 28 S.E. 488 (1897). See also generally Murray v. Berry, 113 N.C. 46, 18 S.E. 78 (1893).

As to failure to deliver property, see McLean v. Douglass, 28 N.C. 233 (1846).

As to failure to return process, see Ex parte Summers, 27 N.C. 149 (1844).

As to failure to settle estates by public administrator, see In re Brinson, 73 N.C. 278 (1875).

Defendant Properly Found in Criminal Contempt. — Defendant was properly found in criminal contempt under G.S. 5A-11(a)(3) as: (1) G.S. 5A-11(a)(3) did not require that a finding of criminal contempt be predicated upon the failure to obey a written order; (2) the practical effect of a show cause order was the same as if it had noticed a first judge's order; (3) defendant was ordered not to visit the judges' office about the case any further, yet defendant entered the courthouse area marked "Judges' Office" to hand deliver an emergency motion to the trial court administrator; (4) defendant knew defendant was to stay out of the judges' office area where the trial court administrator's office was located; and (5) defendant's claim that defendant should not have been held in contempt because defendant's purpose for being in the trial court administrator's office was to leave an emergency motion for the trial court administrator was rejected. State v. Simon, — N.C. App. —, 648 S.E.2d 853, 2007 N.C. App. LEXIS 1734 (2007).

Violations of Court's Holding Regarding Standing. — Where court repeatedly held that former corporation manager had no standing to appeal, but he continued to appeal every decision reached on behalf of corporate defendants in violation of court's orders, trial court had jurisdiction to consider criminal contempt based on corporation manager's repeated violations of the court's orders. Lowder v. All Star Mills, Inc., 100 N.C. App. 318, 396 S.E.2d 92 (1990).

Because an administrative agency of the State is not subject to contempt, respondent, a State employee who was dismissed from his job and later reinstated, could not petition the superior court for a show cause order against petitioner Department of Transportation ("DOT"), an administrative agency of the State, for contempt pursuant to this section or G.S. 5A-21. North Carolina DOT v. Davenport, 334 N.C. 428, 432 S.E.2d 303 (1993).

D. Recalcitrant Witnesses.

Refusal to Testify After Having Been Sworn. — It has been uniformly held by the Supreme Court and by courts of other jurisdictions that the power to punish for contempt committed in the presence of the court is inherent in the court, and not dependent upon statutory authority. Without such power the court cannot perform its judicial function. This principle is especially applicable when the contempt consists in the refusal of the witness in attendance upon the court, after having been duly sworn, to answer a question propounded to him for the purpose of eliciting evidence material to the issue to be decided by the court. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

The giving of testimony which is obviously false or evasive can constitute contempt. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Since the power of the court over a witness in requiring proper responses is inherent and necessary for the furtherance of justice, it must be conceded that testimony which is obviously false or evasive is equivalent to a refusal to testify. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Obviously False or Evasive Testimony Is Equivalent to Refusal to Testify. — The power of the court to require a witness to give proper responses is inherent and necessary for the furtherance of justice, and therefore, testimony which is obviously false or evasive is equivalent to a refusal to testify. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

Although It Is Also a Crime. — Making a false statement under oath may constitute contempt, notwithstanding that the conduct may also be a crime, such as perjury or false swearing. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

And Can Be Punished Civilly or Criminally. — Giving "obviously false" testimony can be punishable by contempt civilly or criminally. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Commissioner May Ask Aid of Judge. — The commissioner before whom the witness had refused to answer may invoke the aid of the judge to punish for contempt. But the judge has no right to delegate the judicial power to punish for contempt to an executive officer. Bradley Fertilizer Co. v. Taylor, 112 N.C. 141, 17 S.E. 69 (1893).

No Distinction Between Refusing to Be Sworn and Refusing to Answer. — This section makes no distinction between one who, in the presence of the court, pursuant to its lawful subpoena, refuses to be sworn as a witness and one who, having been sworn, refuses to answer a proper question. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

Motive of Recalcitrant Witness Immaterial. — Whatever the motive of the recalcitrant witness or party may be, it does not determine whether he may lawfully be adjudged in contempt and punishment. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

The refusal of one subpoenaed as a witness to take the oath or to answer proper questions propounded to him, when done knowingly and intentionally, is willful even though such person believes it to be his moral duty to refuse to testify. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

Decrease in Esteem No Justification for Refusing to Testify. — The fact that one called as a witness fears that his testimony may decrease the esteem in which he is held in the community, or may decrease his ability to render service therein, does not justify refusal by him to testify in response to questions otherwise proper. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

Nor Religious Conscience. — The State has a compelling interest that a person called as a witness should be sworn and should testify in the administration of justice between the State and one charged with a serious offense; therefore a minister called as a witness in such prosecution may be held in contempt of court upon his refusal to be sworn as a witness, notwithstanding he asserts that his refusal is a matter of religious conscience. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967). But see § 8-53.2.

As to refusal to testify before a referee, see LaFontaine v. Southern Underwriters Ass'n, 83 N.C. 132 (1880).

E. Inaccurate Publications.

Publication After Adjournment of Court. — For constructive contempt by publication of false matter relating to the conduct of the presiding judge, published after the adjournment of the court, the judge must seek redress by the ordinary method and bring his cause before an impartial tribunal. He may not proceed to determine the matter summarily without the intervention of a jury. In re Brown, 168 N.C. 417, 84 S.E. 690 (1915).

Publication of Past Matter. — There no longer exists the power to punish summarily for defamatory reports and publications about a matter which is past and ended. To justify contempt proceedings the publication must have been pendente lite. In re Brown, 168 N.C. 417, 84 S.E. 690 (1915).

Trial of Issue by the Court Instead of the Jury. — If on the face of the publication there is nothing to show that it was grossly incorrect or calculated to bring the court into contempt, the respondent is entitled to have the issue tried not by a jury but by a court. In re Robinson, 117 N.C. 533, 23 S.E. 453 (1895).

F. Failure of Officer to Perform Duties.

Gross negligence of attorneys is a sort of contempt, and courts may order them to pay the costs of cases in which they are guilty of such negligence. Ex parte Robins, 63 N.C. 309 (1869).

Abandoning Client. — Actions of defendant, an attorney, in abandoning a client at a courthouse on the day of a hearing because the client failed to pay defendant's fee, were not legally justifiable under G.S. 5A-11(a)(7), as defendant was not held in criminal contempt for failing to return to court the day of the client's hearing and instead attending a parent-teacher conference for defendant's daughter later in the day, but for failing to appear at the client's absconder hearing and abandoning the client. State v. Key, — N.C. App. —, 643 S.E.2d 444, 2007 N.C. App. LEXIS 800 (2007).

Actions of defendant, an attorney, in abandoning a client at a courthouse on the day of a hearing because the client failed to pay defendant's fee were not legally justifiable as defendant entered an appearance in a criminal proceeding without limiting the representation under G.S. 15A-141(2), failed to comply with defendant's duties to the client under G.S. 15A-143, did not have the trial court's permission to withdraw under G.S. 15A-144, and substantially interfered with the court's business under G.S. 5A-11(a)(7) by requiring the trial court, its staff, and its officers to expend significant time and effort in an attempt to get the client's case resolved over a two-day period. State v. Key, — N.C. App. —, 643 S.E.2d 444, 2007 N.C. App. LEXIS 800 (2007).

G. Failure to Comply with Schedules.

Willful Absence of Attorney from Trial. — Generally, the willful absence of an attorney from a scheduled trial constitutes contempt of court, although disputes arise over whether it is direct or indirect contempt. In re Smith, 45 N.C. App. 123, 263 S.E.2d 23 (1980), rev'd on other grounds, 301 N.C. 621, 272 S.E.2d 834 (1981).

V. PRACTICE AND PROCEDURE.

The court must specify the particulars of the offense on the record by stating the words, acts or gestures amounting to direct contempt, and when the record contains only conclusions that contemnor was contemptuous, contemnor is entitled to his discharge. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 320 (1967).

Facts Must Be Found and Filed. — In contempt proceedings the facts upon which the contempt is based must be found and filed, especially the facts concerning the purpose and object of the contemnor, and the judgment must be founded on those findings. In re Odum, 133 N.C. 250, 45 S.E. 569 (1903); Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

In contempt proceedings it is necessary for the court to find the facts supporting the judgment and especially the facts as to the purpose and object of the contemnor, since nothing short of willful disobedience will justify punishment. Smith v. Smith, 247 N.C. 223, 100 S.E.2d 370 (1957).

Failure to Denominate Conclusions of Law as Such. — Where the judgment in contempt fully states the facts found and the conclusions of law based thereon, adjudging defendants in contempt for a willful disobedience of an order lawfully issued by the superior court having jurisdiction, exception on the ground that the court did not specifically denominate his conclusions of law as such cannot be sustained. Glendale Mfg. Co. v. Bonano, 242 N.C. 587, 89 S.E.2d 116 (1955).

Review of Findings of Fact. — In proceedings for contempt, the facts found by the trial judge are not reviewable by the appellate division except for the purpose of passing upon their sufficiency to warrant the judgment. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

In contempt proceedings, the trial judge's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency. O'Briant v. O'Briant, 313 N.C. 432, 329 S.E.2d 370 (1985).

Beyond a reasonable doubt standard not indicated. — Neither the trial court's findings in the summary proceeding, nor the superior court's findings in the plenary proceeding, conducted de novo pursuant to G.S. 5A-17, specifically indicated that the beyond a reasonable doubt standard was actually applied; the failure to make such an indication made the contempt orders fatally deficient. State v. Ford, 164 N.C. App. 566, 596 S.E.2d 846, 2004 N.C. App. LEXIS 1034 (2004).

Appealability of Acquittal of Criminal Contempt. — In a domestic relations case in which plaintiff sought to have defendant's attorney held in contempt for harboring a child for the purpose of resisting and interfering with a court order granting temporary custody to the plaintiff, the charges were in the nature of criminal contempt, and the court's order finding that the attorney's conduct did not constitute contempt was not appealable, since the acquittal did not affect any substantial right of the plaintiff. Patterson v. Phillips, 56 N.C. App. 454, 289 S.E.2d 48 (1982).

§ 5A-12. Punishment; circumstances for fine or imprisonment; reduction of punishment; other measures.

(a) A person who commits criminal contempt, whether direct or indirect, is subject to censure, imprisonment up to 30 days, fine not to exceed five hundred dollars ($500.00), or any combination of the three, except that a person who commits a contempt described in G.S. 5A-11(8) is subject to censure, imprisonment not to exceed 6 months, fine not to exceed five hundred dollars ($500.00), or any combination of the three and a person who has not been arrested who fails to comply with a nontestimonial identification order, issued pursuant to Article 14 of G.S. 15A is subject to censure, imprisonment not to exceed 90 days, fine not to exceed five hundred dollars ($500.00), or any combination of the three.

(b) Except for contempt under G.S. 5A-11(5) or 5A-11(9), fine or imprisonment may not be imposed for criminal contempt, whether direct or indirect, unless:

(1) The act or omission was willfully contemptuous; or
(2) The act or omission was preceded by a clear warning by the court that the conduct is improper.

(c) The judicial official who finds a person in contempt may at any time withdraw a censure, terminate or reduce a sentence of imprisonment, or remit or reduce a fine imposed as punishment for contempt if warranted by the conduct of the contemnor and the ends of justice.

(d) A person held in criminal contempt under this Article shall not, for the same conduct, be found in civil contempt under Article 2 of this Chapter, Civil Contempt.

(e) A person held in criminal contempt under G.S. 5A-11(9) may nevertheless, for the same conduct, be found guilty of a violation of G.S. 14-225.1, but he must be given credit for any imprisonment resulting from the contempt. (1977, c. 711, s. 3; 1985 (Reg. Sess., 1986), c. 843, s. 1; 1987 (Reg. Sess., 1988), c. 1040, ss. 2, 4; 1989 (Reg. Sess., 1990), c. 1039, s. 4; 1991, c. 686, s. 3; 1999-361, s. 3.)

OFFICIAL COMMENTARY

Subsection (b) is drawn from the recommendations of the American Bar Association. It intends to preclude fine or punishment in response to what is essentially innocent conduct although censure alone would still be possible. Subsection (c) makes clear that a judge may change his mind and reduce or remove any punishment he imposed in response to contempt. Subsection (d) makes clear that, although civil contempt and criminal contempt proceedings are distinct, each may be imposed for the same conduct.

Legal Periodicals. — For note on criminal and civil contempt proceedings, see 34 N.C.L. Rev. 221 (1956).

For note on right to jury trial in criminal contempt proceedings, see 6 Wake Forest Intra. L. Rev. 356 (1970).

For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

For note on specific performance of separation agreements, see 58 N.C.L. Rev. 867 (1980).

CASE NOTES

Editor's Note. — *Many of the annotations under this section are from cases decided under former statutory provisions.*

No Constitutional Right to Jury Trial. — In view of the punishment, contempt is a petty offense for which there is no constitutional right to a jury trial. Thompson v. Thompson, 25 N.C. App. 79, 212 S.E.2d 243, appeal dismissed, 288 N.C. 120, 215 S.E.2d 606 (1975).

Punishment Immediate. — The punishment in contempt cases must be immediate, or it would be ineffectual, as it is designed to suppress an outrage which impedes the business of the court. State v. Yancy, 4 N.C. 133 (1814); Blue Jeans Corp. of Am. v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Punishment for Criminal and Civil Contempt Distinguished. — Criminal contempt is administered as punishment for acts already committed that have impeded the administration of justice in some way. And as is the case with all offenses of a criminal nature, the punishment that courts can impose therefor, either by fine or imprisonment, is circumscribed by law. Civil contempt, on the other hand, is employed to coerce disobedient defendants into complying with orders of court, and the length of time that a defendant can be imprisoned in a proper case is not limited by law, since the defendant can obtain his release immediately upon complying with the court's order. Brower v. Brower, 70 N.C. App. 131, 318 S.E.2d 542 (1984).

A major factor in determining whether contempt is criminal or civil is the purpose for which the power is exercised. Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. The importance in distinguishing criminal and civil contempt lies in the difference in procedure, punishment and right of review. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Contempt may be of two kinds, civil or criminal, although the demarcation between the two may be hazy at best. Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Treatment of Civil Contempt. — Where the court finds that a defendant is in civil contempt, it is not limited by this section to imposing a 30-day sentence for criminal contempt. It can, under G.S. 5A-21(b), order his imprisonment until he purges himself of contempt. Bennett v. Bennett, 71 N.C. App. 424, 322 S.E.2d 439 (1984).

Punishment of One Act as Both Criminal and Civil Contempt. — As recognized in subsection (d) of this section and G.S. 5A-21(c), a person may be found to be in both criminal and civil contempt, although only a single act was committed. Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980), aff'd in part and rev'd in part on other grounds, 301 N.C. 561, 273 S.E.2d 247 (1981).

One act may be punishable both as civil contempt and as criminal contempt. This kind of duality particularly inheres in a party litigant's willful failure to comply with a discovery order. Punishment is not, therefore, limited to criminal sanctions. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

Decision Not to Prosecute For Criminal Contempt. — Defendant claimed that his prosecution for failure to appear violated his due process rights under N.C. Const. art. I, § 19, where he was prosecuted under G.S. 15A-543, and he could have been punished for failure to appear under the criminal contempt statute, G.S. 5A-12(a); however, because there was evidence from which a jury could have found that defendant violated either G.S. 15A-543 or G.S. 5A-12(a), it was within the prosecutor's discretion to decide under which statute the State wished to proceed. State v. Dammons, 159 N.C. App. 284, 583 S.E.2d 606, 2003 N.C. App. LEXIS 1539 (2003), cert. denied, 357 N.C. 579, 589 S.E.2d 133 (2003), cert. denied, 541 U.S. 951, 124 S. Ct. 1691, 158 L. Ed. 2d 382 (2004).

No Defense to Criminal Prosecution. — The fact that a person has been punished for contempt of court is no defense to a criminal indictment for the act constituting the contempt. State v. Yancy, 4 N.C. 133 (1814); In re Griffin, 98 N.C. 225, 3 S.E. 515 (1887).

Provision in a criminal contempt adjudication requiring defendant to pay $3,150 in damages to plaintiff was invalid, because this section limits the punishment that can be imposed for criminal contempts to a fine of $500 and 30 days in jail; and damages may not be awarded to a private party because of any contempt, which is an offense against the State. M.G. Newell Co. v. Wyrick, 91 N.C. App. 98, 370 S.E.2d 431 (1988).

Conditioning of Probation or Suspended Sentence on Contemnor's Purging Himself. — The imposition of probationary conditions under G.S. 15A-1343 and the possibility of early termination under G.S. 15A-1342(b) do not transform probationary or suspended sentences into civil relief. However, specifically conditioning the imposition or effect of the probationary or suspended sentence upon the contemnor's purging himself would constitute civil relief. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Order Allowing Defendant to Avoid Confinement by Paying Arrearages Held Remedial Relief. — Where the court ordered defendant confined in jail for a period of 29 days, but it allowed defendant to avoid that punishment altogether by paying the entire amount of child support arrearages, this constituted remedial relief and therefore required that the court's order be construed as adjudicating defendant in civil contempt. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Power of Industrial Commission. — The Industrial Commission proceeding under the Worker's Compensation Act, being expressly given the authority to subpoena witnesses and have them give evidence at the hearing, acts in a judicial capacity in adjudging in contempt a witness who refuses to give material evidence, and has power to punish by a fine or imprisonment under the provisions of this section. In re Hayes, 200 N.C. 133, 156 S.E. 791 (1931).

A sentence of ten days in jail, imposed by the superior court for contempt by refusal to be sworn as a witness, was well within the statutory maximum. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

Imprisonment for Indefinite Period Erroneous. — A judgment entered is erroneous in directing that the defendant be committed to jail for an indefinite period rather than for the statutory period. Basnight v. Basnight, 242 N.C. 645, 89 S.E.2d 259 (1955).

Effect of Abolishment of Imprisonment for Debt. — The abolishment of imprisonment for debt does not include commitment under attachments for failure to comply with an order of court. Wood v. Wood, 61 N.C. 538 (1868).

A fine for contempt goes to the State, being a punishment for a wrong to the State, and should not be directed to be paid to a party to the suit. In re Rhodes, 65 N.C. 518 (1871); Morris v. Whitehead, 65 N.C. 637 (1871).

Where the judge converted an entry into a final judgment, the violation of which subjected the defendant to criminal contempt of court, punishable under subsection (a), the trial court erred when it imposed a term of imprisonment of six months, suspended for five years under the supervision of a probation officer; therefore, the case was remanded for a hearing on contempt pursuant to G.S. 5A-11(a)(3). State v. Brown, 110 N.C. App. 658, 430 S.E.2d 433 (1993).

Sentence Was Not An Abuse of Discretion. — It was not an abuse of discretion to sentence defendant to 30 days of imprisonment, suspended for 18 months, and to probation, as defendant argued only that the sanction was unreasonable, but not that it was an abuse of discretion; defendant did not argue that the special conditions of defendant's probation were not reasonably related to defendant's rehabilitation under G.S. 15A-1343(b1)(10). State v. Key, — N.C. App. —, 643 S.E.2d 444, 2007 N.C. App. LEXIS 800 (2007).

Cited in Faught v. Faught, 67 N.C. App. 37, 312 S.E.2d 504 (1984); North Carolina DOT v. Davenport, 334 N.C. 428, 432 S.E.2d 303 (1993); Atassi v. Atassi, 122 N.C. App. 356, 470 S.E.2d 59 (1996); Peaches v. Payne, 139 N.C. App. 580, 533 S.E.2d 851 (2000); State v. Reaves, 142 N.C. App. 629, 544 S.E.2d 253, 2001 N.C. App. LEXIS 170 (2001); Hodges v. Hodges, 156 N.C. App. 404, 577 S.E.2d 121, 2003 N.C. App. LEXIS 105 (2003).

§ 5A-13. Direct and indirect criminal contempt; proceedings required.

(a) Criminal contempt is direct criminal contempt when the act:

(1) Is committed within the sight or hearing of a presiding judicial official; and

(2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and

(3) Is likely to interrupt or interfere with matters then before the court.

The presiding judicial official may punish summarily for direct criminal contempt according to the requirements of G.S. 5A-14 or may defer adjudication and sentencing as provided in G.S. 5A-15. If proceedings for direct criminal contempt are deferred, the judicial official must, immediately following the conduct, inform the person of his intention to institute contempt proceedings.

(b) Any criminal contempt other than direct criminal contempt is indirect criminal contempt and is punishable only after proceedings in accordance with the procedure required by G.S. 5A-15. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

This section specifies that only direct criminal contempt may be the subject of summary proceedings and defines direct criminal contempt. The three factors listed in subsection (a)(1), (2) and (3) must all be present before an act can be direct contempt. Subsection (a) also permits the judge who is authorized to punish summarily to defer the proceedings if he choose. The last sentence of subsection (a) establishes the rule that a person be cited for contempt at the time the contempt occurs even if the proceedings are to be held later.

CASE NOTES

Editor's Note. *— Some of the annotations under this section are from cases decided under former statutory provisions.*

When Notice and Hearing Are Required. — Summary proceedings are appropriate for punishing direct contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt; however, in cases where a court does not act immediately to punish acts constituting direct contempt or where the contempt is indirect, notice and a hearing is required. O'Briant v. O'Briant, 313 N.C. 432, 329 S.E.2d 370 (1985).

False Testimony as Direct or Indirect Contempt. — Where all the facts necessary to establish false testimony were not before the court, it was impossible to say that there were words spoken or acts committed in the actual presence of the court which would constitute direct contempt. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972), decided under former statutory provisions.

Indirect Contempt. — Indirect contempt is that which arises from matters not occurring in or near the presence of the court, but which tend to obstruct or defeat the administration of justice. Atassi v. Atassi, 122 N.C. App. 356, 470 S.E.2d 59 (1996).

Failure to comply with a prior court order would amount to an act committed outside the presence of the court, at a distance from it, which tends to degrade the court or interrupts, prevents or impedes the administration of justice and would be classified an indirect contempt. Ingle v. Ingle, 18 N.C. App. 455, 197 S.E.2d 61 (1973), decided under former § 5-7; Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980), aff'd in part and rev'd in part on other grounds, 301 N.C. 561, 273 S.E.2d 247 (1981).

Defendant's failure to appear at a show cause hearing was classified as indirect criminal contempt since trial judge had no direct knowledge of facts which would establish that defendant's failure to appear was willful. Cox v. Cox, 92 N.C. App. 702, 376 S.E.2d 13 (1989).

Urging Witness to Disobey Subpoena as Indirect Contempt. — Where there was evidence that defendant telephoned a witness in a civil action and tried to get her not to obey a subpoena to be issued by the court, defendant was held to be in indirect contempt of court in accordance with this section. State v. Wall, 49 N.C. App. 678, 272 S.E.2d 152 (1980).

Deliberate Disobedience Irrespective of Intent. — Attorney willfully disobeyed a lawful order of the court in a manner that was likely to interrupt the matters before the court where he deliberately disobeyed the judge's repeated orders to sit down and be quiet, and while it was unlikely that he intended any insult or injury to the court, he consciously disobeyed direct orders and was properly convicted of criminal contempt. Nakell v. Attorney Gen., 15 F.3d 319 (4th Cir.), cert. denied, 513 U.S. 866, 115 S. Ct. 184, 130 L. Ed. 2d 118 (1994).

Requirements of Due Process. — The requirements of due process are met when one charged with contempt is afforded notice and an opportunity to be heard; delayed summary contempt proceedings are also consistent with due process. Nakell v. Attorney Gen., 15 F.3d 319 (4th Cir.), cert. denied, 513 U.S. 866, 115 S. Ct. 184, 130 L. Ed. 2d 118 (1994).

Cited in State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979); State v. Verbal, 41 N.C. App. 306, 254 S.E.2d 794 (1979); State v. Johnson, 52 N.C. App. 592, 279 S.E.2d 77 (1981); State v. Simon, — N.C. App. —, 648 S.E.2d 853, 2007 N.C. App. LEXIS 1734 (2007).

§ 5A-14. Summary proceedings for contempt.

(a) The presiding judicial official may summarily impose measures in response to direct criminal contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt.

(b) Before imposing measures under this section, the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt. The facts must be established beyond a reasonable doubt. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

If the contempt proceedings are to be summary, subsection (a) requires that they occur substantially at the same time as the contempt itself. Subsection (b) follows the American Bar Association recommendation that the person charged with contempt be given notice of what the contemptuous action was and an opportunity to respond. This was intended not to provide for a hearing, or anything approaching that, in summary contempt proceedings, but merely to assure that the alleged contemnor had an opportunity to point out instances of gross mistake about who committed the contemptuous act or matters of that sort.

Legal Periodicals. — For comment on In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967), see 45 N.C.L. Rev. 863, 884, 924 (1967).

For survey of 1981 criminal law, see 60 N.C.L. Rev. 1289 (1982).

CASE NOTES

Editor's Note. *— Some of the annotations under this section are from cases decided under former statutory provisions.*

Constitutionality. — Summary punishment for direct contempt committed in the presence of the court does not contemplate a trial at which the person charged with contempt must be represented by counsel, and therefore sentence for contempt does not deprive the contemnor of his liberty without due process of law. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

The requirements of this section are meant to ensure that the individual has an opportunity to present reasons not to impose a sanction. In re Owens, 128 N.C. App. 577, 496 S.E.2d 592 (1998), aff'd, 350 N.C. 656, 517 S.E.2d 605 (1999).

The term "substantially contemporaneously with the contempt" in subsection (a) of this section is construed in light of its legislative purpose of meeting due process safeguards. The word "substantially" qualifies the word "contemporaneously," and clearly does not require that the contempt proceedings immediately follow the misconduct. Factors bearing on the time lapse include the contemnor's notice or knowledge of the charged misconduct, the nature of the misconduct, and other circumstances that may have some bearing upon the defendant's right to a fair and timely hearing. State v. Johnson, 52 N.C. App. 592, 279 S.E.2d 77, cert. denied and appeal dismissed, 303 N.C. 549, 281 S.E.2d 390 (1981).

Jury Trial. — It is well settled that the defendant in contempt proceedings is not entitled to a jury trial upon the controverted facts. In re Deaton, 105 N.C. 59, 11 S.E. 244 (1890).

Contemnor Must Have Opportunity to Be Heard. — The court violated this section where the transcript revealed that the court advised contemnor that, because he had questioned the rulings of the court and shown disrespect for the court, he was in the bailiff's custody after which the court was immediately recessed without giving him "an opportunity to present reasons not to impose a sanction." Peaches v. Payne, 139 N.C. App. 580, 533 S.E.2d 851 (2000).

Trial court failed to comply with the statutory requirements by failing to give defendant a summary opportunity to respond to the charge of criminal contempt after defendant failed to stand for the call to rise. State v. Randell, 152 N.C. App. 469, 567 S.E.2d 814, 2002 N.C. App. LEXIS 928 (2002).

When Notice and Hearing Are Required. — Summary proceedings are appropriate for punishing direct contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt; however, in cases where a court does not act immediately to punish acts constituting direct contempt or where the contempt is indirect, notice and a hearing is required. O'Briant v. O'Briant, 313 N.C. 432, 329 S.E.2d 370 (1985).

When Notice and Hearing Not Required. — Notice and a formal hearing are not required when the trial court promptly punishes acts of contempt in its presence. In re Owens, 128 N.C. App. 577, 496 S.E.2d 592 (1998), aff'd, 350 N.C. 656, 517 S.E.2d 605 (1999).

What Findings of Fact Must Include. — A requirement that the judicial official's findings should indicate that the standard of proof required by subsection (b) was applied to his findings of fact is implicit in this section. State v. Verbal, 41 N.C. App. 306, 254 S.E.2d 794 (1979).

It is implicit in this section that the judicial official's findings in a summary contempt proceeding should clearly reflect that the contemnor was given an opportunity to be heard, along with a summary of whatever response was made and the judicial official's finding that the excuse or explanation proffered was inadequate or disbelieved. State v. Verbal, 41 N.C. App. 306, 254 S.E.2d 794 (1979).

Neither the trial court's findings in the summary proceeding, nor the superior court's findings in the plenary proceeding, conducted de novo pursuant to G.S. 5A-17, specifically indicated that the beyond a reasonable doubt standard was actually applied; the failure to make such an indication made the contempt orders fatally deficient. State v. Ford, 164 N.C. App. 566, 596 S.E.2d 846, 2004 N.C. App. LEXIS 1034 (2004).

Trial court's order finding an attorney in criminal contempt under G.S. 5A-11(a)(6) was reversed because the trial court failed to indicate that the trial court applied the beyond a reasonable doubt standard to the trial court's findings as required by G.S. 5A-14(b). In re Contempt Proceedings Against Cogdell, — N.C. App. —, 644 S.E.2d 261, 2007 N.C. App. LEXIS 1044 (2007).

Illustrative Case. — Trial court complied with the requirements of this section and properly declined to recognize a news reporter's qualified privilege to refuse to testify in a criminal proceeding regarding non-confidential information obtained from a non-confidential source. In re Owens, 128 N.C. App. 577, 496 S.E.2d 592 (1998), aff'd, 350 N.C. 656, 517 S.E.2d 605 (1999).

Applied in Pierce v. Pierce, 58 N.C. App. 815, 295 S.E.2d 247 (1982).

Cited in State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979); Cox v. Cox, 92 N.C. App. 702, 376 S.E.2d 13 (1989).

§ 5A-15. Plenary proceedings for contempt.

(a) When a judicial official chooses not to proceed summarily against a person charged with direct criminal contempt or when he may not proceed summarily, he may proceed by an order directing the person to appear before a judge at a reasonable time specified in the order and show cause why he should not be held in contempt of court. A copy of the order must be furnished to the person charged. If the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge.

(b) Proceedings under this section are before a district court judge unless a court superior to the district court issued the order, in which case the proceedings are before that court. Venue lies throughout the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, where the order was issued.

(c) The person ordered to show cause may move to dismiss the order.

(d) The judge is the trier of facts at the show cause hearing.

(e) The person charged with contempt may not be compelled to be a witness against himself in the hearing.

(f) At the conclusion of the hearing, the judge must enter a finding of guilty or not guilty. If the person is found to be in contempt, the judge must make findings of fact and enter judgment. The facts must be established beyond a reasonable doubt.

(g) The judge presiding over the hearing may appoint a prosecutor or, in the event of an apparent conflict of interest, some other member of the bar to represent the court in hearings for criminal contempt. (1977, c. 711, s. 3; 1987 (Reg. Sess., 1988), c. 1037, s. 44.)

OFFICIAL COMMENTARY

This section provides for a show-cause hearing in instances in which the judge either chooses not to proceed by summary proceedings or may not so proceed because the contempt was not direct. Plenary proceedings may not be held by a magistrate or clerk; they must always be held before a judge. The final sentence of subsection (a) responds to the constitutional requirement of Bloom v. Illinois, 391 U.S. 194 (1968), that contempt proceedings be held before another judge when the one citing the contemnor was involved in the act in question. Subsection (f) permits the judge, in addition to using the prosecutor, who traditionally represents the court in contempt actions, to appoint another member of the Bar when there is a conflict of interest. The central example of this would be when the prosecutor himself or a law-enforcement officer with whom he worked closely was involved in the contempt.

Legal Periodicals. — For survey of 1981 criminal law, see 60 N.C.L. Rev. 1289 (1982).

CASE NOTES

Notice of Charges and Opportunity to Be Heard. — The principles of due process require that before an attorney is finally adjudicated in contempt and sentenced after a trial for conduct during the trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. In re Paul, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987), 484 U.S. 1004, 108 S. Ct. 694, 98 L. Ed. 2d 646 (1988).

When Notice and Hearing Are Required. — Summary proceedings are appropriate for punishing direct contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt; however, in cases where a court does not act immediately to punish acts constituting direct contempt or where the contempt is indirect, notice and a hearing is required. O'Briant v. O'Briant, 313 N.C. 432, 329 S.E.2d 370 (1985).

Section Held Applicable. — Where trial judge did not proceed summarily against plaintiff, the Supreme Court would conclude, without deciding whether plaintiff's acts constituted direct or indirect contempt, that this section, requiring a plenary proceeding, governed the appropriate procedure. O'Briant v. O'Briant, 313 N.C. 432, 329 S.E.2d 370 (1985).

What findings of fact must include. — Superior court order from a plenary proceeding of contempt under G.S. 5A-15(f) must indicate that the reasonable doubt standard of proof was applied to the findings of fact; failure to make such an indication is fatally deficient, unless the proceeding is of a limited instance where there were no factual determinations for the court to make. State v. Ford, 164 N.C. App. 566, 596 S.E.2d 846, 2004 N.C. App. LEXIS 1034 (2004).

Findings Not Required. — Court need not make specific findings of improper conduct when issuing a criminal contempt citation. State v. Pierce, 134 N.C. App. 148, 516 S.E.2d 916 (1999).

Defendant Not Subjected to Improper Burden of Proof. — Defendant was not subjected to an improper burden of proof under G.S. 5A-15(f) in finding that defendant was in criminal contempt under G.S. 5A-11(a)(3), as defendant admitted that defendant was ordered to stay out of the judges' offices and that defendant entered an area of the courthouse marked "Judges Offices" to file an emergency motion with the trial court administrator; there was no issue of fact to be decided, and thus no burden of proof was placed on defendant, as the trial court properly required proof beyond a reasonable doubt of defendant's contempt of court. State v. Simon, — N.C. App. —, 648 S.E.2d 853, 2007 N.C. App. LEXIS 1734 (2007).

Verification Not Prerequisite to Issuance of Show Cause Order. — The filing of a petition, an affidavit, or other proper verification is not required as a prerequisite to issuance of a show cause order under this section, although they may be a proper basis for issuance of the show cause order. Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980), aff'd in part and rev'd in part on other grounds, 301 N.C. 561, 273 S.E.2d 247 (1981).

Service Held Proper. — Where the court issued an order pursuant to G.S. 1A-1, Rule 4(j)(1)c notifying a foreign attorney of the contempt charges and allowing him 60 days to respond to the charges, which order was mailed to the attorney at the address he gave the court in a motion to be admitted in a case pro hac vice, this method of service was proper to comply with the requirement of subsection (a) that "[a] copy of the order must be furnished to the person charged", where the court had personal jurisdiction as provided in G.S. 1-75.4. In re Smith, 45 N.C. App. 123, 263 S.E.2d 23 (1980), rev'd on other grounds, 301 N.C. 621, 272 S.E.2d 834 (1981).

Notice Held Inadequate. — Notice afforded plaintiff mother in custody and support proceedings was inadequate to inform her that she should be prepared to defend herself, for her failure to attend court hearings, on charges of contempt at custody trial. O'Briant v. O'Briant, 313 N.C. 432, 329 S.E.2d 370 (1985).

Contempt Following Chapter 19 Injunction. — The plenary proceedings provided for in this section apply to contempt actions following a Chapter 19 injunction. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), vacated, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980), aff'd, 302 N.C. 321, 275 S.E.2d 443 (1981).

Applied in Bennett v. Bennett, 71 N.C. App. 424, 322 S.E.2d 439 (1984); Cox v. Cox, 92 N.C. App. 702, 376 S.E.2d 13 (1989).

Cited in State v. Johnson, 52 N.C. App. 592, 279 S.E.2d 77 (1981); State v. Fie, 320 N.C. 626, 359 S.E.2d 774 (1987); Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988); Hartsell v. Hartsell, 99 N.C. App. 380, 393 S.E.2d 570 (1990), aff'd, 328 N.C. 729, 403 S.E.2d 307 (1991); Atassi v. Atassi, 122 N.C. App. 356, 470 S.E.2d 59 (1996).

§ 5A-16. Custody of person charged with criminal contempt.

(a) A judicial official may orally order that a person he is charging with direct criminal contempt be taken into custody and restrained to the extent necessary to assure his presence for summary proceedings or notice of plenary proceedings.

(b) If a judicial official who initiates plenary proceedings for contempt under G.S. 5A-15 finds, based on sworn statement or affidavit, probable cause to believe the person ordered to appear will not appear in response to the order, he may issue an order for arrest of the person, pursuant to G.S. 15A-305. A person arrested under this subsection is entitled to release under the provisions of Article 26, Bail, of Chapter 15A of the General Statutes. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

The authority for taking custody of a person charged with contempt has been unclear. This section is aimed to fill that gap. Subsection (a) clarifies the legality of seizing a person charged with direct contempt and bringing him before the judge. Subsection (b) makes clear the propriety of issuing an order for arrest of a person when the proceedings are not to be summary. A concurrent change in G.S. 15A-305, providing for the order for arrest, makes clear that an order may be used for this purpose.

CASE NOTES

Applied in Mather v. Mather, 70 N.C. App. 106, 318 S.E.2d 548 (1984).

§ 5A-17. Appeals.

A person found in criminal contempt may appeal in the manner provided for appeals in criminal actions, except appeal from a finding of contempt by a judicial official inferior to a superior court judge is by hearing de novo before a superior court judge. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

This section rejects present law and permits appeal from all convictions for criminal contempt.

Cross References. — As to appeals in criminal actions before magistrates and district court judges, see G.S. 15A-1431 et seq. As to appeals to the appellate division, see G.S. 15A-1441 et seq.

Legal Periodicals. — For article, "The Substantial Right Doctrine and Interlocutory Appeals," see 17 Campbell L. Rev. 71 (1995).

CASE NOTES

Editor's Note. — *Some of the annotations under this section are from cases decided under former statutory provisions.*

Jurisdiction. — This section vests exclusive jurisdiction in the superior court to hear appeals from orders in the district court holding a person in criminal contempt. Michael v. Michael, 77 N.C. App. 841, 336 S.E.2d 414 (1985), cert. denied, 316 N.C. 195, 341 S.E.2d 577 (1986).

Criminal contempt orders are properly appealed from district court to the superior court, not to the Court of Appeals. Hancock v. Hancock, 122 N.C. App. 518, 471 S.E.2d 415 (1996).

Standard of review de novo. — Neither the trial court's findings in the summary proceeding, nor the superior court's findings in the plenary proceeding, conducted de novo pursuant to G.S. 5A-17, specifically indicated that the beyond a reasonable doubt standard was actually applied; the failure to make such an indication made the contempt orders fatally deficient. State v. Ford, 164 N.C. App. 566, 596 S.E.2d 846, 2004 N.C. App. LEXIS 1034 (2004).

Appealability of Acquittal of Criminal Contempt. — In a domestic relations case in which plaintiff sought to have defendant's attorney held in contempt for harboring a child for the purpose of resisting and interfering with a court order granting temporary custody to the plaintiff, the charges were in the nature of criminal contempt, and the court's order finding that the attorney's conduct did not constitute contempt was not appealable, since the acquittal did not affect any substantial right of the plaintiff. Patterson v. Phillips, 56 N.C. App. 454, 289 S.E.2d 48 (1982).

Finding of Fact Not Disturbed. — Where the judge has found sufficient facts to attach the defendant for direct contempt of court, upon imposing punishment therefor, the finding will not be disturbed by appeal. In re Deaton, 105 N.C. 59, 11 S.E. 244 (1890); State v. Little, 175 N.C. 743, 94 S.E. 680 (1917).

The finding of fact by the judge will not be disturbed upon an appeal on an indirect contempt. In re Parker, 177 N.C. 463, 99 S.E. 342 (1919).

On appeals from a subordinate court to the superior court, the facts as well as the law will be reviewed, and even additional testimony may be heard. In re Deaton, 105 N.C. 59, 11 S.E. 244 (1890).

Cited in Patterson v. Phillips, 56 N.C. App. 454, 289 S.E.2d 48 (1982); State v. McGee, 66 N.C. App. 369, 311 S.E.2d 383 (1984); Hammock v. Bencini, 98 N.C. App. 510, 391 S.E.2d 210 (1990); Vaughn v. Vaughn, 99 N.C. App. 574, 393 S.E.2d 567 (1990); State v. Mauney, 106 N.C. App. 26, 415 S.E.2d 208 (1992); Jones v. Jones, 121 N.C. App. 529, 466 S.E.2d 344 (1996); Hodges v. Hodges, 156 N.C. App. 404, 577 S.E.2d 121, 2003 N.C. App. LEXIS 105 (2003).

§§ 5A-18 through 5A-20: Reserved for future codification purposes.

ARTICLE 2.

Civil Contempt.

OFFICIAL COMMENTARY

The Commission felt that it was proper, once they had to deal with civil contempt in some respect as a consequence of severing it in Chapter 5 from the related criminal contempt provisions, to resolve some of the uncertainties that surround the present civil contempt procedures.

§ 5A-21. Civil contempt; imprisonment to compel compliance.

(a) Failure to comply with an order of a court is a continuing civil contempt as long as:

(1) The order remains in force;

(2) The purpose of the order may still be served by compliance with the order;

(2a) The noncompliance by the person to whom the order is directed is willful; and

(3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

(b) A person who is found in civil contempt may be imprisoned as long as the civil contempt continues, subject to the limitations provided in subsections (b1) and (b2) of this section. Notwithstanding subsection (b2) of this section, if a person is found in civil contempt for failure to pay child support or failure to comply with a court order to perform an act that does not require the payment of a monetary judgment, the person may be imprisoned as long as the civil contempt continues without further hearing.

(b1) A person who is found in civil contempt, but was not arrested, for failure to comply with a nontestimonial identification order issued pursuant to Article 14, Nontestimonial Identification Order, of Chapter 15A of the General Statutes may not be imprisoned more than 90 days unless the person is arrested on probable cause.

(b2) The period of imprisonment for a person found in civil contempt shall not exceed 90 days for the same act of disobedience or refusal to comply with an order of the court. A person who has not purged himself or herself of the contempt within the period of imprisonment imposed by the court under this subsection may be recommitted for one or more successive periods of imprisonment, each not to exceed 90 days. However, the total period of imprisonment for the same act of disobedience or refusal to comply with the order of the court shall not exceed 12 months, including both the initial period of imprisonment imposed under this section and any additional period of imprisonment imposed under this subsection. Before the court may recommit a person to any additional period of imprisonment under this subsection, the court shall conduct a hearing de novo. The court must enter a finding for or against the alleged contemnor on each of the elements of G.S. 5A-21(a), and must find that all of elements of G.S. 5A-21(a) continue to exist before the person can be recommitted. For purposes of this subsection, a person's failure or refusal to purge himself or herself of contempt shall not be deemed a separate or additional act of disobedience, failure, or refusal to comply with an order of the court.

(c) A person who is found in civil contempt under this Article shall not, for the same conduct, be found in criminal contempt under Article 1 of this Chapter. (1977, c. 711, s. 3; 1979, 2nd Sess., c. 1080, s. 1; 1999-361, s. 1.)

OFFICIAL COMMENTARY

This section is based on the Commission's recognition that civil contempt should be solely a matter of forcing the contemnor to comply with a court order and, unlike criminal contempt, is not a form of punishment. Subsections (a) and (b) make clear that civil contempt is appropriate only so long as the court order is capable of being complied with. The section rejects the approach of the present Chapter 5 specifying particular grounds for civil contempt. Instead, the only issue in determining whether imprisonment for civil contempt is proper is whether or not there is a court order which may be complied with. Subdivision (3) of subsection (a), by specifying that the contempt continues while the person is "able to take reasonable measures that would enable him to comply," is intended to make clear, for example, that the person who does not have the money to make court-ordered payments but who could take a job which would enable him to make those payments, remains in contempt by not taking such a job. In most cases, a person in civil contempt may be held for so long as his civil contempt continues; he holds the keys to his own jail by virtue of his ability to comply. The Commission felt, however, in the case of failure to comply with nontestimonial identification order by one who is only suspected of a crime, that this unlimited jailing would be improper. Therefore, unless probable cause for arrest arises, the person subject to a nontestimonial identification order who remains noncompliant must be released after 90 days. Concurrent amendments to G.S. 15A-279 (the section dealing with nontestimonial identification orders) point out that resisting compliance with a nontestimonial identification order may be used in determining whether there is probable cause that the person subject to the order committed the crime in question. This means that in many cases the person who resists the order for the full 90 day period will become subject to arrest on probable cause, at which time the 90 day limitation will no longer apply. Another concurrent amendment to G.S. 15A-279 provides, however, that a nontestimonial identification order may not be reissued unless there is newly available evidence to support it. In subsection (c), the Commission was seeking to insure that a person could not serve a longer period of imprisonment by being found in both civil and criminal contempt for the same conduct than he could if he had been found to be in only civil or criminal contempt. An earlier draft of this subsection had specified that a finding of civil or criminal contempt did not preclude disciplinary proceedings if the contemnor were a member of the Bar. The Commission approved this policy but felt it more appropriate that it be mentioned in commentary rather than in the body of the section.

Cross References. — As to punishment for civil contempt of persons failing to report dispositions of criminal cases, see G.S. 15A-1381.

Legal Periodicals. — For comment on this and other sections dealing with contempt, see 12 N.C.L. Rev. 260 (1934).

For note on criminal and civil contempt proceedings, see 34 N.C.L. Rev. 221 (1956).

For note on right to jury trial in criminal contempt proceedings, see 6 Wake Forest Intra. L. Rev. 356 (1970).

For article, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For article, "Contempt, Order in the Courtroom, Mistrials," see 14 Wake Forest L. Rev. 909 (1978).

For note on specific performance of separation agreements, see 58 N.C.L. Rev. 867 (1980).

For note on enforcement of separation agreements by specific performance, see 16 Wake Forest L. Rev. 117 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

For article, "The Distinction Between Civil and Criminal Contempt in North Carolina," see 67 N.C.L. Rev. 1281 (1989).

CASE NOTES

I. General Consideration.
II. Orders Enforceable as Civil Contempt.
III. Purging Contempt.
IV. Practice and Procedure.
V. Appeal and Error.

I. GENERAL CONSIDERATION.

Editor's Note. — *Some of the annotations under this section are from cases decided under former statutory provisions.*

Nature and Purpose of Proceeding. — Civil contempt is applied to a continuing act, and the proceeding is used to compel obedience to orders and decrees made for the benefit of private parties and to preserve and enforce private rights. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 320 (1967); Blue Jeans Corp. of Am. v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Civil contempt proceedings are without question civil in nature. Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980).

This section makes clear that civil contempt is not a form of punishment; rather, it is a civil remedy to be utilized exclusively to enforce compliance with court orders. Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980).

The purpose of civil contempt is not to punish; rather, its purpose is to use the court's power to impose fines or imprisonment as a method of coercing the defendant to comply with an order of the court. Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980); Ferree v. Ferree, 71 N.C. App. 737, 323 S.E.2d 52 (1984), cert. denied, 313 N.C. 328, 327 S.E.2d 889 (1985).

Acts and omissions constituting civil contempt involve matters tending to defeat, impair, impede, or prejudice the rights or remedies of a party to an action pending in court, and are punishable with the underlying purpose of preserving private rights by coercion. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

Criminal and Civil Contempt Distinguished. — The line of demarcation between civil and criminal contempts is hazy at best. A major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised. Where the primary purpose is to preserve the court's authority and to punish for disobedience of its orders, the contempt is criminal. Where the primary purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. Blue Jeans Corp. of Am. v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969); O'Briant v. O'Briant, 313 N.C. 432, 329 S.E.2d 370 (1985).

Criminal contempt is a term applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

Proceedings instituted to vindicate the dignity of the court and to punish attorney for his alleged interference with a custody order, although arising in a civil case, are criminal in nature. Patterson v. Phillips, 56 N.C. App. 454, 289 S.E.2d 48 (1982).

An administrative agency of the State is not subject to contempt. North Carolina DOT v. Davenport, 334 N.C. 428, 432 S.E.2d 303 (1993).

Treatment of Civil Contempt. — Where the court finds that a defendant is in civil contempt, it is not limited by G.S. 5A-12 to imposing a 30-day sentence for criminal contempt. Under subsection (b) of this section, it can order his imprisonment until he purges himself of contempt. Bennett v. Bennett, 71 N.C. App. 424, 322 S.E.2d 439 (1984).

Trial court was in error where it described a civil contempt action as punishment. Atassi v. Atassi, 122 N.C. App. 356, 470 S.E.2d 59 (1996).

Civil contempt order was not proper where the court order allegedly violated was not directed at defendant. Atassi v. Atassi, 122 N.C. App. 356, 470 S.E.2d 59 (1996).

Punishment for Both Criminal and Civil Contempt. — As recognized in G.S. 5A-12(d) and subsection (c) of this section, a person may be found to be in both criminal and civil contempt, although only a single act was committed. Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980), aff'd in part and rev'd in part on other grounds, 301 N.C. 561, 273 S.E.2d 247 (1981).

There are certain instances where contemners may be punished for both criminal contempt and for civil contempt. Blue Jeans Corp. v. Amalgamated Clothing Workers, 4 N.C. App. 245, 166 S.E.2d 698, aff'd, 275 N.C. 503, 169 S.E.2d 867 (1969).

One act may be punishable as both civil contempt and criminal contempt. This kind of duality particularly inheres in a party litigant's willful failure to comply with a discovery order. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

Disobedience Must Be Willful. — A failure to obey an order of a court cannot be punished by contempt proceedings unless the disobedience is willful, which imports knowledge and a stubborn resistance. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

The element of willfulness is required for a finding of civil contempt under G.S. 50-13.4(f)(9) and this section. Jones v. Jones, 52 N.C. App. 104, 278 S.E.2d 260 (1981); Harris v. Harris, 91 N.C. App. 699, 373 S.E.2d 312 (1988).

While a strict reading of this section does not require that a defendant's conduct be willful in order for him/her to be found in civil contempt, the courts have interpreted the statute to require an element of willfulness. Ross v. Voiers, 127 N.C. App. 415, 490 S.E.2d 244 (1997), cert. denied, 347 N.C. 402, 496 S.E.2d 387 (1997).

Although the statutes governing civil contempt do not expressly require willful conduct, case law has interpreted the statutes to require an element of willfulness. Sharpe v. Nobles, 127 N.C. App. 705, 493 S.E.2d 288 (1997).

Father was properly held in contempt for not paying child support where (1) he was properly subject to an order increasing his child support obligation as of the date of the mother's filing of a divorce complaint, (2) the purpose of the order could be served by his compliance, and (3) his noncompliance with the order was willful in that he had made no payment toward the increase in his obligation from the date of the complaint to the date of trial, despite his ability to comply with the court's order, and he presented no evidence as to why he should not be held in contempt. Miller v. Miller, 153 N.C. App. 40, 568 S.E.2d 914, 2002 N.C. App. LEXIS 1070 (2002).

Thus, Defendant Must Possess Means to Comply. — To support a finding of willfulness in failing to comply with a support order, there must be evidence to establish as an affirmative fact that defendant possessed the means to comply with the order at some time after the entry of the order. Teachey v. Teachey, 46 N.C. App. 332, 264 S.E.2d 786 (1980).

For civil contempt to be applicable, the defendant must have the present ability to comply, or the present ability to take reasonable measures that would enable him to comply, with the order. Teachey v. Teachey, 46 N.C. App. 332, 264 S.E.2d 786 (1980); Hodges v. Hodges, 64 N.C. App. 550, 307 S.E.2d 575 (1983); Lee v. Lee, 78 N.C. App. 632, 337 S.E.2d 690 (1985).

In order to punish by contempt proceedings, the trial court must find as a fact that the defendant possessed the means to comply with orders of the court during the period when he was in default. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970); Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Civil contempt is based upon acts or neglect constituting a willful violation of a lawful order of the court. A failure to obey an order of the court cannot be punished by attachment for civil contempt unless the disobedience is willful. It is well settled that one does not act willfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered. Henderson v. Henderson, 307 N.C. 401, 298 S.E.2d 345 (1983).

This section and G.S. 5A-22 must be construed in pari materia. When so construed, these statutes require that a person have the present ability to comply with the conditions for purging the contempt before that person may be imprisoned for civil contempt. McMiller v. McMiller, 77 N.C. App. 808, 336 S.E.2d 134 (1985).

The purpose of civil contempt is to coerce compliance with a court order; therefore, present ability or means to satisfy that order is essential. Adkins v. Adkins, 82 N.C. App. 289, 346 S.E.2d 220 (1986).

Conduct Held Willful. — Defendant's voluntary purging of assets in bankruptcy was considered a deliberate divestment of assets; therefore, failure to comply with a child support order was willful and punishable by contempt proceedings. Harris v. Harris, 91 N.C. App. 699, 373 S.E.2d 312 (1988).

Court Must Determine Defendant's Ability to Comply. — A defendant in a civil contempt action will be fined or incarcerated only after a determination is made that the defendant is capable of complying with the order of the court. Reece v. Reece, 58 N.C. App. 404, 293 S.E.2d 662 (1982).

Findings on Means to Comply Held Adequate. — Trial court's finding regarding contemnor's "present means to comply" held minimally sufficient to satisfy the statutory requirement for civil contempt, although specific findings supporting the contemnor's present means are preferable. Adkins v. Adkins, 82 N.C. App. 289, 346 S.E.2d 220 (1986).

Trial court's finding that a debtor was in civil contempt for failing to comply with a consent judgment for the payment of a debt was proper pursuant to G.S 5A-21(a); the finding was based on evidence establishing as an affirmative fact that the debtor possessed the current ability to comply with the order. GMAC v. Wright, 154 N.C. App. 672, 573 S.E.2d 226, 2002 N.C. App. LEXIS 1524 (2002).

Findings Inadequate to Support Contempt. — A trial court's findings that a defendant was healthy and able-bodied, had been and was presently employed, had not been in ill health or incapacitated, and had the ability to earn good wages, without finding that defendant presently had the means to comply, did not support confinement in jail for contempt. Hodges v. Hodges, 64 N.C. App. 550, 307 S.E.2d 575 (1983).

Trial court erred in holding a husband in contempt for his failure to pay alimony where there was no determination in the trial court's findings of the husband's present ability to comply with the terms of the alimony order. Oakley v. Oakley, 165 N.C. App. 859, 599 S.E.2d 925, 2004 N.C. App. LEXIS 1511 (2004).

Even if he does not have the money to make court ordered payments, a person will be guilty of civil contempt if he could take a job which would enable him to make those payments. Frank v. Glanville, 45 N.C. App. 313, 262 S.E.2d 677 (1980).

Disobedience of an order made without, or in excess of, jurisdiction is not punishable as contempt. Harding v. Harding, 46 N.C. App. 62, 264 S.E.2d 131 (1980); In re Smith, 301 N.C. 621, 272 S.E.2d 834 (1981).

Violation of a provision of a judgment which is void cannot be made the basis for contempt. Corey v. Hardison, 236 N.C. 147, 72 S.E.2d 416 (1952).

Civil Contempt Order Was Improper After Mother Purged Herself. — Trial court erred in holding the mother in civil contempt of an order awarding the father custody of the parties' children since the mother had purged herself of contempt by complying with the amended custody order and returning the children to the father; thus, there was no longer any purpose to be served by holding the mother in civil contempt, and the trial court's conclusion was improper as a matter of law. Ruth v. Ruth, 158 N.C. App. 123, 579 S.E.2d 909, 2003 N.C. App. LEXIS 948 (2003).

Confrontation of Witnesses. — The North Carolina Constitution preserves the right of confrontation of the witnesses against an accused, and this right is applicable to contempt proceedings, so that an adjudication of contempt against defendant based on the affidavit of the receiver of a corporation was invalid. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

No Authority to Award Costs to Private Party in Contempt Proceeding. — A North Carolina court has no authority to award damages in the form of costs to a private party in a contempt proceeding. Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

Although labeled "civil" contempt, a proceeding as for contempt is by no means a civil action or proceeding to which G.S. 6-18 (when costs shall be allowed to plaintiff as a matter of course) or G.S. 6-20 (allowance of costs in discretion of court) would apply. Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

Court Not Authorized to Award Attorneys' Fees. — In a contempt action for the enforcement of a consent judgment regarding defendant's obligation to pay daughter's college tuition, the trial court was without authority to award the plaintiff attorneys' fees. Powers v. Powers, 103 N.C. App. 697, 407 S.E.2d 269 (1991).

When the trial court found plaintiff in contempt under G.S. 5A-21, it erred in awarding attorney fees to defendant as sanctions; such an award was not authorized by statute, as G.S. 6-18 and G.S. 6-20, governing costs, did not apply to a contempt proceeding. Sea Ranch II Owners Ass'n v. Sea Ranch II, Inc., — N.C. App. —, 636 S.E.2d 307, 2006 N.C. App. LEXIS 2246 (2006).

Trial court was without authority to award attorney fees to an individual because there was no statutory authority allowing the trial court to impose attorney fees as a sanction for the failure of business parties to comply with an order of the trial court for the specific performance of a settlement agreement between the individual and the business parties. Baxley v. Jackson, 179 N.C. App. 635, 634 S.E.2d 905, 2006 N.C. App. LEXIS 2055 (2006).

Consent Judgment Not Enforceable Through Contempt Powers. — Where the judgment on which the trial court based its contempt order did not reflect a determination by the trial court of either issues of fact or conclusions of law presented by the case before it, the order was merely a recital of the parties' agreement and not an adjudication of rights. Consequently, the consent judgment was not an order enforceable through the contempt powers of the court. Crane v. Green, 114 N.C. App. 105, 441 S.E.2d 144 (1994).

Applied in Monds v. Monds, 46 N.C. App. 301, 264 S.E.2d 750 (1980).

Cited in Abernethy v. Abernethy, 64 N.C. App. 386, 307 S.E.2d 396 (1983); Berger v. Berger, 67 N.C. App. 591, 313 S.E.2d 825 (1984); Burnett v. Wheeler, 133 N.C. App. 316, 515 S.E.2d 480 (1999); Miller v. Miller, 153 N.C. App. 40, 568 S.E.2d 914, 2002 N.C. App. LEXIS 1070 (2002); N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888, 2004 N.C. LEXIS 909 (2004); State v. Simon, — N.C. App. —, 648 S.E.2d 853, 2007 N.C. App. LEXIS 1734 (2007).

II. ORDERS ENFORCEABLE AS CIVIL CONTEMPT.

Child Support Orders. — Willful failure and refusal of a party to make payments for the support of his child in accordance with decree of court is civil contempt, and the court may order him into custody until he shows compliance or is otherwise discharged according to law. Smith v. Smith, 248 N.C. 298, 103 S.E.2d 400 (1958).

Civil contempt proceedings are a proper method of enforcing orders for payment of child support. The purpose of civil contempt in such a case is not to punish but to coerce a defendant into compliance with the support order. McMiller v. McMiller, 77 N.C. App. 808, 336 S.E.2d 134 (1985).

Father was properly held in contempt where he unilaterally reduced his child support payments after suffering a substantial reduction in income. Chused v. Chused, 131 N.C. App. 668, 508 S.E.2d 559 (1998).

Former wife was not in contempt, although she divided her child support in half when one of the parties' two children came to live with her, and shortly thereafter moved the court for a reduction in child support, thereby indicating that the reduction was not a deliberate or intentional attempt to violate the court's support order. Spencer v. Spencer, 133 N.C. App. 38, 514 S.E.2d 283 (1999).

Husband was found to be in contempt of order requiring him to pay $5,000 to his wife as a lump sum property settlement and to provide health insurance for their minor children: the husband was aware of his obligation to pay the property settlement, but admittedly failed to pay because he paid higher taxes due to the wife's failure to jointly file tax returns with him; in addition, there was no evidence to support the husband's contention that the wife agreed to modify that portion of the original order requiring the husband to provide health insurance for the children. Meehan v. Lawrance, 166 N.C. App. 369, 602 S.E.2d 21, 2004 N.C. App. LEXIS 1731 (2004).

Trial court's order of specific performance, which required business parties to comply with the terms of a court approved settlement agreement with an individual, was enforceable through the contempt powers of the court. Baxley v. Jackson, 179 N.C. App. 635, 634 S.E.2d 905, 2006 N.C. App. LEXIS 2055 (2006).

Visitation Orders. — Where mother encouraged child to go with his father for scheduled visitations, and the child refused, the evidence was insufficient to find that the mother acted purposefully and deliberately or with knowledge and stubborn resistance to prevent the father's visitation with the child, so as to subject her to civil contempt; the mother was not required to physically force the child to go. Hancock v. Hancock, 122 N.C. App. 518, 471 S.E.2d 415 (1996).

Trial court properly found a mother to be in civil contempt of court pursuant to G.S. 5A-21(a); the mother knew of the existence of an order granting the child's grandparents visitation, but refused to send the child for visitation and took the child to Hawaii for the summer to prevent the visitation in a willful manner. Young v. Young, 169 N.C. App. 31, 609 S.E.2d 795, 2005 N.C. App. LEXIS 539 (2005).

Payment of Educational Expenses. — Where defendant refused to pay educational expenses as provided in consent judgment, there was competent evidence to support the court's findings and conclusion that the defendant was in contempt of the consent judgment pursuant to subsection (a). Smith v. Smith, 121 N.C. App. 334, 465 S.E.2d 52 (1996).

Trial court properly found father in civil contempt where he willfully failed to pay his daughters college expenses as he had contracted to do. Ross v. Voiers, 127 N.C. App. 415, 490 S.E.2d 244 (1997), cert. denied, 347 N.C. 402, 496 S.E.2d 387 (1997).

Imprisonment for Nonsupport. — A defendant in a nonsupport civil contempt proceeding can be imprisoned only if he has willfully violated the court order and has the present ability to make the payments. He can regain his liberty by doing that which the court has ordered him to do and he has the ability to do, i.e., make the payments. This is consistent with the notion that civil contempt is not criminal punishment, but a civil remedy to be utilized exclusively to enforce compliance with court orders. Hodges v. Hodges, 64 N.C. App. 550, 307 S.E.2d 575 (1983).

Before a previous order of child support can be enforced by civil imprisonment which can be avoided by paying money, it must first appear that the defendant is capable of making the payments required. State v. Miller, 77 N.C. App. 436, 335 S.E.2d 187 (1985).

Failure to Pay Child Support Where Unable to Do So. — A defendant who has not made child support payments because he is actually unable to make the payments does not face a loss of liberty. Hodges v. Hodges, 64 N.C. App. 550, 307 S.E.2d 575 (1983); Graham v. Graham, 77 N.C. App. 422, 335 S.E.2d 210 (1985).

Although an order for child support is enforceable by civil contempt proceedings, a supporting party cannot be held in contempt unless such party has willfully failed to comply with the support order. A finding of willful failure to comply with the order requires evidence of the present ability to pay or to take reasonable measures to comply. Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Consent Judgment in Domestic Relations Setting. — In a domestic relations setting, a consent judgment which has been adopted by the court, but which contains unequivocal language to the effect that it is not subject to modification, may nevertheless be enforced by civil contempt. Henderson v. Henderson, 55 N.C. App. 506, 286 S.E.2d 657 (1982), aff'd, 307 N.C. 401, 298 S.E.2d 345 (1983).

Civil contempt proceedings to enforce orders for payment of support to children pursuant to consent judgment are authorized by this section. Smith v. Smith, 248 N.C. 298, 103 S.E.2d 400 (1958).

Alimony. — A judgment ordering the payment of alimony may be enforced by the contempt power. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Where the trial judge found that individual was a healthy and able-bodied man for his age, and further found that he could pay at least a portion of the alimony, it was error to imprison him until he should pay the whole amount. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

A breach of contract is not punishable as civil contempt. Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951); In re Will of Smith, 249 N.C. 563, 107 S.E.2d 89 (1959).

Where proceeding for civil contempt is set in motion to compel a person to substitute a binding agreement for an invalid one, an order penalizing the plaintiff runs counter to the sound rule that the court will not entertain contempt proceedings where the mover's purpose is to coerce his adversary into making a contract. Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951).

Refusal to effectuate an agreement to sign a consent judgment may not be made the basis for contempt proceedings where it does not appear that the parties ever agreed to the exact terms of such judgment. State v. Clark, 207 N.C. 657, 178 S.E. 119 (1935).

Failure to Comply with Discovery Order. — Where defendant was accused of mismanaging, diverting and wasting corporate assets, and the trial court ordered him to cooperate with receivers of the corporation and to provide them and plaintiffs with copies of his tax returns and a list of his assets, defendant's contempt, if any, in failing to provide the required materials could be criminal or civil, and contemnor waived procedural requirements when he came into court to answer charges of the trial court's show cause order. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

Refusal of municipal officers to surrender their offices in accordance with the results of an election held pursuant to the provisions of a decree of court cannot be made the basis for contempt proceedings, since upon the hearing of the order to show cause the court must first adjudicate the rights of the parties to the offices, and such adjudication can be made only in a direct proceeding for that purpose. Corey v. Hardison, 236 N.C. 147, 72 S.E.2d 416 (1952).

Order to Produce Tax Returns. — Where defendant was accused of mismanaging, diverting, converting and wasting corporate assets, and he was ordered by the trial court to produce his tax returns, the production of the returns did not amount to such authentication as to be compelled testimonial self-incrimination which would support a claim of Fifth Amendment privilege; thus, defendant could be found in contempt. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

Where defendant was accused of mismanaging, diverting, converting and wasting corporate assets, defendant's refusal to comply with the trial court's order to produce tax returns was not protected by the Fifth Amendment proscription against compulsory self-incrimination, and thus he could be found in contempt, since there was no evidence tending to show that defendant was under any physical or mental coercion at the time he prepared his tax returns, and he therefore could not rely upon the contents of the tax returns to support his claim of Fifth Amendment protection. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

Order to Appear as Attorney. — An out-of-state attorney could not be held in and punished for willful contempt of court for failure to comply with an order of the trial court that he appear as an attorney in a criminal case where there had been no general appearance by local counsel as required by G.S. 84-4.1 and the out-of-state attorney thus never acquired eligibility to appear in the case and was never an attorney in the case admitted to limited practice in North Carolina. In re Smith, 301 N.C. 621, 272 S.E.2d 834 (1981).

Order Allowing Defendant to Avoid Confinement by Paying Arrearages Held Remedial Relief. — Where the court ordered defendant confined in jail for a period of 29 days, but it allowed defendant to avoid that punishment altogether by paying the entire amount of child support arrearages, this constituted remedial relief and therefore required that the court's order be construed as adjudicating defendant in civil contempt. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Continual Violation of Sexual Exhibition/Adult Business Ordinance. — Competent evidence supported the trial court's decision to hold plaintiff owner of adult business in contempt, and the plaintiff, by her refusal to present testimony and invoking her Fifth Amendment Right, chose to abandon her claim that she was not in contempt of the trial court's order. McKillop v. Onslow County, 139 N.C. App. 53, 532 S.E.2d 594, 2000 N.C. App. LEXIS 808 (2000).

III. PURGING CONTEMPT.

Payment of Counsel Fees as Condition to Being Purged of Contempt. — The contempt power includes the authority for a district court judge to require one whom he has found in willful contempt of court for failure to comply with a child support order entered pursuant to G.S. 50-13.1, et seq., to pay reasonable counsel fees to opposing counsel as a condition to being purged of contempt. Blair v. Blair, 8 N.C. App. 61, 173 S.E.2d 513 (1970).

Effect of Payment of Fine. — A party to a proceeding as for contempt undoubtedly waives his right to have the judgment in the proceeding reviewed on appeal by voluntarily paying the fine imposed upon him by the judgment. But where the record reveals that the fine was paid under protest at the precise moment an appeal was noted from the order imposing it, and that the party took this course to avoid being committed to jail until the fine was paid, inasmuch as the payment was the product of coercion, the right of appeal was not waived by making it. Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951).

Payment of Child Support. — Husband could not be found in civil contempt under G.S. 5A-21(b), for his failure to pay child support, where he paid the past due support prior to the contempt hearing, even though it was paid after he was served with the show cause contempt motion. Reynolds v. Reynolds, 147 N.C. App. 566, 557 S.E.2d 126, 2001 N.C. App. LEXIS 1231 (2001), cert. denied, 355 N.C. 493, 563 S.E.2d 567 (2002).

Conditioning of Probation or Suspended Sentence on Contemnor's Purging Himself. — The imposition of probationary conditions under G.S. 15A-1343 and the possibility of early termination under G.S. 15A-1342(b) do not transform probationary or suspended sentences into civil relief. However, specifically conditioning the imposition or effect of the probationary or suspended sentence upon the contemnor's purging himself would constitute civil relief. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

IV. PRACTICE AND PROCEDURE.

Jury Trial. — Respondents in proceedings for civil contempt are not entitled to a jury trial. In re Gorham, 129 N.C. 481, 40 S.E. 311 (1901).

Filing of Injunction Required for Contempt Purposes. — A party could not be held in contempt for violations of a preliminary injunction that occurred after the order for the injunction was issued, but before it was filed with the county clerk. Onslow County v. Moore, 129 N.C. App. 376, 499 S.E.2d 780 (1998).

Appointment of Counsel for Indigents. — Due process requires appointment of counsel for indigents in nonsupport civil contempt proceedings only in those cases where assistance of counsel is necessary for an adequate presentation of the merits or to otherwise ensure fundamental fairness. Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980).

When a civil proceeding may result in imprisonment, due process requirements are met by evaluating the necessity for appointed counsel on a case-by-case basis. Hodges v. Hodges, 64 N.C. App. 550, 307 S.E.2d 575 (1983).

Right to Confront Witnesses. — A person denying his asserted violation of a restraining order in contempt proceedings has the right under the provisions of N.C. Const., Art. I, § 19, synonymous with due process of law under the United States Constitution, to confront and cross-examine witnesses by whose testimony the asserted violation is to be established. Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980), aff'd in part and rev'd in part on other grounds, 301 N.C. 561, 273 S.E.2d 247 (1981).

But This Right Is Waivable. — See Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980), aff'd in part and rev'd in part on other grounds, 301 N.C. 561, 273 S.E.2d 247 (1981).

District Court May Enforce Judgment Entered in Superior Court. — A district court judge may hold a party to a proceeding before him in civil contempt for failure to comply with court orders issued pursuant to a confession of judgment regarding payment of alimony which was entered in the superior court prior to the establishment of a district court for the district in which the order was entered. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Where the trial court made no findings of defendant's ability to pay the entire arrearage arising from nonpayment of child support, the Court of Appeals was required to conclude that there were inadequate findings to support the adjudication of civil contempt. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

V. APPEAL AND ERROR.

Scope of Review. — The scope of review in contempt proceedings is limited to whether the findings of fact by the trial judge are supported by competent evidence and whether those factual findings are sufficient to support the judgment. McMiller v. McMiller, 77 N.C. App. 808, 336 S.E.2d 134 (1985); Adkins v. Adkins, 82 N.C. App. 289, 346 S.E.2d 220 (1986).

The findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence, and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970); Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Incorrect standard in ruling on show cause order. — Trial court's conclusion, in ruling on a motion to show cause for failure to comply with the court's previous orders, that no showing had been made under G.S. 5A-21 was error, as the trial court was only required to determine, pursuant to G.S. 5A-23(a), whether the information contained in the motion and the record was sufficient to warrant a prudent person to believe the contemnor had the ability to comply with the trial court's order; since the trial court used the incorrect standard in denying the motion, remand was required. Young v. Mastrom, Inc., 149 N.C. App. 483, 560 S.E.2d 596, 2002 N.C. App. LEXIS 192 (2002).

Interference with Order Awarding Child Custody. — Trial court erred by holding a husband in contempt for violating the court's order awarding custody of the husband's children to his ex-wife where the husband followed his ex-wife as she was leaving a ball game and argued with her in front of their children. Scott v. Scott, 157 N.C. App. 382, 579 S.E.2d 431, 2003 N.C. App. LEXIS 742 (2003).

§ 5A-22. Release when civil contempt no longer continues.

(a) A person imprisoned for civil contempt must be released when his civil contempt no longer continues. The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt. Upon finding compliance with the specifications, the sheriff or other officer having custody may release the person without a further order from the court.

(b) On motion of the contemnor, the court must determine if he is subject to release and, on an affirmative determination, order his release. The motion must be directed to the judge who found civil contempt unless he is not available. Then the motion must be made to a judge of the same division in the same district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be. The contemnor may also seek his release under other procedures available under the law of this State. (1977, c. 711, s. 3; 1987 (Reg. Sess., 1988), c. 1037, s. 45.)

OFFICIAL COMMENTARY

Subsection (a) permits the one who has custody of a jailed contemnor to release him without a court order or any formal proceedings, if the custodian finds that the contemnor has purged himself of the contempt by complying with the contempt order's specifications. This is intended to apply mainly to the situation in which compliance with the order calls for payment to the court. It was felt that this action was so clear that the custodian should be able to proceed on his own. The possibility that a person will be released when a release was not proper was outweighed by the importance of seeing to it that a person did not remain jailed longer than was necessary. Subsection (b) establishes the machinery for a civil contemnor to seek his own release if he has complied or if compliance is no longer possible, but he has still not been released.

CASE NOTES

The purpose of civil contempt is not to punish but to coerce the defendant to comply with a court order. Cox v. Cox, 133 N.C. App. 221, 515 S.E.2d 61 (1999).

Civil contempt is employed to coerce disobedient defendants into complying with orders of court, and the length of time that a defendant can be imprisoned in a proper case is not limited by law, since the defendant can obtain his release immediately upon complying with the court's order. Brower v. Brower, 70 N.C. App. 131, 318 S.E.2d 542 (1984).

Defendant Must Have Present Ability to Comply. — This section and G.S. 5A-21 must be construed in pari materia. When so construed, these statutes require that a person have the present ability to comply with the conditions for purging the contempt before that person may be imprisoned for civil contempt. McMiller v. McMiller, 77 N.C. App. 808, 336 S.E.2d 134 (1985).

Purging Provision. — The contempt order must be vacated if it fails to specify, as required by subsection (a) of this section, how the defendant might purge herself of contempt. The purpose of civil contempt is not to punish, but to coerce the defendant to comply with the order. Thus the purging provision is essential to the order. Bethea v. McDonald, 70 N.C. App. 566, 320 S.E.2d 690 (1984).

Means for Purging Contempt Required. — Trial court had the authority to enforce consent order regarding repairs to a dwelling through its contempt powers, but the trial court erred by failing to provide for a means for defendant to purge himself of the contempt. Nohejl v. First Homes of Craven County, Inc., 120 N.C. App. 188, 461 S.E.2d 10 (1995).

Purge Provision Impermissibly Vague. — A condition of a temporary child custody order was impermissibly vague, where a condition to be met for the mother to purge herself of civil contempt was that she not punish either of the minor children in any manner that was "stressful, abusive, or detrimental" to the child. Cox v. Cox, 133 N.C. App. 221, 515 S.E.2d 61 (1999).

Trial Court Without Authority to Require Contemnor to Pay Compensatory Damages. — Upon a finding of contempt, in situations where the original order requires a transfer of property (including intangible property such as that represented by stock certificates), the trial court has authority to order the contemnor to transfer said property as a condition of purging the contempt, but does not have authority to require the contemnor to pay compensatory damages incurred as a result of his noncompliance with the original order. Hartsell v. Hartsell, 99 N.C. App. 380, 393 S.E.2d 570 (1990), aff'd, 328 N.C. 729, 403 S.E.2d 307 (1991).

Cited in Leonard v. Hammond, 804 F.2d 838 (4th Cir. 1986); Sharpe v. Nobles, 127 N.C. App. 705, 493 S.E.2d 288 (1997); Scott v. Scott, 157 N.C. App. 382, 579 S.E.2d 431, 2003 N.C. App. LEXIS 742 (2003).

§ 5A-23. Proceedings for civil contempt.

(a) Proceedings for civil contempt are by motion pursuant to G.S. 5A-23(a1), by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt, or by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt. The order or notice must be given at least five days in advance of the hearing unless good cause is shown. The order or notice may be issued on the motion and sworn statement or affidavit of one with an interest in enforcing the order, including a judge, and a finding by the judicial official of probable cause to believe there is civil contempt.

(a1) Proceedings for civil contempt may be initiated by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt. A copy of the motion and notice must be served on the alleged contemnor at least five days in advance of the hearing unless good cause is shown. The motion must include a sworn statement or affidavit by the aggrieved party setting forth the reasons why the alleged contemnor should be held in civil contempt. The burden of proof in a hearing pursuant to this subsection shall be on the aggrieved party.

(b) Except when the General Statutes specifically provide for the exercise of contempt power by the clerk of superior court, proceedings under this section are before a district court judge, unless a court superior to the district court issued the order in which case the proceedings are before that court. When the proceedings are before a superior court, venue is in the superior court district or set of districts as defined in G.S. 7A-41.1 of the court which issued the order. Otherwise, venue is in the county where the order was issued.

(c) The person ordered to show cause may move to dismiss the order.

(d) The judicial official is the trier of facts at the show cause hearing.

(e) At the conclusion of the hearing, the judicial official must enter a finding for or against the alleged contemnor on each of the elements set out in G.S. 5A-21(a). If civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and specifying the action which the contemnor must take to purge himself or herself of the contempt.

(f) A person with an interest in enforcing the order may present the case for a finding of civil contempt for failure to comply with an order.

(g) A person who is found in civil contempt under this Article shall not, for the same conduct, be found in criminal contempt under Article 1 of this Chapter. (1977, c. 711, s. 3; 1979, 2nd Sess., c. 1080, ss. 2-4; 1987 (Reg. Sess., 1988), c. 1037, s. 46; 1999-361, ss. 2, 4, 5; 2000-140, s. 35.)

OFFICIAL COMMENTARY

Subsection (a) draws a distinction between an order to appear for a show of cause hearing and a notice that the show-cause hearing will be held. The Commission wanted to make clear the propriety of a person's not appearing if he was notified of the show-cause hearing rather than ordered to appear at it. Since the Commission felt that there were some instances in which the court would want the contemnor present regardless of his wishes, the order was left as an option. Application of subsection (b) results in magistrates and clerks being unable to hold proceedings for civil contempt. The Commission particularly intended "a person with an interest" under subsection (f) to include the State, as represented by the district attorney, in a criminal case. Subsection (g) permits, in essence, consolidated hearings for civil and criminal contempt, thus permitting a judge who has begun a civil contempt hearing to continue and find the person in criminal contempt even though he is beyond the reach of civil contempt because of inability at that time to comply with the order.

Legal Periodicals. — For note on right to jury trial in criminal contempt proceedings, see 6 Wake Forest Intra. L. Rev. 356 (1970).

CASE NOTES

Editor's Note. — *Some of the annotations under this section are from cases decided under former statutory provisions.*

This section has no application in criminal contempt proceedings. Mather v. Mather, 70 N.C. App. 106, 318 S.E.2d 548 (1984).

Defendant's Rights Under U.S. Const., Amend. V Not Implicated in Civil Contempt Case. — Where trial court ordered defendant incarcerated, gave defendant the opportunity to purge his contempt by complying with prior consent order and paying certain sums for attorney's fees and damages, and imposed no other penalty, the relief granted was wholly civil in nature. Since defendant was not, in fact, subject to criminal penalties, there was no necessity to examine whether defendant's rights under U.S. Const., Amend. V were adequately protected during the contempt proceeding. Hartsell v. Hartsell, 99 N.C. App. 380, 393 S.E.2d 570 (1990), aff'd, 328 N.C. 729, 403 S.E.2d 307 (1991).

Contemnor Must Have Means to Comply Before Being Found in Contempt. — Contempt proceedings are not a form of punishment, but serve to ensure obedience to orders of the court. Therefore it is essential that the alleged contemnor have the means to comply, and that the court so find, before she can be found in contempt. Glesner v. Dembrosky, 73 N.C. App. 594, 327 S.E.2d 60 (1985).

On its face order demonstrated noncompliance with this section where the trial court first determined that plaintiff's failure to appear created the jeopardy of contempt, then it immediately found plaintiff to be in actual contempt. Garrett v. Garrett, 121 N.C. App. 192, 464 S.E.2d 716 (1995).

Findings Preferable But Not Essential in Proceeding to Enforce Support. — While explicit findings are always preferable in a civil contempt proceeding to enforce an order for child support, they are not absolutely essential where the findings otherwise clearly indicate that a contempt order is warranted. Plott v. Plott, 74 N.C. App. 82, 327 S.E.2d 273 (1985).

Court Need Only Find Means to Comply and Refusal to Do So. — In civil contempt proceedings to enforce orders for child support, the court is required to find only that the allegedly delinquent obligor has the means to comply with the order and that he or she willfully refused to do so. Plott v. Plott, 74 N.C. App. 82, 327 S.E.2d 273 (1985).

Incorrect standard in ruling on show cause order. — Trial court's conclusion, in ruling on a motion to show cause for failure to comply with the court's previous orders, that no showing had been made under G.S. 5A-21 was error, as the trial court was only required to determine, pursuant to G.S. 5A-23(a), whether the information contained in the motion and the record was sufficient to warrant a prudent person to believe the contemnor had the ability to comply with the trial court's order; since the trial court used the incorrect standard in denying the motion, remand was required. Young v. Mastrom, Inc., 149 N.C. App. 483, 560 S.E.2d 596, 2002 N.C. App. LEXIS 192 (2002).

Findings were insufficient to support the court's contempt holding that the defendant was in violation of the parental visitation order that provided for defendant's daily telephone contact with the minor child. Watkins v. Watkins, 136 N.C. App. 844, 526 S.E.2d 485, 2000 N.C. App. LEXIS 163.

Opposing party must show cause why he should not be found in contempt. In a proceeding to enforce an order for child support, this would involve showing either that he lacked the means to pay or that the failure to pay was not willful. Plott v. Plott, 74 N.C. App. 82, 327 S.E.2d 273 (1985).

The statutes governing proceedings for civil contempt in child support cases clearly assign the burden of proof to the party alleged to be delinquent, and after a civil contempt proceeding is initiated by an interested party who files a motion in the cause, the opposing party must then show cause why he should not be found in contempt. Belcher v. Averette, 136 N.C. App. 803, 526 S.E.2d 663, 2000 N.C. App. LEXIS 166 (2000).

Evidence sufficient to support finding of contempt. — The trial court properly found that defendant was sufficiently able to comply with the temporary alimony order but willfully, deliberately, and without justification failed to do so where the defendant failed to meet his burden of proof of establishing that he lacked the means to pay or that his failure to pay was not willful; the defendant failed to provide a financial statement or personal bank statements, failed to give his accountant accurate information, failed to explain large sums of money he received from his girlfriend, and was generally vague or indifferent as to supplemental income he did or could receive. Shumaker v. Shumaker, 137 N.C. App. 72, 527 S.E.2d 55, 2000 N.C. App. LEXIS 268 (2000).

Judge was authorized to shorten notice

period of civil contempt hearing for good cause, where the defendant had known for several months of the particular charges pending against him and had had ample opportunity to prepare to meet them, where all the witnesses, some of whom had been in court on earlier occasions, were present, along with the parties, and where defendant's lawyer acknowledged that his argument for delaying the hearing was based, not upon any unreadiness to proceed, but upon his mistaken impression that a hearing upon less than five days notice was automatically invalid. M.G. Newell Co. v. Wyrick, 91 N.C. App. 98, 370 S.E.2d 431 (1988).

Notice. — Arrest order was improper where it was issued without assurance that the party had received notice and opportunity to be heard as required by this section. In re Ammons, 344 N.C. 195, 473 S.E.2d 326 (1996).

Service on a father of a motion by the mother, and ex-wife of the father, of a motion to show cause and a notice of a hearing 27 days before the scheduled hearing was adequate notice of a contempt proceeding in a case where the mother claimed that the father was not meeting his child support obligations. Trivette v. Trivette, 162 N.C. App. 55, 590 S.E.2d 298, 2004 N.C. App. LEXIS 40 (2004).

The trial court failed to comply with the provisions of this section in its contempt proceeding against the defendant where no notice or order to show cause was ever issued to the defendant. Watkins v. Watkins, 136 N.C. App. 844, 526 S.E.2d 485, 2000 N.C. App. LEXIS 163.

Defendant Held Not Entitled to Notice. — Where the defendant had notice of civil contempt hearing and he was simultaneously adjudged to be in both civil and criminal contempt, defendant was entitled to no notice as to the criminal contempt, as subsection (g) of this section expressly authorizes a judge conducting a hearing to determine civil contempt to "find the person in criminal contempt for the same conduct" upon making the required findings. M.G. Newell Co. v. Wyrick, 91 N.C. App. 98, 370 S.E.2d 431 (1988).

Requirement for Proper Verification. — Although the language used in this section seems to be permissive in nature, prior case law under the antecedent statute established that, in cases of civil contempt, previously denominated as cases as for contempt, a petition, affidavit, or other proper verification charging a willful violation of an order of court was necessary in order for an order to show cause to issue. The legislature has not altered this requirement. Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980), aff'd in part and rev'd in part on other grounds, 301 N.C. 561, 273 S.E.2d 247 (1981).

The procedure to punish for civil contempt is by order to show cause based upon a petition, affidavit, or other proper verification charging a willful violation of an order of court. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967).

Precedent decrees that a judge should recuse himself in contempt proceeding involving his personal feelings, which do not make for an impartial and calm judicial consideration and conclusion in the matter. Ponder v. Davis, 233 N.C. 699, 65 S.E.2d 356 (1951).

No judge should sit in his own case or participate in a matter in which he has a personal interest or has taken sides. Ponder v. Davis, 233 N.C. 699, 65 S.E.2d 356 (1951).

Trial court did not have jurisdiction to conduct contempt proceedings while appeal was pending, because, under G.S. 1-294, all proceedings below are stayed; therefore order finding defendant in contempt was void, at least until appeal was perfected. Collins v. Collins, 18 N.C. App. 45, 196 S.E.2d 282 (1973), decided under former G.S. 5-9.

Waiver of Procedural Requirements. — Where defendant was accused of mismanaging, diverting and wasting corporate assets and the trial court ordered him to cooperate with receivers of the corporation and to provide them and plaintiffs with copies of his tax returns and a list of his assets, defendant's contempt, if any, in failing to provide the required materials could be criminal or civil, and contemnor waived procedural requirements when he came into court to answer charges of the trial court's show cause order. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

Jurisdiction Conferred by General Appearance. — The defendant's appearance in court on the scheduled date and participation in the contempt proceedings constituted a general appearance which conferred jurisdiction over her person, despite the fact that the plaintiff's motion instigating the civil contempt proceedings was not accompanied by a sworn statement or affidavit and no order or notice by a judicial official directing the defendant to appear and show cause why she should not be held in civil contempt was ever issued or served upon her. Bethea v. McDonald, 70 N.C. App. 566, 320 S.E.2d 690 (1984).

Willfulness Required. — Although the statutes governing civil contempt do not expressly require willful conduct, case law has interpreted the statutes to require an element of willfulness. Sharpe v. Nobles, 127 N.C. App. 705, 493 S.E.2d 288 (1997).

Burden of Proof. — Because the trial court erroneously placed the burden on the father to prove a lack of wilful contempt for failing to meet his child support payments, the trial court's finding of fact did not support its conclusion of law; thus, the appellate court vacated the father's adjudication of wilful civil contempt. Trivette v. Trivette, 162 N.C. App. 55, 590 S.E.2d 298, 2004 N.C. App. LEXIS 40 (2004).

Applied in Bennett v. Bennett, 71 N.C. App. 424, 322 S.E.2d 439 (1984).

Cited in Allison v. Allison, 51 N.C. App. 622, 277 S.E.2d 551 (1981); Wilson v. Wilson, 124 N.C. App. 371, 477 S.E.2d 254 (1996); State v. Pierce, 134 N.C. App. 148, 516 S.E.2d 916 (1999); Ollo v. Mills, 136 N.C. App. 618, 525 S.E.2d 213, 2000 N.C. App. LEXIS 110 (2000); Miller v. Miller, 153 N.C. App. 40, 568 S.E.2d 914, 2002 N.C. App. LEXIS 1070 (2002).

§ 5A-24. Appeals.

A person found in civil contempt may appeal in the manner provided for appeals in civil actions. (1977, c. 711, s. 3.)

Legal Periodicals. — For article, "The Substantial Right Doctrine and Interlocutory Appeals," see 17 Campbell L. Rev. 71 (1995).

CASE NOTES

Nature of Order. — Where order allowed mother to purge the contempt by delivering the child over to the father for his scheduled visitation and by turning over the father's property or otherwise consenting to a search of her home, the contempt order was actually civil in nature. Hancock v. Hancock, 122 N.C. App. 518, 471 S.E.2d 415 (1996).

In civil contempt matters, appeal is from the district court to the Court of Appeals. Hancock v. Hancock, 122 N.C. App. 518, 471 S.E.2d 415 (1996).

Cited in Watkins v. Watkins, 136 N.C. App. 844, 526 S.E.2d 485, 2000 N.C. App. LEXIS 163; Patterson v. Phillips, 56 N.C. App. 454, 289 S.E.2d 48 (1982); State v. Mauney, 106 N.C. App. 26, 415 S.E.2d 208 (1992); Crane v. Green, 114 N.C. App. 105, 441 S.E.2d 144 (1994); Wilson v. Wilson, 124 N.C. App. 371, 477 S.E.2d 254 (1996); Sharpe v. Nobles, 127 N.C. App. 705, 493 S.E.2d 288 (1997).

§ 5A-25. Proceedings as for contempt and civil contempt.

Whenever the laws of North Carolina call for proceedings as for contempt, the proceedings are those for civil contempt set out in this Article. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

This section makes clear that all of the existing references to "as for contempt" in the General Statutes should be interpreted to call for the procedures provided in this Article for civil contempt.

Legal Periodicals. — For note on enforcement of separation agreements by specific performance, see 16 Wake Forest L. Rev. 117 (1980).

CASE NOTES

Cited in Sharpe v. Nobles, 127 N.C. App. 705, 493 S.E.2d 288 (1997); McKillop v. Onslow County, 139 N.C. App. 53, 532 S.E.2d 594, 2000 N.C. App. LEXIS 808 (2000).

§§ 5A-26 through 5A-30: Reserved for future codification purposes.

Article 3.

Contempt by Juveniles.

§ 5A-31. Contempt by a juvenile.

(a) Each of the following, when done by an unemancipated minor who (i) is at least six years of age, (ii) is not yet 16 years of age, and (iii) has not been convicted of any crime in superior court, is contempt by a juvenile:

(1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.

(2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.

(3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

(4) Willful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, willful refusal to answer any legal and proper question when the refusal is not legally justified.

(5) Willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court.

(6) Willful refusal to testify or produce other information upon the order of a judge acting pursuant to Article 61 of Chapter 15A of the General Statutes, Granting of Immunity to Witnesses.

(7) Willful communication with a juror in an improper attempt to influence the juror's deliberations.

(8) Any other act or omission specified in another Chapter of the General Statutes as grounds for criminal contempt.

(b) Contempt by a juvenile is direct contempt by a juvenile when each of the following conditions is met:

(1) The act is committed within the sight or hearing of a presiding judicial official.

(2) The act is committed in, or in the immediate proximity to, the room where proceedings are being held before the court.

(3) The act is likely to interrupt or interfere with matters then before the court.

(c) Contempt by a juvenile that is not direct contempt by a juvenile is indirect contempt by a juvenile. (2007-168, s. 1.)

Editor's Note. — Session Laws 2007-168, s. 8, makes this article effective December 1, 2007, and applicable to acts occurring or offenses committed on or after that date.

§ 5A-32. Direct contempt by a juvenile.

(a) A presiding judicial official may summarily impose measures in response to direct contempt by a juvenile when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt. Before imposing measures summarily, the judicial official shall do all of the following:

(1) Give the juvenile summary notice of the contempt allegation and a summary opportunity to respond.

(2) Appoint an attorney to represent the juvenile and allow time for the juvenile and attorney to confer.

(3) Find facts supporting the summary imposition of measures in response to contempt by a juvenile. The facts shall be established beyond a reasonable doubt.

(b) When a judicial official chooses not to proceed summarily, the official may enter an order appointing counsel for the juvenile and directing the juvenile to appear before a judge in a juvenile proceeding at a reasonable time specified in the order and show cause why the juvenile should not be held in contempt. A copy of the order shall be furnished to the juvenile and to the juvenile's attorney. If the direct contempt by a juvenile is based on acts before a judge that so involve the judge that the judge's objectivity may reasonably be questioned, the order shall be returned before a different judge presiding in juvenile court.

(c) After a determination is made pursuant to subsection (a) or (b) of this section that a juvenile has committed direct contempt, the court may order any or all of the following:

(1) That the juvenile be detained in a juvenile detention facility for up to five days.

(2) That the juvenile perform up to 30 hours of supervised community service as arranged by a juvenile court counselor.

(3) That the juvenile be required to undergo any evaluation necessary for the court to determine the needs of the juvenile.

The court shall not impose any of these sanctions without finding first that the juvenile's act or omission was willfully contemptuous or that the act or omission was preceded by a clear warning by the court that the conduct is improper.

(d) A judicial official who finds a juvenile in direct contempt may at any time terminate or reduce a sanction of detention or eliminate or reduce the number of hours of community service ordered if warranted by the juvenile's conduct and the ends of justice.

(e) A judicial official may orally order that a juvenile the official is charging with direct contempt be taken into custody and restrained to the extent necessary to assure the juvenile's presence for summary proceedings or notice of plenary proceedings.

(f) The clerk shall place a copy of any order or other paper issued pursuant to this section in the juvenile's juvenile file, if one exists, or in a new juvenile file.

(g) Appeal from an order finding a juvenile in direct contempt is to the Court of Appeals. (2007-168, s. 1.)

§ 5A-33. Indirect contempt by a juvenile.

Indirect contempt by a juvenile may be adjudged and sanctioned only pursuant to the procedures in Subchapter II of Chapter 7B of the General Statutes. (2007-168, s. 1.)

§ 5A-34. When minor can be in contempt.

(a) No act or omission by a minor younger than six years of age constitutes contempt.

(b) The provisions of Article 1 and Article 2 of this Chapter apply to acts or omissions by a minor who:

(1) Is 16 years of age or older;

(2) Is married or otherwise emancipated; or

(3) Before the act or omission, was convicted in superior court of any criminal offense. (2007-168, s. 1.)

Chapter 6.

Liability for Court Costs.

Article 1.

Generally.

Sec.
6-1. Items allowed as costs.
6-2. [Repealed.]
6-3. Sureties on prosecution bonds liable for costs.
6-4. Execution for unpaid costs; bill of costs to be attached.
6-5, 6-6. [Repealed.]
6-7. Clerk to enter costs in case file.
6-8 through 6-12. [Repealed.]

Article 2.

When State Liable for Costs.

6-13. Civil actions by the State; joinder of private party.
6-14. Civil action by and against State officers.
6-15. Actions by State for private persons, etc.
6-16. [Repealed.]
6-17. Costs of State on appeals to federal courts.
6-17.1. Costs and expenses of State in connection with federal litigation arising out of State cases.

Article 3.

Civil Actions and Proceedings.

6-18. When costs allowed as of course to plaintiff.
6-19. When costs allowed as of course to defendant.
6-19.1. Attorney's fees to parties appealing or defending against agency decision.
6-19.2. [Repealed.]
6-20. Costs allowed or not, in discretion of court.
6-21. Costs allowed either party or apportioned in discretion of court.
6-21.1. Allowance of counsel fees as part of costs in certain cases.
6-21.2. Attorneys' fees in notes, etc., in addition to interest.
6-21.3. Remedies for returned check.
6-21.4. Allowance of counsel fees and costs in certain cases involving principals or teachers.
6-21.5. Attorney's fees in nonjusticiable cases.
6-22. Petitioner to pay costs in certain cases.
6-23. Defendant unreasonably defending after notice of no personal claim to pay costs.
6-24. Suits by an indigent; payment of costs by an indigent.
Sec.
6-25. Party seeking recovery on usurious contracts; no costs.
6-26. Costs in special proceedings.
6-27. [Repealed.]
6-28. Costs of laying off homestead and exemption.
6-29. Costs of reassessment of homestead.
6-30. Costs against infant plaintiff; guardian responsible.
6-31. Costs where executor, administrator, trustee of express trust, or person authorized by statute a party.
6-32. Costs against assignee after action brought.

Article 4.

Costs on Appeal.

6-33. Costs on appeal generally.
6-34, 6-35. [Repealed.]

Article 5.

Liability of Counties in Criminal Actions.

6-36 through 6-39. [Repealed.]
6-40. Liability of counties, where trial removed from one county to another.
6-41 through 6-44. [Repealed.]

Article 6.

Liability of Defendant in Criminal Actions.

6-45, 6-46. [Repealed.]
6-47. Judgment confessed; bond given to secure fine and costs.
6-48. Arrest for nonpayment of fine and costs.

Article 7.

Liability of Prosecuting Witness for Costs.

6-49. Prosecuting witness liable for costs in certain cases; court determines prosecuting witness.
6-50. Imprisonment of prosecuting witness for willful nonpayment of costs if prosecution frivolous.

Article 8.

Fees of Witnesses.

6-51. Not entitled to fees in advance.
6-52. [Repealed.]
6-53. Witness to prove attendance; action for fees.
6-54 through 6-59. [Repealed.]
6-60. No more than two witnesses may be

Sec.
subpoenaed to prove single material fact; liability for fees of such witnesses; one fee for day's attendance.
6-61. [Repealed.]
6-62. District attorney to announce discharge of State's witnesses.
Sec.
6-63. [Repealed.]

Article 9.

Criminal Costs Before Justices, Mayors, County or Recorders' Courts.

6-64, 6-65. [Repealed.]

ARTICLE 1.

Generally.

§ 6-1. Items allowed as costs.

To the party for whom judgment is given, costs shall be allowed as provided in Chapter 7A and this Chapter. (Code, s. 528; Rev., s. 1249; C.S., s. 1225; 1955, c. 922; 1971, c. 269, s. 1.)

Cross References. — As to prosecution bonds for costs, see G.S. 1-109 et seq. As to partial recovery, see G.S. 6-18. As to fees of witnesses, see G.S. 6-51 et seq.

Legal Periodicals. — For article, "The Legal Theory of Attorney Fee Shifting: A Critical Overview," see 1982 Duke L.J. 651.

For article, "Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance," see 32 Wake Forest L. Rev. 397 (1997).

CASE NOTES

- I. General Consideration.
- II. Particular Costs.
  - A. Attorneys' Fees.
  - B. Witness Fees.
  - C. Other Costs.

I. GENERAL CONSIDERATION.

For discussion of costs generally, see State v. Massey, 104 N.C. 877, 10 S.E. 608 (1889).

Jurisdiction of Court to Make Award. — Because a successor judge lacked jurisdiction to overrule a prior judge's denial of summary judgment and to award summary judgment to plaintiffs on their second claim for relief, a valid judgment was not awarded to the plaintiffs so that they were not to be considered the prevailing parties; thus, there was not a statutory basis for the award of costs to the plaintiffs. Cail v. Cerwin, — N.C. App. —, 648 S.E.2d 510, 2007 N.C. App. LEXIS 1684 (2007).

Costs Follow the Judgment. — In general this section states the rule that costs follow the judgment, a rule which is founded on policy and natural justice, designed to prevent the unsuccessful litigant from escaping the consequence ensuing from the unfavorable termination of a suit, and which, to a great extent, acts as deterrent to the prosecution or appeal of promiscuous and frivolous litigation. Criminal actions and civil suits alike are controlled by the principle. In State v. Horne, 119 N.C. 853, 26 S.E. 36 (1896), it is said: "There is no exception in State cases to the rule prevailing in civil cases that the costs follow the result of the final judgment." The true and only test of liability for costs depends upon the nature of the final judgment, and the party cast in the suit is the one upon whom the costs must fall. Kincaid v. Graham, 92 N.C. 154 (1885); Williams v. Hughes, 139 N.C. 17, 51 S.E. 790 (1905); Smith v. Cashie & Cowan R.R. & Lumber Co., 148 N.C. 334, 62 S.E. 416 (1908); Kinston Cotton Mills v. Rocky Mount Hosiery Co., 154 N.C. 462, 70 S.E. 910 (1911); Ritchie v. Ritchie, 192 N.C. 538, 135 S.E. 458 (1926).

This basic rule of costs is underlying throughout and apparent from the other provisions of this chapter, and, as stated in Costin v. Baxter, 29 N.C. 111 (1846), "in no instance found in the books has the losing party recovered his costs or any part of them."

Trial judges are authorized to tax court costs, and if the court misused its authority in taxing costs against pauper plaintiff, that error was waived by her failure to appeal therefrom.

Schaffner v. Pantelakos, 98 N.C. App. 399, 391 S.E.2d 41 (1990).

At common law neither party to a civil action could recover costs. Costin v. Baxter, 29 N.C. 111 (1846); State v. Massey, 104 N.C. 877, 10 S.E. 608 (1889); Charwick v. Life Ins. Co., 158 N.C. 380, 74 S.E. 115 (1912); Waldo v. Wilson, 177 N.C. 461, 100 S.E. 182 (1919); City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

And each party paid his own witnesses. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Costs are entirely creatures of legislation, etc, without which they do not exist. Clerk's Office v. Commissioners of Carteret County, 121 N.C. 29, 27 S.E. 1003 (1897).

Today in this State, all costs are given in a court of law by virtue of some statute. Costs, in this State, are entirely creatures of legislation, and without this they do not exist. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

The court's power to tax costs is entirely dependent upon statutory authorization. State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972).

An award of costs is an exercise of statutory authority; if the statute is misinterpreted, the judgment is erroneous. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Plain meaning of G.S. 7A-320, 6-1, and 6-20 precluded a finding that any reasonable and necessary litigation expenses could be taxed as costs against a non-prevailing opposing party; pursuant to North Carolina Supreme Court precedent, the only expenses which could be taxed as costs were those specifically authorized by statute. DOT v. Charlotte Area Manufactured Hous., Inc., 160 N.C. App. 461, 586 S.E.2d 780, 2003 N.C. App. LEXIS 1822 (2003).

Statutes Are Strictly Construed. — Since the right to tax costs did not exist at common law and costs are considered penal in their nature, statutes relating to costs are strictly construed. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Costs May Not Be Adjudged on Mere Equitable or Moral Grounds. — Since costs may be taxed solely on the basis of statutory authority, it follows a fortiori that courts have no power to adjudge costs against anyone on mere equitable or moral grounds. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Parties Are Entitled to Actual Costs Reasonably Incurred and Specifically Authorized. — Parties to whom judgment is given are entitled to recover their actual costs reasonably incurred and specifically authorized by statutes. Such reimbursement is the limit of their entitlement. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Costs and Expenses Unnecessarily Incurred. — Even when allowed by statute, costs and expenses unnecessarily incurred by the prevailing party will not be taxed against the unsuccessful party. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

No Costs in Mistrial. — Trial court had no discretion to award witness expenses to the doctors as a cost from the first malpractice trial which ended in a mistrial. Smith v. Cregan, 178 N.C. App. 519, 632 S.E.2d 206, 2006 N.C. App. LEXIS 1568 (2006).

Applied in In re Cox, 17 N.C. App. 687, 195 S.E.2d 132 (1973); Brady v. Smith, 18 N.C. App. 293, 196 S.E.2d 580 (1973); Miller v. Forsyth Mem'l Hosp., Inc., 173 N.C. App. 385, 618 S.E.2d 838, 2005 N.C. App. LEXIS 2040 (2005).

Cited in Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Town of Chapel Hill v. Fox, 120 N.C. App. 630, 463 S.E.2d 421 (1995); Cosentino v. Weeks, 160 N.C. App. 511, 586 S.E.2d 787, 2003 N.C. App. LEXIS 1830 (2003); Morgan v. Steiner, 173 N.C. App. 577, 619 S.E.2d 516, 2005 N.C. App. LEXIS 2105 (2005).

II. PARTICULAR COSTS.

A. Attorneys' Fees.

In the absence of express statutory authority, attorneys' fees are not allowable as part of the court costs in civil actions. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

In the absence of express statutory authority, attorneys' fees are not allowable. — Pursuant to G.S. 1-294, a trial court did not have jurisdiction to decide the issue of attorney fees after a county and its board of commissioners had filed their notice of appeal from the judgment in favor of a chairman of a county airport authority who had been improperly removed from his position; an exception did not apply, as the award of attorney fees under G.S. 6-1, G.S. 6-20, G.S. 6-19.1, G.S. 7A-314, and G.S. 143-318.16B was based upon the chairman being the prevailing party. McClure v. County of Jackson, — N.C. App. —, 648 S.E.2d 546, 2007 N.C. App. LEXIS 1814 (2007).

The power to make an allowance of attorneys' fees from a fund brought into court is susceptible of great abuse, and should be exercised with jealous caution. With the power of award being limited to items of reasonable attorneys' fees and expenses, so as to exclude compensation or allowance of any kind for the time and effort of the suing taxpayer, thus fixing it so the taxpayer may not capitalize on the suit, there is no real danger of abuse. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

B. Witness Fees.

In General. — The losing party is taxed with the costs of his adversary's witness only if the witness was subpoenaed and examined or tendered. Hobbs v. Atlantic C.L.R.R., 151 N.C. 134, 65 S.E. 755 (1909); Chadwick v. Life Ins. Co., 158 N.C. 380, 74 S.E. 115 (1912); City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972). See also, Porter v. Durham, 79 N.C. 596 (1878); Sitton v. Edward-Eversole Lumber Co., 135 N.C. 540, 47 S.E. 609 (1904).

Witnesses Who Are Not Summoned or Who Are Nonresidents. — There is no provision in our law authorizing the taxation, as costs, of the fees for attendance and mileage of witnesses who have not been summoned, nor of witnesses who have been summoned but who are nonresidents of the State. Stern v. Herren, 101 N.C. 516, 8 S.E. 221 (1888).

Witness Fees Not Allowed and Taxed for Party Testifying in His Own Case. — The general rule is that, unless authorized by express statute provision, witness fees cannot be allowed and taxed for a party to the action. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

In construing this section, it is not necessary to resort to rules of construction. Clearly, the legislature did not contemplate that a party would disburse or become liable to himself for a fee when he testified as a witness for himself in his own case. Neither did it contemplate that a party would pay an officer to subpoena himself as a witness. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

If a successful party is not entitled to have a witness fee for himself taxed against his losing adversary, he is not entitled to have taxed an expert witness fee for himself. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Expert witness fees can be taxed against an adverse party only when the testimony of the witness examined or tendered was or would have been material and competent. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

The testimony of expert civil engineer that his plan for widening street was as good as city's was totally irrelevant to the question of city's right to condemn the property in question. The record disclosed no facts which would justify taxing, as a part of the costs for which the city was liable, an expert witness fee. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Where neither expert witness testified in obedience to a subpoena, the court was without authority to allow either of them an expert fee or to tax the losing party with the amount of the fee as a part of the costs. Couch v. Couch, 18 N.C. App. 108, 196 S.E.2d 64 (1973).

Witnesses Summoned by Both Parties. — A witness summoned by each party to a suit is entitled to compensation from each. Peace v. Person, 5 N.C. 188 (1808).

Expense of Transporting Witnesses. — A provision in an order for removal that movant should pay "costs" of transporting the witnesses of the adverse party was held to mean "expense," since such "costs" are no part of the costs of the action. Nichols v. Goldston, 231 N.C. 581, 58 S.E.2d 348 (1950).

This section does not include expenses for returning defendant to this State from points without the State. State v. Patterson, 224 N.C. 471, 31 S.E.2d 380 (1944).

Effect of Nonsuit. — The costs of the defendant's witnesses who are present when the case is brought for trial, but are not sworn, because the plaintiff takes a nonsuit, are properly taxed against the latter. Henderson v. Williams, 120 N.C. 339, 27 S.E. 30 (1897).

C. Other Costs.

Compensation for Time and Effort Devoted to Litigation. — Parties are not entitled to recover an hourly wage or per diem for the time they expend in attending hearings, or securing evidence or exhibits; a party is not entitled to compensation for the time and effort he devotes to the litigation. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Mileage, Meals and Hotel Bills. — No statute authorizes the inclusion of expenses of parties for mileage, meals and hotel bills expended in securing evidence and attending hearings in court costs. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

The expense of procuring surveys, maps, plans, photographs and documents are not taxable as costs unless there is clear statutory authority therefor or unless they have been ordered by the court. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Nominal Damages Entitling Plaintiff to Costs Not Allowed in Action for Wrongful Death. — Where, in an action for wrongful death, the sole issue is that of damages, and there is no pecuniary loss on which recovery could be based, nominal damages, which would entitle plaintiff to costs, would not be allowed. Armentrout v. Hughes, 247 N.C. 631, 101 S.E.2d 793 (1958).

Where the appellate court allowed improvements claimed in partition proceedings, claimant would not be taxed with the costs of trial in the superior court involving her claim. Jenkins v. Strickland, 214 N.C. 441, 199 S.E. 612 (1938).

Arbitration Fee. — Costs were properly allowed to a successful driver even though the driver's insurer paid all of his costs, as: (1) the judgment was entered for the driver and the costs award did not violate G.S. 6-1; (2) the driver incurred the expenses; (3) the award of an arbitration fee was specifically allowed in

G.S. 7A-305(d)(7); (4) it was not an abuse of discretion under G.S. 6-20 to award the deposition fee; and (5) the preparation time fees of a driver's reconstruct expert were properly allowed. Hoffman v. Oakley, — N.C. App. —, 647 S.E.2d 117, 2007 N.C. App. LEXIS 1628 (2007).

An action upon a contract sounding in damages is one at law, and the costs are taxable under this section, and are not in the discretion of the court as an equity proceeding controlled by G.S. 6-20. Highland Cotton Mills v. Ragan Knitting Co., 194 N.C. 80, 138 S.E. 428 (1927).

§ **6-2:** Repealed by Session Laws 1971, c. 269, s. 15.

§ 6-3. Sureties on prosecution bonds liable for costs.

When an action is brought in any court in which security is given for the prosecution thereof, or when any case is brought up to a court by an appeal or otherwise, in which security for the prosecution of the suit has been given, and judgment is rendered against the plaintiff for the costs of the defendant, the appellate court shall also give judgment against the surety for said costs, and execution may issue jointly against the plaintiff and his surety. (1831, c. 46; R.S., c. 31, s. 133; R.C., c. 31, s. 126; Code, s. 543; Rev., s. 1251; 1913, c. 189, s. 1; C.S., s. 1227.)

Cross References. — As to appeal bonds, see G.S. 1-297. As to use of mortgages in lieu of security for costs, etc., see G.S. 58-74-5.

CASE NOTES

Section Applies in Supreme Court. — This section could not be restricted in its application to appeals from the court of a justice of the peace, for the first sentence of the section would not apply to such a court, as no prosecution bond for costs is given there, but only in the superior court, or in the Supreme Court if an action is brought there against the State, or perhaps in some other cases not cognizable by a justice of the peace. Kenney v. Seaboard Air Line Ry., 166 N.C. 566, 82 S.E. 849 (1914); Grimes v. Andrews, 171 N.C. 367, 88 S.E. 513 (1916), decided prior to abolition of office of justices of the peace.

The words "appellate court," as used by the amendment of this section in 1913, in view of the context could mean only the Supreme Court. Kenney v. Seaboard Air Line Ry., 166 N.C. 566, 82 S.E. 849 (1914).

It Is Not Limited to Cases Where Plaintiff Appeals. — This section is so broadly worded as to apply to all cases where the costs are adjudged for the defendant against the plaintiff, and not simply to those where the plaintiff appeals. Kenney v. Seaboard Air Line Ry., 166 N.C. 566, 82 S.E. 849 (1914).

But it does not apply where the defendant does not gain an entire reversal in the appellate court; where a partial new trial only is awarded, the costs are in the discretion of the appellate court, as provided in G.S. 6-33. Rayburn v. Casualty Co., 142 N.C. 376, 55 S.E. 296 (1906).

Application Where Judgment Is Asked Against Sureties in Quo Warranto. — Where an action is brought to recover fees of an office, and in the same action judgment is asked against the sureties on a bond given in a quo warranto proceeding, the superior court has jurisdiction and judgment may be rendered against the sureties. McCall v. Zachary, 131 N.C. 466, 42 S.E. 903 (1902).

The words "security for the prosecution" mean the prosecution bond. Kenney v. Seaboard Air Line Ry., 166 N.C. 566, 82 S.E. 849 (1914).

Increasing Penalty of Bond. — Where the defendant has been successful on his appeal to the appellate court, and his judgment for costs against the sureties on the prosecution bond of the plaintiff results in making insecure the costs in the superior court, the remedy is by application to increase the penalty of the bond. Kenney v. Seaboard Air Line Ry., 166 N.C. 566, 82 S.E. 849 (1914).

Appeal by Surety. — Though a surety on a prosecution bond is not a party to the action, yet, when he is made a party to a proceeding to tax the costs in a case, he may appeal from the order allowing the motion to retax. Smith v. Arthur, Coffin & Co., 116 N.C. 871, 21 S.E. 696 (1895).

§ 6-4. Execution for unpaid costs; bill of costs to be attached.

When costs are not paid by the party from whom they are due, the clerk of superior court shall issue an execution for the costs, and attach a bill of costs to each execution. The sheriff shall levy the execution as in other cases. (R.C., c. 102, s. 24; Code, s. 3762; Rev., s. 1252; C.S., s. 1228; 1969, c. 44, s. 17; 1971, c. 269, s. 2.)

CASE NOTES

Every execution presupposes a judgment of some sort, and the right given by this section to issue the one implies the existence of the other. Sheppard v. Bland, 87 N.C. 163 (1882).

Order to pay costs. — Trial court's order that an employee pay costs in the first case he brought against an agency was a civil judgment, and the trial court was not authorized to dismiss the employee's second case against the agency for his failure to pay costs ordered in first case; however, the agency's motion to dismiss was well founded, and the trial court's refusal to award sanctions was affirmed. Leverette v. Batts Temp. Servs. , 165 N.C. App. 328, 598 S.E.2d 192, 2004 N.C. App. LEXIS 1174 (2004), cert. denied, 359 N.C. 69, 604 S.E.2d 666 (2004).

As to the difference between including attorney's fees in the costs taxed against a party to a lawsuit and in ordering the payment of attorney's fees, see Smith v. Price, 315 N.C. 523, 340 S.E.2d 408 (1986).

§§ 6-5, 6-6: Repealed by Session Laws 1971, c. 269, s. 15.

§ 6-7. Clerk to enter costs in case file.

The clerk of superior court shall enter in the case file, after judgment, the costs allowed by law. (Code, s. 532; Rev., s. 1255; C.S., s. 1231; 1971, c. 269, s. 3.)

CASE NOTES

Revision by Trial Judge. — The act of the superior court clerk of taxing costs is ministerial and is subject to revision by the trial judge. Leary v. Nantahala Power & Light Co., 76 N.C. App. 165, 332 S.E.2d 703 (1985).

Authority of Assistant Clerk to Tax Cost of Deposition. — An assistant clerk of the superior court had the authority to tax the cost of a deposition against a plaintiff who took a voluntary dismissal of his case before it reached the trial calendar. Thigpen v. Piver, 37 N.C. App. 382, 246 S.E.2d 67, cert. denied, 295 N.C. 653, 248 S.E.2d 257 (1978).

Costs Properly Adjudged After Decision of Appellate Court. — After decision of the appellate court modifying and affirming a judgment of the superior court on appeal from the referee, allowances constituting items of costs may be adjudged as provided by this section. Clark v. Cagle, 226 N.C. 230, 37 S.E.2d 672 (1946).

Referee's Fee as Part of Costs. — In Young v. Connelly, 112 N.C. 646, 17 S.E. 424 (1893), the court cited this section to the following statement: "The referee's fee was a part of the costs. It was necessary for the clerk to tax the costs and insert the amount in the entry of judgment in addition to the sum adjudged by his honor."

Applied in Thigpen v. Piver, 37 N.C. App. 382, 246 S.E.2d 67 (1978).

Cited in Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814 (1984).

§§ 6-8 through 6-12: Repealed by Session Laws 1971, c. 269, s. 15.

Article 2.

When State Liable for Costs.

§ 6-13. Civil actions by the State; joinder of private party.

In all civil actions prosecuted in the name of the State, by an officer duly authorized for that purpose, the State shall be liable for costs in the same cases and to the same extent as private parties. If a private person be joined with the State as plaintiff, he shall be liable in the first instance for the defendant's costs, which shall not be recovered of the State till after execution is issued therefor against such private party and returned unsatisfied. (Code, s. 536; Rev., s. 1259; C.S., s. 1236.)

Legal Periodicals. — For article, "The Legal Theory of Attorney Fee Shifting: A Critical Overview," see 1982 Duke L.J. 651.

CASE NOTES

Constitutionality. — In State ex rel. Blount v. Simmons, 119 N.C. 50, 25 S.E. 789 (1896), it was held that nothing in the Constitution deprived the legislature of power to enact this section.

Judgment May Be Rendered Against State for Costs. — Upon the failure of the litigation, the State is, under this section, liable for the costs of an action authorized by act of the General Assembly and prosecuted in its name by the district attorney, and judgment may be rendered in such action against the State for such costs. State ex rel. Blount v. Simmons, 119 N.C. 50, 25 S.E. 789 (1896).

State's Liability Dependent upon Statute. — The general statutes giving costs do not include the sovereign, and the State is only liable for costs in the event of express statutory provisions. State ex rel. Blount v. Simmons, 120 N.C. 19, 26 S.E. 649 (1897).

Disbarment Proceedings. — Where the proceedings for disbarment of an attorney have not been sustained, the costs are taxable against the State under the provisions of this section, and an order erroneously taxing them against the county in which the matter was tried will be vacated. State ex rel. Committee on Grievances v. Strickland, 201 N.C. 619, 161 S.E. 76 (1931).

Actions to Vacate Oyster-Bed Entry. — Where, in an action by the district attorney in the name of the State to vacate an oyster-bed entry, the plaintiff was nonsuited, it was error to tax the costs against the county, which was not a party to the action. State ex rel. Blount v. Simmons, 118 N.C. 9, 23 S.E. 923 (1896).

Under this section the State is liable for the costs of an action instituted by the district attorney solicitor to vacate an oyster-bed entry. In such case, it seems that the persons making the required affidavit, alleging that the entry is a fraud upon the State, might be held liable as relators if it should appear that the action was for their benefit and at their instance. State ex rel. Blount v. Simmons, 120 N.C. 19, 26 S.E. 649 (1897).

§ 6-14. Civil action by and against State officers.

In all civil actions depending, or which may be instituted, by any of the officers of the State, or which have been or shall be instituted against them, when any such action is brought or defended pursuant to the advice of the Attorney General, and the same is decided against such officers, the cost thereof shall be paid by the State Treasurer upon properly drawn warrants. (1874-75, c. 154; Code, s. 3373; Rev., s. 1260; C.S., s. 1237; 1971, c. 269, s. 4.)

§ 6-15. Actions by State for private persons, etc.

In an action prosecuted in the name of the State for the recovery of money or property, or to establish a right or claim for the benefit of any county, city, town, village, corporation or person, costs awarded against the plaintiff shall be a charge against the party for whose benefit the action was prosecuted, and not against the State. (Code, s. 537; Rev., s. 1261; C.S., s. 1238.)

§ 6-16: Repealed by Session Laws 1971, c. 269, s. 15.

§ 6-17. Costs of State on appeals to federal courts.

In all cases, whether civil or criminal, to which the State of North Carolina is a party, and which are carried from the courts of this State, or from the district court of the United States, by appeal or writ of error, to the United States circuit court of appeals, or to the Supreme Court of the United States, and the State is adjudged to pay the costs, it is the duty of the Attorney General to certify the amount of such costs to the Treasurer, who shall pay them upon properly drawn warrants. (1871-2, c. 26; Code, s. 538; Rev., s. 1263; C.S., s. 1240; 1971, c. 269, s. 5.)

§ 6-17.1. Costs and expenses of State in connection with federal litigation arising out of State cases.

In all cases of litigation in any court of the United States arising out of or by reason of any cases pending or tried in any court of the State of North Carolina, or in any action originally instituted in any court of the United States, the expenses for State court costs, securing of court records and transcripts, and other necessary expenses in representing the State of North Carolina or any of its departments, officials or agencies shall be allocated from and paid out of the State Contingency and Emergency Fund. (1963, c. 844.)

Article 3.

Civil Actions and Proceedings.

Legal Periodicals. — For article, "Awarding Attorney Fees Against Adversaries: Introducing the Problem," see 1986 Duke L.J. 435.

§ 6-18. When costs allowed as of course to plaintiff.

Costs shall be allowed of course to the plaintiff, upon a recovery, in the following cases:

(1) In an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial.

(2) In an action to recover the possession of personal property.

(3) In an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction, if the plaintiff recovers less than fifty dollars ($50.00) damages, he shall recover no more costs than damages.

(4) When several actions are brought on one bond, recognizance, promissory note, bill of exchange or instrument in writing, or in any other

case, for the same cause of action against several parties who might have been joined as defendants in the same action, no costs other than disbursements shall be allowed to the plaintiff in more than one of such actions, which shall be at his election, provided the party or parties proceeded against in such other action or actions were within the State and not secreted at the commencement of the previous action or actions.

(5) In an action brought under Article 1 of Chapter 19A. (R.C., c. 31, s. 78; 1874-5, c. 119; Code, s. 525; Rev., s. 1264; C.S., s. 1241; 1971, c. 269, s. 6; 1979, c. 808, s. 5.)

Legal Periodicals. — For article, "The Legal Theory of Attorney Fee Shifting: A Critical Overview," see 1982 Duke L.J. 651.

For article, "Awarding Attorney Fees Against Adversaries: Introducing the Problem," see 1986 Duke L.J. 435.

CASE NOTES

I. General Consideration.
II. Actions for Recovery of Real Property, etc.
III. Recovery of Personalty.
IV. Costs When Damages Are Less than $50.00.

I. GENERAL CONSIDERATION.

In North Carolina costs are taxed on the basis of statutory authority. Estate of Smith ex rel. Smith v. Underwood, 127 N.C. App. 1, 487 S.E.2d 807 (1997), cert. denied, 347 N.C. 398, 494 S.E.2d 410 (1997).

G.S. 6-20 followed G.S. 6-18 and G.S. 6-19, which required an award of costs to one of the parties in certain types of actions, and the costs to be awarded under G.S. 6-18 and G.S. 6-19 were the costs specifically delineated in G.S. 7A-305(d). DOT v. Charlotte Area Manufactured Hous., Inc., 160 N.C. App. 461, 586 S.E.2d 780, 2003 N.C. App. LEXIS 1822 (2003).

G.S. 6-20 Governs Where This Section Inapplicable. — Where the action is not of such a nature that it falls within any of the subdivisions of this section or of the following section, it comes within the terms of and is included by G.S. 6-20. Parton v. Boyd, 104 N.C. 422, 10 S.E. 490 (1889); Yates v. Yates, 170 N.C. 533, 87 S.E. 317 (1915).

Negligence cases were not listed among the types of actions in which costs had to be awarded to a prevailing party pursuant to either G.S. 6-18 or G.S. 6-19; therefore, the trial court's costs ruling was governed by G.S. 6-20, and costs could be allowed or not, in the discretion of the court. Smith v. Cregan, 178 N.C. App. 519, 632 S.E.2d 206, 2006 N.C. App. LEXIS 1568 (2006).

Section Inapplicable to Contempt Proceeding. — Although labeled "civil" contempt, a proceeding as for contempt is by no means a civil action or proceeding to which this section or G.S. 6-20, allowing costs in discretion of court, would apply. United Artists Records, Inc. v. Eastern Tape Corp., 18 N.C. App. 183, 196 S.E.2d 598, cert. denied, 283 N.C. 666, 197 S.E.2d 880 (1973); Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

A North Carolina court has no authority to award damages in the form of costs to a private party in a contempt proceeding. Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

When the trial court found plaintiff in contempt under G.S. 5A-21, it erred in awarding attorney fees to defendant as sanctions; such an award was not authorized by statute, as G.S. 6-18 and G.S. 6-20, governing costs, did not apply to a contempt proceeding. Sea Ranch II Owners Ass'n v. Sea Ranch II, Inc., — N.C. App. —, 636 S.E.2d 307, 2006 N.C. App. LEXIS 2246 (2006).

But Attorney's Fees Permissible. — Although neither the provisions of this section or G.S. 6-20 are applicable to an action for civil contempt a trial court may properly award attorney's fees to a plaintiff who prevails in a civil contempt action. The Appellate Court has approved the allowance of attorney's fees in contempt actions where such fees were expressly authorized by statute as in the case of child support. Smith v. Smith, 121 N.C. App. 334, 465 S.E.2d 52 (1996).

Meaning of Recovery. — The recovery referred to in this section is a final determination upon the merits, and success in the appellate court is by no means equivalent to a recovery in the court below. Williams v. Hughes, 139 N.C. 17, 51 S.E. 790 (1905).

A recovery within the meaning of the section cannot be predicated upon anything coming to the plaintiff which was not in the contemplation of the plaintiff when he filed his complaint, and especially of a thing to which he virtually disclaimed any right or title. Patterson v. Ramsey, 136 N.C. 561, 48 S.E. 811 (1904).

In order to determine who should pay the costs, the general result must be considered and inquiry made as to who has, in the view of the law, succeeded in the action. Patterson v. Ramsey, 136 N.C. 561, 48 S.E. 811 (1904).

Partial Recovery. — There is no provision that limits the allowance of costs in favor of the plaintiff in case of only a partial recovery. The language of the statute as to them is comprehensive and without exceptive provision. In Wall v. Covington, 76 N.C. 150 (1877), it was held that no part of the costs in such actions can be taxed against the party recovering. And in Horton v. Horne, 99 N.C. 219, 5 S.E. 927 (1888), it was decided in an action to recover personal property, that if the plaintiff establishes his title to only a portion of the property delivered to him under claim and delivery proceedings, he will be entitled to costs. Wooten v. Walters, 110 N.C. 251, 14 S.E. 734 (1892); Ferrabow v. Green, 110 N.C. 414, 14 S.E. 973 (1892); Kinston Cotton Mills v. Rocky Mount Hosiery Co., 154 N.C. 462, 70 S.E. 910 (1911).

Action by Executor. — Where the action involves the question as to the recovery of a portion of the estate of a deceased person, and judgment is rendered in favor of the executor, the plaintiff, he is entitled to a judgment for costs under this section. White v. Mitchell, 196 N.C. 89, 144 S.E. 526 (1928).

Applied in Wolfe v. Montgomery Ward & Co., 211 N.C. 295, 189 S.E. 772 (1937); Williams v. Boylan-Pearce, Inc., 69 N.C. App. 315, 317 S.E.2d 17 (1984); Delta Envtl. Consultants of N.C., Inc. v. Wysong & Miles Co., 132 N.C. App. 160, 510 S.E.2d 690 (1999); Coffman v. Roberson, 153 N.C. App. 618, 571 S.E.2d 255 (2002), cert. denied, 356 N.C. 668, 577 S.E.2d 111 (2003).

Cited in Dorsey v. Dorsey, 53 N.C. App. 622, 281 S.E.2d 429 (1981); Alsup v. Pitman, 98 N.C. App. 389, 390 S.E.2d 750 (1990); Powers v. Powers, 103 N.C. App. 697, 407 S.E.2d 269 (1991); Smith v. McDonald, 767 F. Supp. 732 (M.D.N.C. 1991); Sara Lee Corp. v. Carter, 129 N.C. App. 464, 500 S.E.2d 732 (1998), rev'd on other grounds, 351 N.C. 27, 519 S.E.2d 308 (1999); Lewis v. Setty, 140 N.C. App. 536, 537 S.E.2d 505, 2000 N.C. App. LEXIS 1216 (2000); Cosentino v. Weeks, 160 N.C. App. 511, 586 S.E.2d 787, 2003 N.C. App. LEXIS 1830 (2003); Handex of the Carolinas, Inc. v. County of Haywood, 168 N.C. App. 1, 607 S.E.2d 25, 2005 N.C. App. LEXIS 148 (2005); Morgan v. Steiner, 173 N.C. App. 577, 619 S.E.2d 516, 2005 N.C. App. LEXIS 2105 (2005).

II. ACTIONS FOR RECOVERY OF REAL PROPERTY, ETC.

Section States Common-Law Rule. — Subdivision (1) of the section is in affirmance of the principle established before its enactment. Moore v. Angel, 116 N.C. 843, 21 S.E. 699 (1895).

Construed with G.S. 6-19. — Costs were properly awarded to the animal shelter pursuant to G.S. 6-19, as G.S. 6-19 permitted the shelter, as a defendant, to recover costs in the same way as a plaintiff could pursuant to this section in an action for the recovery of real property. County of Moore v. Humane Soc'y of Moore County, Inc., 157 N.C. App. 293, 578 S.E.2d 682, 2003 N.C. App. LEXIS 644 (2003).

Construed with G.S. 6-21. — This section, allowing plaintiffs' costs as of course, upon recovery, in an action involving title to real estate, and G.S. 6-21, providing apportionment of costs in a special proceeding for the division or sale of realty or personalty are related sections, pertain to the same subject matter, and must be construed in pari materia. Bailey v. Hayman, 222 N.C. 58, 22 S.E.2d 6 (1942).

Actions to Recover Both Realty and Personalty. — Under this section, the plaintiff in an action to recover both real and personal property is entitled to recover costs, even if he recovers only the real property. Wooten v. Walters, 110 N.C. 251, 14 S.E. 734 (1892).

Jurisdiction for Award Under G.S. 50-20(i). — Trial court was not without jurisdiction at the time it entered its G.S. 50-20(i) order, and therefore the court had jurisdiction to award attorney's fees under that section, but not under subsection (2) of this section. McKissick v. McKissick, 129 N.C. App. 252, 497 S.E.2d 711 (1998).

Partial Recovery. — Where the plaintiff is adjudged entitled to a part of the land sued for, whether such land is a portion of one tract or is one of several tracts for which the action is brought, then the plaintiff is exonerated as to costs and no part thereof should be found against him. Ferrabow v. Green, 110 N.C. 414, 14 S.E. 973 (1892); Moore v. Angel, 116 N.C. 843, 21 S.E. 699 (1895); Field v. Wheeler, 120 N.C. 264, 26 S.E. 812 (1897); Vanderbilt v. Johnson, 141 N.C. 370, 54 S.E. 298 (1906). See Staley v. Staley, 174 N.C. 640, 94 S.E. 407 (1917).

Where the plaintiff has been required to introduce evidence of his title to the whole of the locus in quo, and then the defendant consents that the court charge the jury to find for the plaintiff if they believe the evidence as to a certain part, and the issue is found for the defendant as to the remaining land, the costs of the action are properly awarded against the defendant. Swain v. Clemmons, 175 N.C. 240, 95 S.E. 489 (1918).

When There Is More Than One Issue. — In an action of trespass to real property, where the plaintiff's title and the fact of trespass are both put in issue by the defendant's answer, and the jury find the issue as to the title in favor of the plaintiff, and the issue as to the trespass in favor of the defendant, the defendant is entitled to judgment for costs. To entitle the plaintiff to recover costs, both issues must be found in his favor. Murray v. Spencer, 92 N.C. 264 (1885).

Boundary Dispute. — Where, in an action in ejectment and for damages for cutting of timber, defendant files an answer defending plaintiffs' title to the land in dispute, and verdict is entered in favor of plaintiffs, plaintiffs, as a matter of law, are not liable for any of the costs, notwithstanding that upon the trial each party admitted the title of the other within the boundaries of their respective grants, and the only controversy was as to the location of the boundary between their respective grants. Cody v. England, 221 N.C. 40, 19 S.E.2d 10 (1942).

Necessity for Disclaimer in Order to Avoid Costs. — A defendant in an action concerning land should enter a disclaimer if he does not claim the land in controversy, or does not intend to litigate with the plaintiff, in order to escape the payment of costs. Swain v. Clemmons, 175 N.C. 240, 95 S.E. 489 (1918).

Where, in an action in trespass, the defendant failed to disclaim title to all the land declared for by plaintiff, but recovered according to the boundaries set up in his answer, with a greater amount for damages on his counterclaim than was allowed the plaintiff, plaintiff was nevertheless held entitled to costs. Moore v. Angel, 116 N.C. 843, 21 S.E. 699 (1895).

If the defendant disclaims title to all the land declared for, except that for which he proves his right, no issue as to the plaintiff's title will arise, and the findings that the defendant's title, disputed by the plaintiff, is good and that the defendant has sustained greater damages than his adversary, upon both necessarily, perhaps on either, will entitle the defendant to costs. Moore v. Angel, 116 N.C. 843, 21 S.E. 699 (1895).

In ejectment, where the defendant denies the right to possession and denies that the plaintiff holds the title in trust for him, and judgment is rendered that the defendant is entitled to the land upon payment of an amount found due the plaintiff, no part of the cost is taxable against the defendant. Patterson v. Ramsey, 136 N.C. 561, 48 S.E. 811 (1904).

It would seem that in order to escape potential liability for costs the defendant must enter his disclaimer of all the lands declared for, and that a disclaimer of half the locus in quo will not suffice to enable him to escape upon the unfavorable adjudication of the other half. See In re Hurley, 185 N.C. 422, 117 S.E. 345 (1923).

One who successfully maintains an equitable defense against the recovery of land on the bare legal title is entitled to judgment for his costs. Vestal v. Sloan, 83 N.C. 555 (1880).

Liability of Intervener. — Where the defendant intervenes in an action to recover real property, files a joint answer with his codefendant, and makes a joint defense, the plaintiff is entitled to the costs. Having joined in the controversy, and made common cause in the defense, interveners must abide the result. Spruill v. Arrington, 109 N.C. 192, 13 S.E. 779 (1891). See Willis v. Coleburn, 169 N.C. 670, 86 S.E. 596 (1915).

III. RECOVERY OF PERSONALTY.

Partial Recovery. — There is no exception to the partial recovery rule when the action is for the recovery of personalty, and when the plaintiff establishes title to any part of the property sued for, he is entitled to judgment for costs. Wooten v. Walters, 110 N.C. 251, 14 S.E. 734 (1892); Field v. Wheeler, 120 N.C. 264, 26 S.E. 812 (1897). This is not the case where some of the defendants recover judgment, in which case, of course, they recover costs. Phillips v. Little, 147 N.C. 282, 61 S.E. 49 (1908).

As an example of the application of this rule to claims for personal property, it has been held that the plaintiff on being adjudged entitled to only a portion of a crop in a suit for claim and delivery was entitled to costs. Field v. Wheeler, 120 N.C. 264, 26 S.E. 812 (1897).

Claim and Delivery. — Judgment in an action of claim and delivery carries all costs under this section. Rawlings v. Neal, 126 N.C. 271, 35 S.E. 597 (1900).

Enforcement of Lien. — Where controversy depended upon right of mechanic to repossess an automobile that he repaired, in order that he could enforce his lien thereon, and the jury found in the plaintiff's favor upon determinative issues, but in the defendant's favor upon an issue of fraud, the question of taxing the cost did not depend upon the finding of the jury on the issue of the defendant's fraud, and the plaintiff, having established his right to the possession, was entitled to recover the costs under this section. Maxton Auto Co. v. Rudd, 176 N.C. 497, 97 S.E. 477 (1918).

IV. COSTS WHEN DAMAGES ARE LESS THAN $50.00.

In General. — In a civil action, if the provocation is great, the jury will usually see fit to return nominal or small damages, and if the amount is less than $50.00 the plaintiff, under this section, recovers no more costs than damages. Palmer v. Winston-Salem Ry. & Elec. Co., 131 N.C. 250, 42 S.E. 604 (1902).

For case in which the recovery for slander was less than $50.00, see Smith v. Myers, 188 N.C. 551, 125 S.E. 178 (1924).

For case in which one dollar damages were sustained by the erection of a mill, see Bridgers v. Purcell, 23 N.C. 232 (1840).

The former rule as to slander is stated in Coates v. Stephenson, 52 N.C. 124 (1859), where it was held that the costs of the plaintiff, under R.C., c. 31, G.S. 78, could not be taxed against the defendant.

Where the plaintiff is entitled to nominal damages, such damages will carry with it the costs under this section. Wilson v. Forbes, 13 N.C. 30 (1828); Britton v. Ruffin, 123 N.C. 67, 31 S.E. 271 (1898).

Instructed Verdict for One Penny Damages and One Penny Costs. — For a case where an instructed verdict for one penny damages and one penny costs, under this section, was held erroneous because actual and not nominal damage was shown, see Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

§ 6-19. When costs allowed as of course to defendant.

Costs shall be allowed as of course to the defendant, in the actions mentioned in G.S. 6-18 unless the plaintiff be entitled to costs therein. In all actions where there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor or any of them. (C.C.P., s. 277; Code, ss. 526, 527; Rev., s. 1266; C.S., s. 1242; 2007-212, s. 1.)

Effect of Amendments. — Session Laws 2007-212, s. 1, effective August 1, 2007, and applicable to all motions for costs filed on or after that date, substituted "G.S. 6-18" for "the preceding section" in the first sentence.

Legal Periodicals. — For article, "The Legal Theory of Attorney Fee Shifting: A Critical Overview," see 1982 Duke L.J. 651.

CASE NOTES

Where plaintiff fails to recover in an action involving title to real property in which a court survey is ordered, the clerk is without authority to tax the surveyor's fees in the bill of costs, but on appeal from the clerk's order, the superior court, while properly affirming the clerk's order, should pass upon the motion for taxing such fees as a part of the costs as a matter of right. Ipock v. Miller, 245 N.C. 585, 96 S.E.2d 729 (1957). See § 38-4 and note.

Costs were properly awarded to the animal shelter pursuant to this section, as this section permitted the shelter, as a defendant, to recover costs in the same way as a plaintiff could pursuant to G.S. 6-18 in an action for the recovery of real property. County of Moore v. Humane Soc'y of Moore County, Inc., 157 N.C. App. 293, 578 S.E.2d 682, 2003 N.C. App. LEXIS 644 (2003).

Not Applicable to Negligence Actions. — Negligence cases were not listed among the types of actions in which costs had to be awarded to a prevailing party pursuant to either G.S. 6-18 or G.S. 6-19; therefore, the trial court's costs ruling was governed by G.S. 6-20, and costs could be allowed or not, in the discretion of the court. Smith v. Cregan, 178 N.C. App. 519, 632 S.E.2d 206, 2006 N.C. App. LEXIS 1568 (2006).

Where the plaintiff fails in an action upon a covenant, the defendant recovers costs under this section. Britton v. Ruffin, 123 N.C. 67, 31 S.E. 271 (1898).

Unsuccessful Action to Set Aside Deed. — Costs were properly awarded to the grantee in a deed in an unsuccessful action to set aside such deed. D. B. Brisco & Co. v. Norris, 112 N.C. 671, 16 S.E. 850 (1893).

In an action for ejectment, this section was applicable, and therefore, the list of costs recoverable by a prevailing party in a civil action under G.S. 7A-305 was controlling. Minton v. Lowe's Food Stores, 121 N.C. App. 675, 468 S.E.2d 513 (1996).

In North Carolina costs are taxed on the basis of statutory authority. Estate of Smith ex rel. Smith v. Underwood, 127 N.C. App. 1, 487 S.E.2d 807 (1997), cert. denied, 347 N.C. 398, 494 S.E.2d 410 (1997).

G.S. 6-20 followed G.S. 6-18 and G.S. 6-19, which required an award of costs to one of the parties in certain types of actions, and the costs to be awarded under G.S. 6-18 and G.S. 6-19 were the costs specifically delineated in G.S. 7A-305(d). DOT v. Charlotte Area Manufactured Hous., Inc., 160 N.C. App. 461, 586 S.E.2d 780, 2003 N.C. App. LEXIS 1822 (2003).

Taxing Costs. — Trial court did not err in taxing costs of defendant bakery company and its defendant driver to the mother and minor son personal injury plaintiffs, as the bakery company and its driver were found not liable to the mother and minor son and the decision to tax the costs was made pursuant to a motion under G.S. 6-19, not this section. Sterling v. Gil Soucy Trucking, Ltd., 146 N.C. App. 173, 552 S.E.2d 674, 2001 N.C. App. LEXIS 868 (2001).

Applied in Delta Envtl. Consultants of N.C., Inc. v. Wysong & Miles Co., 132 N.C. App. 160, 510 S.E.2d 690 (1999).

Cited in Gold v. Kiker, 218 N.C. 204, 10 S.E.2d 650 (1940); Smith v. McDonald, 767 F. Supp. 732 (M.D.N.C. 1991); Sara Lee Corp. v. Carter, 129 N.C. App. 464, 500 S.E.2d 732 (1998), rev'd on other grounds, 351 N.C. 27, 519 S.E.2d 308 (1999); Lewis v. Setty, 140 N.C. App. 536, 537 S.E.2d 505, 2000 N.C. App. LEXIS 1216 (2000); Cosentino v. Weeks, 160 N.C. App. 511, 586 S.E.2d 787, 2003 N.C. App. LEXIS 1830 (2003); Handex of the Carolinas, Inc. v. County of Haywood, 168 N.C. App. 1, 607 S.E.2d 25, 2005 N.C. App. LEXIS 148 (2005); Morgan v. Steiner, 173 N.C. App. 577, 619 S.E.2d 516, 2005 N.C. App. LEXIS 2105 (2005).

§ 6-19.1. Attorney's fees to parties appealing or defending against agency decision.

In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action pursuant to G.S. 150B-43 or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if:

(1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and

(2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust. The party shall petition for the attorney's fees within 30 days following final disposition of the case. The petition shall be supported by an affidavit setting forth the basis for the request.

Nothing in this section shall be deemed to authorize the assessment of attorney's fees for the administrative review portion of the case in contested cases arising under Article 9 of Chapter 131E of the General Statutes.

Nothing in this section grants permission to bring an action against an agency otherwise immune from suit or gives a right to bring an action to a party who otherwise lacks standing to bring the action.

Any attorney's fees assessed against an agency under this section shall be charged against the operating expenses of the agency and shall not be reimbursed from any other source. (1983, c. 918, s. 1; 1987, c. 827, s. 1; 2000-190, s. 1.)

CASE NOTES

The legislature, in enacting this section, obviously sought to curb unwarranted, ill-supported suits initiated by State agencies. Crowell Constructors, Inc. v. State, 342 N.C. 838, 467 S.E.2d 675 (1996).

State Tort Claim. — Counterclaim brought by the State in the content of a tort claim is the equivalent to "any civil action brought by the State pursuant to any other appropriate provisions of law" as intended under G.S. 6-19.1 and, therefore, the North Carolina Industrial Commission is justified to award attorney's fees under § 6-19.1. Sprinkle v. N.C. Wildlife Res. Comm'n, 165 N.C. App. 721, 600 S.E.2d 473, 2004 N.C. App. LEXIS 1513 (2004).

Administrative Hearings. — Pursuant to this section, an administrative hearing under G.S. 150B-22 et seq. is not a civil action brought pursuant to G.S. 150B-43. Walker v. North Carolina Coastal Resources Comm'n, 124 N.C. App. 1, 476 S.E.2d 138 (1996), cert. denied, 346 N.C. 185, 486 S.E.2d 220 (1997).

Award to petitioners for counsel fees and costs applicable to the "administrative review" portion of the case was reversed; award of counsel fees and costs for the "judicial review" portion of the case was affirmed. Walker v. North Carolina Coastal Resources Comm'n, 124 N.C. App. 1, 476 S.E.2d 138 (1996), cert. denied, 346 N.C. 185, 486 S.E.2d 220 (1997).

G.S. 6-19.1 authorizes a superior court to award fees to the employee of a county Department of Social Services who has prevailed under the State Personnel Act, G.S. 126-1 et seq.; therefore, a trial court was authorized to award fees for representation of a plaintiff during the administrative proceedings contesting her termination while on medical leave, which was adjudged without cause and wrongful. Early v. County of Durham Dep't of Soc. Servs., 172 N.C. App. 344, 616 S.E.2d 553, 2005 N.C. App. LEXIS 1788 (2005).

Services Performed Prior to Judicial Review. — This section allows for an award of attorney's fees in State Personnel Commission cases only for services rendered on judicial review, not for services performed prior to judicial review. Morgan v. North Carolina DOT, 124 N.C. App. 180, 476 S.E.2d 431 (1996).

Motion Timely. — Petitioner's motion for attorney's fees, filed well before final judgment, was timely; therefore, the trial court had jurisdiction to hear the matter. Whiteco Indus., Inc. v. Harrelson, 111 N.C. App. 815, 434 S.E.2d 229 (1993); Whiteco Indus., Inc. v. Harrington, 111 N.C. App. 839, 434 S.E.2d 234 (1993), cert. granted, 335 N.C. 565, 441 S.E.2d 135 (1994).

Motion Untimely. — Trial court lacked jurisdiction to award attorney's fees because an employee did not file his motion within 30 days of the final disposition of his case against the North Carolina Department of Transportation; because a petition is a formal written application to a court requesting judicial action on a certain matter, a request for attorney's fees contained within a complaint's prayer for relief does not constitute a "petition" within the meaning of G.S. 6-19.1(2). Hodge v. N.C. DOT , 161 N.C. App. 726, 589 S.E.2d 737, 2003 N.C. App. LEXIS 2276 (2003), cert. denied, 358 N.C. 234, 595 S.E.2d 151 (2004).

Superior court was time barred under G.S. 6-19.1 from considering the attorney's petition for attorney's fees where the statute required the attorney to petition for fees within the 30-day time frame following final disposition of the underlying action; the attorney did not make his petition for well over a year from that date. McIntyre v. Forsyth County Dep't of Soc. Servs., 162 N.C. App. 94, 589 S.E.2d 745, 2004 N.C. App. LEXIS 52 (2004), cert. denied, 358 N.C. 377, 598 S.E.2d 136 (2004).

Findings of Fact Required. — Although the award of attorney's fees is within the discretion of the trial judge under this section, the trial court must make findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney. North Carolina Dep't of Cors. v. Harding, 120 N.C. App. 451, 462 S.E.2d 671 (1995).

Accurate Calculations Required. — The trial court erred in calculating the attorney's fee which was reasonably found to be one fourth of the present value of the future benefits recovered by his client. Thornburg v. Consolidated Judicial Ret. Sys., 137 N.C. App. 150, 527 S.E.2d 351, 2000 N.C. App. LEXIS 262 (2000).

Jurisdiction of Superior Court. — Where permit holder petitioned the superior court for review of Department of Transportation revocation of permit for highway sign, this gave the superior court jurisdiction to determine the whole case including the taxing of costs including section providing for attorney's fees to be taxed as costs in some instances. Able Outdoor, Inc. v. Harrelson, 341 N.C. 167, 459 S.E.2d 626 (1995).

Substantial Justification. — In order to further the legislature's purpose of reining in wanton, unfounded litigation, the State's action for purposes of this section is measured by the phrase "substantial justification". Thus, the agency is required to demonstrate that its position, at and from the time of its initial action, was rational and legitimate to such degree that a reasonable person could find it satisfactory or justifiable in light of the circumstances then known to the agency. Crowell Constructors, Inc. v. State, 342 N.C. 838, 467 S.E.2d 675 (1996).

Where stockpiles of sand as high as 25 feet tall were placed upon surface soil and 24 years later the sand was covered with new surface soil which grew vegetation, including pine trees, the Department of Environment, Health and Natural Resources (now the Department of Environment and Natural Resources) was not "without substantial justification" in its position that the landowner was engaged in mining by removing the sand. Crowell Constructors, Inc. v. State, 342 N.C. 838, 467 S.E.2d 675 (1996).

To demonstrate that it acted with substantial justification an agency must show that its position, from the time of its initial action, was rational and legitimate such that a reasonable person could find it satisfactory or justifiable in light of the circumstances. North Carolina Div. of Sons of Confederate Veterans v. Faulkner, 131 N.C. App. 775, 509 S.E.2d 207 (1998).

The respondent was without "substantial justification" for denying the petitioner's retirement benefits and the trial court, therefore, reasonably awarded the petitioner attorney's fees pursuant to this section. The respondent accepted the petitioner's contributions after she began to take half year leaves of absence as part of a job sharing agreement and continued to represent to her that she was a full-fledged member of the retirement system until she prepared to collect her benefits at which time the respondent first informed petitioner that she was not a retirement system member although the North Carolina Administrative Code allowed for periods of interrupted employment. Wiebenson v. Board of Tr., 138 N.C. App. 489, 531 S.E.2d 500, 2000 N.C. App. LEXIS 627 (2000).

Plaintiffs Not Entitled to Attorneys' Fees. — Plaintiffs were not entitled to attorneys' fees under G.S. 6-19.1 and 42 U.S.C.S. § 1988, or the private attorney general doctrine as in the absence of express statutory authority, attorneys' fees were not allowable as part of the court costs in civil actions; Bailey v. State, 500 S.E.2d 54 (1998), was distinguishable as: (1) there was no common fund resulting from the litigation; (2) Bailey involved a class action in which the attorneys' fees borne by the class representatives were shared or equally distributed to the class from the recovery; and (3) plaintiffs sought to shift the burden of attorney fees to the State, instead of to a resulting fund. Stephenson v. Bartlett, 177 N.C. App. 239, 628 S.E.2d 442, 2006 N.C. App. LEXIS 870 (2006).

Applied in Tay v. Flaherty, 100 N.C. App. 51, 394 S.E.2d 217 (1990); State ex rel. Envtl. Mgt. Comm'n v. House of Raeford Farms, Inc., 101 N.C. App. 433, 400 S.E.2d 107 (1991); Able Outdoor, Inc. v. Harrelson, 113 N.C. App. 483, 439 S.E.2d 245 (1994).

Cited in In re Magee, 87 N.C. App. 650, 362 S.E.2d 564 (1987); S.E.T.A. UNC-CH, Inc. v. Huffines, 107 N.C. App. 440, 420 S.E.2d 674 (1992); Williams v. North Carolina Dep't of Economic & Community Dev., 119 N.C. App. 535, 458 S.E.2d 750 (1995); North Carolina Dep't of Cors. v. Myers, 120 N.C. App. 437, 462 S.E.2d 824 (1995); H.B.S. Contractors v. Cumberland County Bd. of Educ., 122 N.C. App. 49, 468 S.E.2d 517 (1996); Gordon v. N.C. Dep't of Corr., 173 N.C. App. 22, 618 S.E.2d 280, 2005 N.C. App. LEXIS 1918 (2005).

§ **6-19.2:** Repealed by Session Laws 1995, c. 388, s. 6.

§ 6-20. Costs allowed or not, in discretion of court.

In actions where allowance of costs is not otherwise provided by the General Statutes, costs may be allowed in the discretion of the court. Costs awarded by the court are subject to the limitations on assessable or recoverable costs set forth in G.S. 7A-305(d), unless specifically provided for otherwise in the General Statutes. (Code, s. 527; Rev., s. 1267; C.S., s. 1243; 2007-212, s. 2.)

Cross References. — As to costs where new trial is granted, see G.S. 6-33 and the note thereto.

Editor's Note. — Session Laws 2006-248, ss. 12.1 through 12.5, provide: "12.1. A House of Representatives Task Force on the Recovery of Costs in Civil Cases is established to review and recommend a resolution to the conflict in North Carolina law regarding the recovery of costs in a civil case. Specifically, the Task Force on the Recovery of Costs in Civil Cases shall study the conflict that exists between G.S. 6-20 and G.S. 7A-305, and the appellate cases interpreting those statutes, and recommend revisions to one or both statutes to resolve that conflict.

"12.2. The Speaker of the House of Representatives shall appoint to serve on the Task Force six members of the House of Representatives and three public members: one member of the North Carolina Academy of Trial Lawyers, one member of the North Carolina Association of Defense Attorneys, and one member of the North Carolina Bar Association. The Speaker shall appoint a chair from the Task Force membership. The Task Force shall meet upon the call of its chair. A quorum of the Committee shall be a majority of its members.

"12.3. Members of the Task Force shall receive per diem, subsistence, and travel allowances in accordance with G.S. 120-3.1, 138-5, or 138-6, as appropriate. Upon the prior approval of the Legislative Services Commission, the Legislative Services Officer shall assign professional and clerical staff to the Task Force to aid in its work. The Task Force may contract for professional, clerical, or consultant services as provided by G.S. 120-32.02. The Task Force may meet at various locations around the State to promote greater public participation in its deliberations. Subject to the approval of the Legislative Services Commission, the Task Force may meet in the Legislative Building or the Legislative Office Building. The Task Force, while in the discharge of its official duties, may exercise all the powers provided under the provisions of G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4, including the power to request all officers, agents, agencies, and departments of the State to provide any information, data, or documents within their possession, ascertainable from their records, or otherwise available to them and the power to subpoena witnesses.

"12.4. The Task Force shall report the results of its review and its recommended resolution to the conflict to the Speaker of the House of Representatives by December 31, 2006.

"12.5. From funds appropriated to the General Assembly, the Legislative Services Commission shall allocate funds for the purpose of conducting the study provided for in this Part."

Effect of Amendments. — Session Laws 2007-212, s. 2, effective August 1, 2007, and applicable to all motions for costs filed on or after that date, rewrote the section, which read: "In other actions, costs may be allowed or not, in the discretion of the court, unless otherwise provided by law."

Legal Periodicals. — For article, "The Legal Theory of Attorney Fee Shifting: A Critical Overview," see 1982 Duke L.J. 651.

CASE NOTES

The purpose of this provision is to give the court authority to allow costs, as the justice of the case may require. Gulley v. Macy, 89 N.C. 343 (1883); Parton v. Boyd, 104 N.C. 422, 10 S.E. 490 (1889).

In North Carolina costs are taxed on the basis of statutory authority, etc. Estate of Smith ex rel. Smith v. Underwood, 127 N.C. App. 1, 487 S.E.2d 807 (1997), cert. denied, 347 N.C. 398, 494 S.E.2d 410 (1997).

Plain meaning of G.S. 7A-320, and of G.S. 6-1, and G.S. 6-20 precluded a finding that any reasonable and necessary litigation expenses could be taxed as costs against a non-prevailing opposing party; pursuant to North Carolina Supreme Court precedent, the only expenses which could be taxed as costs were those specifically authorized by statute. DOT v. Charlotte Area Manufactured Hous., Inc., 160 N.C. App. 461, 586 S.E.2d 780, 2003 N.C. App. LEXIS 1822 (2003).

In a condemnation action, the prevailing landowner's map expenses were not taxable as costs against the opposing condemning authority because G.S. 7A-305(d) did not mention maps, and G.S. 6-20 did not, on its face, make map expenses taxable. DOT v. Charlotte Area Manufactured Hous., Inc., 160 N.C. App. 461, 586 S.E.2d 780, 2003 N.C. App. LEXIS 1822 (2003).

Section Inapplicable to Contempt Proceeding. — Although labeled "civil" contempt, a proceeding as for contempt is by no means a civil action or proceeding to which G.S. 6-18, providing when costs shall be allowed to plaintiff as a matter of course, or this section would apply. United Artists Records, Inc. v. Eastern Tape Corp., 18 N.C. App. 183, 196 S.E.2d 598, cert. denied, 283 N.C. 666, 197 S.E.2d 880 (1973); Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

A North Carolina court has no authority to award damages in the form of costs to a private party in a contempt proceeding. Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

When the trial court found plaintiff in contempt under G.S. 5A-21, it erred in awarding attorney fees to defendant as sanctions; such an award was not authorized by statute, as G.S. 6-18 and G.S. 6-20, governing costs, did not apply to a contempt proceeding. Sea Ranch II Owners Ass'n v. Sea Ranch II, Inc., — N.C. App. —, 636 S.E.2d 307, 2006 N.C. App. LEXIS 2246 (2006).

But Attorney's Fees Permissible. — Although neither the provisions of G.S. 6-18 or this section are applicable to an action for civil contempt a trial court may properly award attorney's fees to a plaintiff who prevails in a civil contempt action. The Appellate Court has approved the allowance of attorney's fees in contempt actions where such fees were expressly authorized by statute as in the case of child support. Smith v. Smith, 121 N.C. App. 334, 465 S.E.2d 52 (1996).

Attorney's Fees Must Be Permitted by Another Section. — This section does not authorize a trial court to include attorney's fees as a part of the costs awarded unless specifically permitted by another statute. Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc., 143 N.C. App. 1, 545 S.E.2d 745, 2001 N.C. App. LEXIS 228 (2001).

In a suit for the breach of a commercial lease, the trial court did not err in not awarding attorney fees under G.S. 6-20; section 6-20 did not authorize a trial court to include attorney fees as a part of the costs awarded under that section, unless specifically permitted by another statute, and plaintiff had not pointed to any statute that allowed an award of attorney fees in breach of contract cases. N.C. Indus. Capital, LLC v. Clayton, — N.C. App. —, 649 S.E.2d 14, 2007 N.C. App. LEXIS 1825 (2007).

Construction with Other Law. — The trial court did not abuse its discretion and violate G.S. 7A-305 in taxing the expert witness fees to appellant patient pursuant to this section after he voluntarily dismissed his negligence suit pursuant to G.S. 1A-1, Rule 41 on the day of trial; costs which are to be taxed under Rule 41(d) include those costs enumerated in G.S. 7A-305(d), and that section does not preclude liability for other costs such as those outlined in this section. Lewis v. Setty, 140 N.C. App. 536, 537 S.E.2d 505, 2000 N.C. App. LEXIS 1216 (2000).

Trial court's decision finding that it did not have the authority to award a successful litigant in a condemnation case the appraisal fees incurred by the litigant as costs taxable against the non-prevailing condemning authority was consistent with precedent of the North Carolina Supreme Court, as well as G.S. 6-20. DOT v. Charlotte Area Manufactured Hous., Inc., 160 N.C. App. 461, 586 S.E.2d 780, 2003 N.C. App. LEXIS 1822 (2003).

G.S. 7A-320 Does Not Abrogate Court's

Authority Under This Section. — Under G.S. 7A-305, which specifies in subsection (d) the costs recoverable in civil actions, and also provides in subsection (e) that nothing in this section shall affect the liability of the respective parties for costs as provided by law, the authority of trial courts to tax deposition expenses as costs pursuant to G.S. 6-20 remains undisturbed, regardless of the language of G.S. 7A-320. Alsup v. Pitman, 98 N.C. App. 389, 390 S.E.2d 750 (1990).

Award of Costs Discretionary, Not Mandatory. — Where plaintiff took voluntary dismissal, and then refiled, defendants were not entitled to expert witness fees, deposition transcripts, court reporter fees, or attorney travel costs under G.S. 1A-1, Rule 41(a); assuming, arguendo, that all the expenses denied by the trial court were recoverable as common law costs under G.S. 6-20, such an award was permissive, not mandatory. Cosentino v. Weeks, 160 N.C. App. 511, 586 S.E.2d 787, 2003 N.C. App. LEXIS 1830 (2003).

Negligence cases were not listed among the types of actions in which costs had to be awarded to a prevailing party pursuant to either G.S. 6-18 or G.S. 6-19; therefore, the trial court's costs ruling was governed by G.S. 6-20, and costs could be allowed or not, in the discretion of the court. Smith v. Cregan, 178 N.C. App. 519, 632 S.E.2d 206, 2006 N.C. App. LEXIS 1568 (2006).

Exercise of Discretion Presumed. — Nothing to the contrary appearing, it will be taken that the court gave judgment in the exercise of its discretion as provided in this section. Gulley v. Macy, 89 N.C. 343 (1883); Wooten v. Walters, 110 N.C. 251, 14 S.E. 734 (1892).

Discretion Not Reviewable. — By this section the taxing of costs is placed in the discretion of the trial judge, which discretion is not reviewable. Kluttz v. Allison, 214 N.C. 379, 199 S.E. 395 (1938); Chriscoe v. Chriscoe, 268 N.C. 554, 151 S.E.2d 33 (1966).

The exercise of the court's discretionary authority is not reviewable. Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1963); Dixon, Odom & Co. v. Sledge, 59 N.C. App. 280, 296 S.E.2d 512 (1982).

Taxation of costs against the plaintiff is within the court's discretion and is not reviewable on appeal, the action being equitable in nature. Bumgarner & Bowman Bldrs. v. Hollar, 7 N.C. App. 14, 171 S.E.2d 60 (1969).

Trial court's taxing costs of costs to an injured party under G.S. 6-20 was not reviewable on appeal as the trial court specifically stated that the costs were awarded in the trial court's discretion. Griffis v. Lazarovich, 164 N.C. App. 329, 595 S.E.2d 797, 2004 N.C. App. LEXIS 821 (2004).

Appellate court did not review a trial court's decision to award costs as that award was made in the trial court's discretion. Castle McCulloch, Inc. v. Freedman, 169 N.C. App. 497, 610 S.E.2d 416, 2005 N.C. App. LEXIS 604 (2005), aff'd, 360 N.C. 57, 620 S.E.2d 674 (2005).

Costs Discretionary in Actions of An Equitable Nature. — In equity there was a broad discretion on the subject of costs, Little v. Lockman, 50 N.C. 433 (1858), and the allowance rested with the court. Worthy v. Brower, 93 N.C. 492 (1885); Hooper v. Davies, 166 N.C. 236, 81 S.E. 1063 (1914).

Even since the abolition of the courts of equity in this State, it is held that where the case partakes of an equitable nature, the question of costs is in the court's discretion. Thus where the jury found that each party was entitled to an undivided half in land, and the appeal was from taxing the defendant with costs, there being no element of an action in ejectment, neither party was permitted to recover costs from the other, especially as the question was of an equitable nature, and the taxing of costs was, under this section, in the sound discretion of the court. Hare v. Hare, 183 N.C. 419, 111 S.E. 620 (1922).

In actions of an equitable nature the costs are in the discretion of the court. Yates v. Yates, 170 N.C. 533, 87 S.E. 317 (1915).

If an action is equitable in nature the taxing of the costs is within the discretion of the court, and the court may allow costs in favor of one party or the other or require the parties to share the costs. Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1963).

Taxing Costs in Personal Injury Cases. — Trial court did not err in taxing costs of defendant bakery company and its defendant driver to mother and minor son personal injury plaintiffs, as the bakery company and its driver were found not liable to the mother and minor son and taxing the costs to them was done within the court's discretion under G.S. 6-20. Sterling v. Gil Soucy Trucking, Ltd., 146 N.C. App. 173, 552 S.E.2d 674, 2001 N.C. App. LEXIS 868 (2001).

Although the trial court did not err when it awarded a pedestrian who was awarded $7,000 in damages after he was struck by a truck over $32,000 in attorneys' fees, it did err when it granted the pedestrian's request for reimbursement of costs he incurred to make photocopies, telephone calls, photographs, trial diagrams and exhibits, and to obtain medical reports and records, because those expenses were not recoverable as costs, pursuant to G.S. 7A-305. Overton v. Purvis, 162 N.C. App. 241, 591 S.E.2d 18, 2004 N.C. App. LEXIS 120 (2004).

Trial court erred in awarding numerous costs not authorized for medical reports, deposition costs, filing fees, travel costs, trial exhibits, color copies, and photocopies; there was statutory authority, however, for the following awards: mediation fees pursuant to G.S. 7A-305(d)(7); expert witness fees pursuant to G.S. 7A-305(d)(1); and service of process fees pursuant to G.S. 7A-305(d)(6). Oakes v. Wooten, 173 N.C. App. 506, 620 S.E.2d 39, 2005 N.C. App. LEXIS 2100 (2005).

Apportionment of Costs. — Where a jury found that the allegations of the complaint with respect to the maintenance of the nuisance were true, the trial court, when it ordered the personal property sold, had discretionary power with respect to the apportionment of the costs. State ex rel. Morris v. Shinn, 262 N.C. 88, 136 S.E.2d 244 (1964).

A consolidated action, tried before the referee, in which judgments are rendered, is not an equitable proceeding, in which costs may be allowed or not, in the discretion of the court under this section. Highland Cotton Mills v. Ragan Knitting Co., 194 N.C. 80, 138 S.E. 428 (1927).

Creditor's Bill. — It is within the discretion of the trial court to tax the costs accruing upon either of the parties litigant, in an action in the nature of a creditor's bill, brought by materialmen, claiming under the statutory lien, the unpaid balance due by the owner of a dwelling, etc., to his contractor for its erection; and the action of the judge in taxing the trust funds in the owner's hands with the cost is commended in this suit. Bond v. Pickett Cotton Mills, Inc., 166 N.C. 20, 81 S.E. 936 (1914).

Specific Performance Generally. — Where the purpose of an action was simply to compel the specific performance of an executory contract, and to adjust certain rights involved in an account of moneys collected and certain indebtedness incident to that contract, it was clearly within this section. Parton v. Boyd, 104 N.C. 422, 10 S.E. 490 (1889).

In a class action for injunctive and declaratory relief against the collection of taxes on retirement benefits of certain state and local government retirees, creation of a "common fund" for the payment of attorney's fees and other costs incurred by the class representatives was proper. Bailey v. State, 348 N.C. 130, 500 S.E.2d 54 (1998).

Where one of the defendants in an injunction suit seeks affirmative relief by way of specific performance, the taxing of costs is in the discretion of the trial court, since the controversy is of an equitable nature. Consequently the order of the court apportioning the costs will not ordinarily be disturbed on appeal upon affirmance of the judgment. Chandler v. Cameron, 229 N.C. 62, 47 S.E.2d 528, 3 A.L.R.2d 571 (1948).

Setting Aside Proceedings of Probate Court. — Where the action is to set aside certain proceedings in the probate court, the court is vested with discretion in the matter of allowing costs, under this section; each party is ordered to pay his own and each to pay one half of the allowance to the referee. Gulley v. Macy, 89 N.C. 343 (1883).

Deposition Expenses. — As a general rule, recoverable costs may include deposition expenses unless it appears that the depositions were unnecessary. Even though deposition expenses do not appear expressly in the statutes they may be considered as part of "costs" and taxed in the trial court's discretion. Dixon, Odom & Co. v. Sledge, 59 N.C. App. 280, 296 S.E.2d 512 (1982); Alsup v. Pitman, 98 N.C. App. 389, 390 S.E.2d 750 (1990).

This section authorizes trial courts to tax deposition expenses as costs. Alsup v. Pitman, 98 N.C. App. 389, 390 S.E.2d 750 (1990).

Trial court had full authority to tax, in its discretion, deposition expenses as costs pursuant to G.S. 1A-1, Rule 41(d) and 6-20. Alsup v. Pitman, 98 N.C. App. 389, 390 S.E.2d 750 (1990).

Award of costs made to an engineering firm, after a trial court granted the firm a directed verdict, was modified to remove the award of deposition costs because, while G.S. 7A-305 permitted the court to award the firm costs for mediation fees, expert witness fees, and service of process fees for trial subpoenas, it did not grant the court statutory authority to award the deposition costs. Handex of the Carolinas, Inc. v. County of Haywood, 168 N.C. App. 1, 607 S.E.2d 25, 2005 N.C. App. LEXIS 148 (2005).

In a negligence case, deposition costs were recoverable as trial expenses under G.S. 6-20 because they were established by case law prior to the enactment of G.S. 7A-320 in 1983. Morgan v. Steiner, 173 N.C. App. 577, 619 S.E.2d 516, 2005 N.C. App. LEXIS 2105 (2005).

When, in a personal injury case, a trial court ruled that it did not have discretion to tax a landowner's deposition costs against alleged injured parties, this was error, as the trial court had such discretion under G.S. 6-20, so the trial court's judgment was reversed to allow it to exercise this discretion. Walden v. Morgan, — N.C. App. —, 635 S.E.2d 616, 2006 N.C. App. LEXIS 2169 (2006).

Costs were properly allowed to a successful driver even though the driver's insurer paid all of his costs, as: (1) the judgment was entered for the driver and the costs award did not violate G.S. 6-1; (2) the driver incurred the expenses; (3) the award of an arbitration fee was specifically allowed in G.S. 7A-305(d)(7); (4) it was not an abuse of discretion under G.S. 6-20 to award the deposition fee; and (5) the preparation time fees of a driver's reconstruct expert were properly allowed. Hoffman v. Oakley, — N.C. App. —, 647 S.E.2d 117, 2007 N.C. App. LEXIS 1628 (2007).

Cost of an Independent Appraiser's Valuation Report. — The trial court acted within its discretion when it taxed the entire cost of an independent appraiser's valuation report to the defendants/majority stockholders of a closely-held corporation, as allowed under G.S. 7A-305(d), and ignored or effectually amended the court's pre-trial case management order, in which the court stated that appraisal costs would be shared by both parties. Royals v. Piedmont Elec. Repair Co., 137 N.C. App. 700, 529 S.E.2d 515, 2000 N.C. App. LEXIS 497 (2000).

Other Reasonable and Necessary Costs. — While case law has found that deposition costs are allowable under this section, it has in no way precluded the trial court from taxing other costs that may be reasonable and necessary. Minton v. Lowe's Food Stores, 121 N.C. App. 675, 468 S.E.2d 513 (1996).

Line of decisions from the North Carolina Court of Appeals holding that trial courts have broad authority under G.S. 6-20 to tax any expenses deemed "reasonable and necessary" were not consistent with the context and plain meaning of G.S. 6-20 or with controlling precedent of the North Carolina Supreme Court. DOT v. Charlotte Area Manufactured Hous., Inc., 160 N.C. App. 461, 586 S.E.2d 780, 2003 N.C. App. LEXIS 1822 (2003).

Award of Costs for Expert Witnesses. — For case upholding award to plaintiffs as costs of charges of expert witnesses for time spent outside trial and expenses for expert witnesses who testified about the standard of care applicable to nurses in similar communities, see Campbell ex rel. McMillan v. Pitt County Mem. Hosp., 84 N.C. App. 314, 352 S.E.2d 902, aff'd, 321 N.C. 260, 362 S.E.2d 273 (1987), overruled on other grounds, Johnson v. Ruark Ob. & Gyn. Assocs., 327 N.C. 283, 395 S.E.2d 85 (1990), rehearing denied, 327 N.C. 644, 399 S.E.2d 133 (1990).

Trial court did not exceed its discretionary authority in assessing expert witness fees for the testimony of three physicians, even though they all were used to prove identical facts in issue. Brown v. Flowe, 128 N.C. App. 668, 496 S.E.2d 830 (1998), rev'd on other grounds, 349 N.C. 520, 507 S.E.2d 894 (1998).

Denial of Costs for Expert Witnesses. — Since the trial court's costs ruling was governed by G.S. 6-20, and thus could be allowed at the discretion of the court, and the doctors had not alleged, and there appeared to the appellate court to be no abuse of discretion in the denial of their request to be reimbursed for the expert witness fees where the verdict was in their favor, the judgment was affirmed. Smith v. Cregan, 178 N.C. App. 519, 632 S.E.2d 206, 2006 N.C. App. LEXIS 1568 (2006).

Costs for Trial Exhibits in a Negligence Action. — The trial court rightly exercised its discretion and allowed costs for trial exhibits to be taxed to the appellant patient where the appellee doctor did not receive notice of his voluntary dismissal until the day of trial; the costs were reasonable and necessary pursuant to this section although trial exhibit costs are not enumerated in G.S. 7A-305(d). Lewis v. Setty, 140 N.C. App. 536, 537 S.E.2d 505, 2000 N.C. App. LEXIS 1216 (2000).

While decisions of the North Carolina Court of Appeals had found a trial court had the discretion, under G.S. 6-20, to order the reimbursement of a party for trial expenses, this was contrary to precedent of the North Carolina Supreme Court, limiting a trial court's authority concerning tax costs to those expenses specifically statutorily authorized, and the North Carolina General Statutes did not explicitly authorize a trial court to tax expenses related to trial exhibits. DOT v. Charlotte Area Manufactured Hous., Inc., 160 N.C. App. 461, 586 S.E.2d 780, 2003 N.C. App. LEXIS 1822 (2003).

The authority of the court to tax costs in an action to recover under uninsured motorist provisions of an insurance policy is not dependent on either the insurance policy or G.S. 20-279.21(b)(3). Ensley v. Nationwide Mut. Ins. Co., 80 N.C. App. 512, 342 S.E.2d 567, cert. denied, 318 N.C. 414, 349 S.E.2d 594 (1986).

Experts Must Be Subpoenaed. — Where one expert was not served with a subpoena and another was unsure as to what a subpoena was, the trial court did not have the authority to order defendants to pay expert witness expenses as costs. Rogers v. Sportsworld of Rocky Mount, Inc., 134 N.C. App. 709, 518 S.E.2d 551 (1999).

Travel expenses of a party are not an assessable cost. Crist v. Crist, 145 N.C. App. 418, 550 S.E.2d 260, 2001 N.C. App. LEXIS 660 (2001).

Estates. — Where questions regarding inheritance arise concerning the estate of the deceased, a court may award attorney's fees if legitimate claims exist. Batcheldor v. Boyd, 119 N.C. App. 204, 458 S.E.2d 1 (1995).

Bond Premium Tax. — This section, which vests the trial judge with discretionary authority to allow costs as justice may require, provided statutory authority for judge's decision to tax defendant's bond premiums, paid pursuant to G.S. 1-111, against plaintiff. Minton v. Lowe's Food Stores, 121 N.C. App. 675, 468 S.E.2d 513 (1996).

Unable to Recover Litigation Costs or Attorney's Fees. — Inmate, who had obtained a verdict against a deputy sheriff with regard to an assault and battery suit, was unable to recover litigation costs or attorney's fees, because no statutory authority existed allowing such recovery to a prevailing party in a civil assault case. Cunningham v. Riley, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 511 (Mar. 15, 2005).

Jurisdiction of Trial Court to Award. — Pursuant to G.S. 1-294, a trial court did not have jurisdiction to decide the issue of attorney fees after a county and its board of commissioners had filed their notice of appeal from the judgment in favor of a chairman of a county airport authority who had been improperly removed from his position; an exception did not apply, as the award of attorney fees under G.S. 6-1, G.S. 6-20, G.S. 6-19.1, G.S. 7A-314, and G.S. 143-318.16B was based upon the chairman being the prevailing party. McClure v. County of Jackson, — N.C. App. —, 648 S.E.2d 546, 2007 N.C. App. LEXIS 1814 (2007).

Applied in Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260 (1985); True v. T & W Textile Mach., Inc., 112 N.C. App. 358, 435 S.E.2d 551 (1993), cert. granted, 335 N.C. 555, 441 S.E.2d 134, aff'd per curiam, 337 N.C. 798, 448 S.E.2d 514 (1994); Delta Envtl. Consultants of N.C., Inc. v. Wysong & Miles Co., 132 N.C. App. 160, 510 S.E.2d 690 (1999); Coffman v. Roberson, 153 N.C. App. 618, 571 S.E.2d 255 (2002), cert. denied, 356 N.C. 668, 577 S.E.2d 111 (2003); Lord v. Customized Consulting Specialty, Inc., 164 N.C. App. 730, 596 S.E.2d 891, 2004 N.C. App. LEXIS 1144 (2004); Miller v. Forsyth Mem'l Hosp., Inc., 173 N.C. App. 385, 618 S.E.2d 838, 2005 N.C. App. LEXIS 2040 (2005); Watts v. N.C. Dep't of Env't & Natural Res., — N.C. App. —, 641 S.E.2d 811, 2007 N.C. App. LEXIS 595 (2007).

Cited in Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814 (1984); Brown v. Rhyne Floral Supply Mfg. Co., 89 N.C. App. 717, 366 S.E.2d 894 (1988); Powers v. Powers, 103 N.C. App. 697, 407 S.E.2d 269 (1991); Brandenburg Land Co. v. Champion Int'l Corp., 107 N.C. App. 102, 418 S.E.2d 526 (1992); Wachovia Bank v. Bob Dunn Jaguar, Inc., 117 N.C. App. 165, 450 S.E.2d 527 (1994); Tate Terrace Realty Investors, Inc. v. Currituck County, 127 N.C. App. 212, 488 S.E.2d 845 (1997), cert. denied, 347 N.C. 409, 496 S.E.2d 394 (1997); Sara Lee Corp. v. Carter, 129 N.C. App. 464, 500 S.E.2d 732 (1998), rev'd on other grounds, 351 N.C. 27, 519 S.E.2d 308 (1999); Harborgate Property Owners Ass'n v. Mountain Lake Shores Dev. Corp., 145 N.C. App. 290, 551 S.E.2d 207, 2001 N.C. App. LEXIS 647 (2001); Murphy Family Farms v. N.C. Dep't of Env't & Natural Res., 160 N.C. App. 338, 585 S.E.2d 446, 2003 N.C. App. LEXIS 1793 (2003), cert. granted, 358 N.C. 155, 592 S.E.2d 690 (2004); House v. Stone, 163 N.C. App. 520, 594 S.E.2d 130, 2004 N.C. App. LEXIS 507 (2004); Lord v. Customized Consulting Specialty, Inc., — N.C. App. —, 643 S.E.2d 28, 2007 N.C. App. LEXIS 782 (2007).

§ 6-21. Costs allowed either party or apportioned in discretion of court.

Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:

(1) Application for years' support, for surviving spouse or children.

(2) Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder; provided, that in any caveat proceeding under this subdivision, the court shall allow attorneys' fees for the attorneys of the caveators only if it finds that the proceeding has substantial merit.

(3) Habeas corpus; and the court shall direct what officer shall tax the costs thereof.

(4) In actions for divorce or alimony; and the court may both before and after judgment make such order respecting the payment of such costs as may be incurred by either spouse from the sole and separate estate of either spouse, as may be just.

(5) Application for the establishment, alteration or discontinuance of a public road, cartway or ferry. The board of county commissioners may order the costs incurred before them paid in their discretion.

(6) The compensation of referees and commissioners to take depositions.

(7) All costs and expenses incurred in special proceedings for the division or sale of either real estate or personal property under the Chapter entitled Partition.

(8) In all proceedings under the Chapter entitled Drainage, except as therein otherwise provided.

(9) In proceedings for reallotment of homestead for increase in value, as provided in the Chapter, Civil Procedure.

(10) In proceedings regarding illegitimate children under Article 3, Chapter 49 of the General Statutes.

(11) In custody proceedings under Chapter 50A of the General Statutes.

(12) In actions brought for misappropriation of a trade secret under Article 24 of Chapter 66 of the General Statutes.

The word "costs" as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow: provided that attorneys' fees in actions for alimony shall not be included in the costs as provided herein, but shall be determined and provided for in accordance with G.S. 50-16.4. (Code, ss. 533, 1294, 1323, 1422, 1660, 2039, 2056, 2134, 2161; 1889, c. 37; 1893, c. 149, s. 6; Rev., s. 1268; C.S., s. 1244; 1937, c. 143; 1955, c. 1364; 1965, c. 633; 1967, c. 993, s. 2; c. 1152, s. 5; 1977, c. 576; 1979, c. 110, s. 3; 1981, c. 809, s. 1; c. 890, s. 2.)

Local Modification. — Edgecombe: 1953, c. 737; Johnston: 1967, c. 835; Nash: 1939, c. 46; 1941, c. 18; 1953, c. 737.

Editor's Note. — The reference in subdivision (12) of this section to Article 24 of Chapter 66 is as directed by the Revisor of Statutes. The reference in Session Laws 1981, c. 890 had been to Article 22 of Chapter 66, which was recodified as Article 24 thereof.

Legal Periodicals. — For article discussing the effect of the 1937 amendment to this section and the history of attorneys' fees as costs in this State, see 15 N.C.L. Rev. 333 (1937).

For discussion as to attorneys' fees being awarded a successful litigant, see 38 N.C.L. Rev. 156 (1960).

For survey of 1976 case law on wills, trusts and estates, see 55 N.C.L. Rev. 1109 (1977).

For survey of 1977 law on wills, trusts and estates, see 56 N.C.L. Rev. 1152 (1978).

For survey of 1981 property law, see 60 N.C.L. Rev. 1420 (1982).

For article, "The Legal Theory of Attorney Fee Shifting: A Critical Overview," see 1982 Duke L.J. 651.

For note, "A Public Goods Approach to Calculating Reasonable Fees under Attorney Fee Shifting Statutes," see 1989 Duke L.J. 438.

CASE NOTES

I. General Consideration.
II. Costs In Particular Actions.
  A. Caveats to Wills.
  B. Construction of Will or Trust.
  C. Habeas Corpus.
  D. Divorce or Alimony.
  E. Compensation of Referees.
  F. Partition or Sale of Property.
  G. Actions Not Covered by This Section.
  H. Illegitimate Children.
III. Procedure.

I. GENERAL CONSIDERATION.

Attorneys' Fees Generally. — Ordinarily attorneys' fees are taxable as costs only when expressly authorized by statute. Horner v. Chamber of Commerce, 236 N.C. 96, 72 S.E.2d 21 (1952). For note commenting on this case see 31 N.C.L. Rev. 115 (1952).

Except as otherwise provided by this section, attorneys' fees are not now regarded as part of the court costs in North Carolina. Wachovia Bank & Trust Co. v. Schneider, 235 N.C. 446, 70 S.E.2d 578 (1952); Horner v. Chamber of Commerce, 236 N.C. 96, 72 S.E.2d 21 (1952); Rider v. Lenoir County, 238 N.C. 632, 78 S.E.2d 745 (1953); Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1963); Perkins v. American Mut. Fire Ins. Co., 4 N.C. App. 466, 167 S.E.2d 93 (1969).

This section authorizes attorneys' fees in certain enumerated actions to be taxed as a part of the costs, to be paid out of the fund which is the subject matter of the action. Rider v. Lenoir County, 238 N.C. 632, 78 S.E.2d 745 (1953).

In the types of cases enumerated in this section, attorneys' fees may be included as a part of the costs in such amounts as the court in its discretion determines and allows. Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1963).

Fees for Services Pursuant to Void Contract. — A trial court has no discretion to award statutory legal fees for services rendered in a child custody and support action pursuant to a contract void as against public policy. Davis v. Taylor, 81 N.C. App. 42, 344 S.E.2d 19, cert. denied, 318 N.C. 414, 349 S.E.2d 593 (1986).

Attorneys' Fees and Costs in Drainage Law. — Assuming that G.S. 105-374(i) is incorporated by reference into Chapter 156, because the section provides for attorneys' fees for taxing authorities does not mean that it prohibits attorneys' fees being taxed as part of the costs for members of drainage districts. Northampton County Drainage Dist. Number One v. Bailey, 326 N.C. 742, 392 S.E.2d 352 (1990).

This section provides for an award of costs in all actions under the drainage chapter and authorizes award of attorneys' fees to members of drainage district in action brought by district seeking to collect unpaid assessments and G.S. 105-374(i) even if incorporated by reference into Chapter 156 does not prohibit attorneys' fees from being taxed as part of the costs for members of drainage districts. Northampton County Drainage Dist. Number One v. Bailey, 326 N.C. 742, 392 S.E.2d 352 (1990).

Jurisdiction to Award Fees After Appeal Filed. — The trial court lacked jurisdiction to award attorney fees to the trust settlor's adopted grandchildren after the settlor's natural grandchildren filed an appeal of the judgment deciding that the adopted grandchildren were entitled to share in distribution of the trust. Gibbons v. Cole, 132 N.C. App. 777, 513 S.E.2d 834 (1999).

As to award of attorneys' fees in particular actions, see annotations under analysis lines II (A)-(F).

Application in Trade Secrets Cases. — Trial court's denial of defendants' motion for attorney fees was proper in a trade secrets case because attorney fees may have been awarded to the prevailing party if a claim of misappropriation was made in bad faith or if willful and malicious misappropriation existed regardless of the language of G.S. 6-21. Bruning & Federle Mfg. Co. v. Mills, — N.C. App. —, 647 S.E.2d 672, 2007 N.C. App. LEXIS 1717 (2007).

As to the difference between including attorneys' fees in the costs taxed against a party to a lawsuit and in ordering the payment of attorneys' fees, see Smith v. Price, 315 N.C. 523, 340 S.E.2d 408 (1986).

Judicial Review. — The exercise of the court's discretionary authority is not reviewable. Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1962); Davis v. Davis, 58 N.C. App. 25, 293 S.E.2d 268, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982).

The decision to award counsel fees is within the discretion of the trial court, and the Court of Appeals will not disturb what it deems to be a sound exercise of that discretion.

If the findings of the superior court regarding an award of attorney's fees in a caveat proceeding are supported by the evidence the reviewing court cannot disturb them. Dyer v. State, 331 N.C. 374, 416 S.E.2d 1 (1992).

Applied in Field v. Wheeler, 120 N.C. 264, 26 S.E. 812 (1897); Tyser v. Sears, 252 N.C. 65, 112 S.E.2d 750 (1960); Dillon v. North Carolina Nat'l Bank, 6 N.C. App. 584, 170 S.E.2d 571 (1969); Citizens Nat'l Bank v. Grandfather Home for Children, Inc., 280 N.C. 354, 185 S.E.2d 836 (1972); Keener v. Korn, 46 N.C. App. 214, 264 S.E.2d 829 (1980); Wake County ex rel. Denning v. Ferrell, 71 N.C. App. 185, 321 S.E.2d 913 (1984); National Medical Enters., Inc. v. Sandrock, 72 N.C. App. 245, 324 S.E.2d 268 (1985); Lash ex rel. Wilson v. Lash, 107 N.C. App. 755, 421 S.E.2d 615 (1992); Beau Rivage Plantation, Inc. v. Melex USA, Inc., 112 N.C. App. 446, 436 S.E.2d 152 (1993).

Cited in Perry v. Pulley, 206 N.C. 701, 175 S.E. 89 (1934); Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966); In re King, 281 N.C. 533, 189 S.E.2d 158 (1972); City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972); Norman v. Royal Crown Bottling Co., 49 N.C. App. 656, 272 S.E.2d 355 (1980); In re North Carolina Nat'l Bank, 52 N.C. App. 353, 278 S.E.2d 330 (1981); Dorsey v. Dorsey, 53 N.C. App. 622, 281 S.E.2d 429 (1981); In re Cooper, 81 N.C. App. 27, 344 S.E.2d 27 (1986); Casstevens v. Wagoner, 99 N.C. App. 337, 392 S.E.2d 776 (1990); Tew v. West, 143 N.C. App. 534, 546 S.E.2d 183, 2001 N.C. App. LEXIS 314 (2001); Handex of the Carolinas, Inc. v. County of Haywood, 168 N.C. App. 1, 607 S.E.2d 25, 2005 N.C. App. LEXIS 148 (2005); Pritchett & Burch, PLLC v. Boyd, 169 N.C. App. 118, 609 S.E.2d 439, 2005 N.C. App. LEXIS 540 (2005).

II. COSTS IN PARTICULAR ACTIONS.

A. Caveats to Wills.

Editor's Note. — *Most of the cases below were decided prior to the amendment to subdivision (2) of this section by Session Law 1981, c. 809, s. 1.*

Discretion of Court. — It is within the discretionary power of the court before which an issue of devisavit vel non is tried to direct the payment of the costs out of the estate. Mayo v. Jones, 78 N.C. 406 (1878). See In re Will of Hargrove, 206 N.C. 307, 173 S.E. 577 (1934), for dicta on this point.

Subdivision (2) of this section leaves the taxing of court costs and the apportionment thereof to be made in the discretion of the court. Moreover, the fixing of reasonable attorneys' fees in applicable cases is likewise a matter within the sound discretion of the trial court. Godwin v. Wachovia Bank & Trust Co., 259 N.C. 520, 131 S.E.2d 456 (1963).

Where appellant did not contend that the fees allowed counsel were unreasonable and nothing to the contrary appeared in the record, it was taken that the court taxed the costs and attorneys' fees in the exercise of its discretion and that there was no abuse of this discretion. Wachovia Bank & Trust Co. v. Dodson, 260 N.C. 22, 131 S.E.2d 875 (1963).

When an executor's right to qualify is contested and judicially denied, whether the court will exercise its discretion to award costs, including attorneys' fees, incurred in his unsuccessful litigation, will depend in each case upon the grounds for the opposition and the reasonableness of his resistance to it, his good faith in pressing his appointment and whether his efforts were in the interest of the estate. In re Estate of Moore, 292 N.C. 58, 231 S.E.2d 849 (1977).

Albeit subdivision (2) authorizes the trial judge in his discretion to award costs, including attorneys' fees, in the instances specified therein, it is quite clear (1) that he should not award costs and attorneys' fees to an executor-designate whose claim for appointment is rejected unless the claim was reasonable, made in good faith and prima facie in the interest of the estate; and (2) that the judge has no discretion to tax costs against an estate when the nominated executor was disqualified to act as a matter of law. Estate of Moore, 292 N.C. 58, 231 S.E.2d 849 (1977).

Where a surviving spouse is forced to engage in litigation to determine whether a right of dissent from the will of the deceased spouse exists, the discretionary power given the trial judge under this section includes the power to award attorney's fees for the surviving spouse when, in the opinion of the trial court, the proceeding was one of substantial merit. In re Kirkman, 302 N.C. 164, 273 S.E.2d 712 (1981).

Taxing of Costs Where Caveat Is Unsuccessful. — Under this section, even though judgment is entered in favor of propounders, the trial court may tax the costs, including an allowance to counsel representing caveators, against the estate upon finding that the filing of the caveat was apt and proper and done in good faith. In re Will of Slade, 214 N.C. 361, 199 S.E. 290 (1938).

Allowance of Attorneys' Fees. — The allowance of attorneys' fees to counsel for the propounders is in the sound discretion of the trial court. In re Will of Coffield, 216 N.C. 285, 4 S.E.2d 870 (1939).

Same — Where Caveat Is Unsuccessful. — This statute authorizes the trial court in its discretion to allow attorneys' fees to counsel for unsuccessful caveators to a will. In re Will of Ridge, 47 N.C. App. 183, 266 S.E.2d 766 (1980), rev'd on other grounds, 302 N.C. 375, 275 S.E.2d 424 (1981).

It is a matter in the discretion of the court, both as to whether to allow attorneys' fees to counsel for unsuccessful caveators to a will and the amount of such fees. In re Will of Ridge, 47 N.C. App. 183, 266 S.E.2d 766 (1980), rev'd on other grounds, 302 N.C. 375, 275 S.E.2d 424 (1981).

This section does not require the court to award attorneys' fees to counsel for unsuccessful caveators to a will, but clearly authorizes the court to do so; thus, it is a matter in the discretion of the court, both as to whether to allow fees and the amount of such fees. In re Ridge, 302 N.C. 375, 275 S.E.2d 424 (1981).

As long as a dissent has substantial merit, the court may exercise its discretion in awarding reasonable attorneys' fees. In re Estate of Tucci, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. dismissed, 331 N.C. 748, 417 S.E.2d 236 (1992).

The substantial merit requirement under subdivision (2) of this section does not mean success on the merits; in its sound discretion, the trial court may award attorneys' fees even to unsuccessful caveators. In re Estate of Tucci, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. dismissed, 331 N.C. 748, 417 S.E.2d 236 (1992).

Attorneys' Fees as Costs Paid by Executor. — The language of subdivision (2) of this section is sufficient to vest in the trial court the discretionary authority to tax reasonable attorneys' fees as a part of the costs to be paid by the executor. McWhirter v. Downs, 8 N.C. App. 50, 173 S.E.2d 587 (1970).

Attorneys' Fees Fixed by Mutual Agreement Not Taxable Costs. — Fees for services rendered by attorneys to the parties in a caveat to a will do not automatically become costs of the proceeding merely because they are incurred and paid. This section commits the allowance and apportionment of the fees and the determination of the amounts thereof to the discretion of the court. Where the court had made no determination of the matter, but the amounts were fixed by contingent agreement between attorneys and clients prior to suit and the allowance of the fees as part of the costs of the proceeding was intentionally excluded from the judgment of the court, the amounts paid to the attorneys did not and could not become part of the taxable costs of the suit under this section. Commercial Nat'l Bank v. United States, 196 F.2d 182 (4th Cir. 1952).

Expense of Caveat Not Cost of Administration. — Costs of administration, as used in G.S. 29-2(5), means those ordinary, usual, and necessary expenses of administering a decedent's estate; a will caveat and its expense is neither of these, for a will caveat is a claim that the will involved is invalid, and its expense is a cost of court taxable against either party, or apportioned among the parties, in the discretion of the court. In re Estate of Ward, 97 N.C. App. 660, 389 S.E.2d 441 (1990).

"Common Fund" Not Prerequisite to Award of Costs. — There is no requirement in subdivision (2) of this section that a "common fund be available before costs may be awarded." McNaull v. McNaull, 94 N.C. App. 547, 380 S.E.2d 590, cert. denied, 325 N.C. 546, 385 S.E.2d 498 (1989).

No Authority to Award Fees Which Were Postponed Pending Retrial After Judgment Erroneously Set Aside. — Where the court's refusal to award attorneys' fees was based on its decision to postpone any award until the matter was retried, and the court erred when it set aside the judgment and ordered a new trial, and since the appellate court directed that the consent judgment be reinstated, the trial court was without authority to order the payment of attorneys' fees as a part of the costs of the caveat proceedings. In re Baity, 65 N.C. App. 364, 309 S.E.2d 515 (1983), cert. denied, 311 N.C. 401, 319 S.E.2d 266 (1984).

Standing to Stipulate to Payment of Attorneys' Fees. — Where estate was taxed with the payment of attorneys' fees pursuant to subdivision (2) of this section, the attorneys' fees were considered to be an item of costs, and since the clerk's order indicated that the attorneys' fees should be paid directly to the law firm involved, and not to the dissenter, only the law firm could stipulate that the clerk's order had been satisfied. In re Estate of Tucci, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. dismissed, 331 N.C. 748, 417 S.E.2d 236 (1992).

Caveators Should Have Been Apprised of Court's Determination Regarding Fees. — Where the trial court permitted an attorney for all the named caveators to withdraw as counsel of record for certain caveators, implicit in that decision was permission for these caveators to retain their own counsel; therefore, if at the outset of the trial, the court determined that there was duplicity on the part of all counsel in its representation of the caveators, then the caveators should have been apprised that such a determination by the trial court might result in the denial of attorney fees pursuant to subsection (2) of this section, rather than for the trial court to summarily deny a successor law firm's request for fees at the conclusion of the matter. Hill v. Cox, 108 N.C. App. 454, 424 S.E.2d 201 (1993).

Trial court did not err in denying a propounder's motion for attorney's fees and costs, because the court was not required to enter findings of fact on whether the propounder's position, although unsuccessful, was supported by substantial merit, under G.S. 6-21; the statute required that prior to awarding attorney's fees to a caveator, the trial court had to make a finding of fact that the proceeding had substantial merit, under G.S. 6-21(2), but the statute did not require the trial court make any such findings in the case of a propounder. In re Will of McDonald, 156 N.C. App. 220, 577 S.E.2d 131, 2003 N.C. App. LEXIS 126 (2003).

Trial Court Abused Its Discretion. — The trial court abused its discretion by denying a petition of a law firm for approval and award of legal expenses where the trial court implicitly found that the caveat proceeding had substantial merit and where there was evidence that the law firm performed substantial services on behalf of the caveators it represented. Hill v. Cox, 108 N.C. App. 454, 424 S.E.2d 201 (1993).

Trial Court Did Not Abuse Its Discretion. — Caveators failed to show that the court abused its discretion when it awarded costs, including attorneys' fees, to propounders. In re Will of Sechrest, 140 N.C. App. 464, 537 S.E.2d 511, 2000 N.C. App. LEXIS 1206 (2000).

B. Construction of Will or Trust.

Sale of Trust Property. — The trial court had authority to tax a reasonable attorneys' fee as part of the costs and to apportion it among the parties in an action for a declaratory judgment and for instructions to the trustees in connection with the sale of certain trust property. Tripp v. Tripp, 17 N.C. App. 64, 193 S.E.2d 366 (1972).

Testamentary Trusts. — In an action pursuant to the Uniform Declaratory Judgment Act for construction of certain trust provisions of a will, the taxing of costs, the inclusion therein of attorneys' fees, and the fixing of reasonable counsel fees, are matters within the sound discretion of the trial court. Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 113 S.E.2d 689 (1960).

C. Habeas Corpus.

A reasonable allowance for attorneys' fees may be made as a part of the costs in habeas corpus proceedings, but not until there is a proper hearing or an opportunity for defendant to be heard. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

D. Divorce or Alimony.

Husband Formerly Always Liable for His Own Costs. — Prior to the 1977 amendment to this section, in actions for divorce the husband, whether successful or unsuccessful, was liable for his own costs, and whether he should pay the wife's costs was in all cases in the discretion of the court. Broom v. Broom, 130 N.C. 562, 41 S.E. 673 (1902).

Guardian Ad Litem Fees. — Having properly appointed guardian ad litem, the trial court was within its discretion to assess as an item of costs the fees of the guardian ad litem and to tax those fees to either party or apportion them between the parties. Van Every v. McGuire, 125 N.C. App. 578, 481 S.E.2d 377 (1997), aff'd, 348 N.C. 58, 497 S.E.2d 689 (1998).

E. Compensation of Referees.

Subdivision (6) must be considered in pari materia with at least two other statutes, G.S. 1-7 and 1A-1, Rule 41(d). Thigpen v. Piver, 37 N.C. App. 382, 246 S.E.2d 67, cert. denied, 295 N.C. 653, 248 S.E.2d 257 (1978).

Referees' Fees — May Be Apportioned. — Originally, under the Code of 1883, § 533, referees' fees were taxed, like other costs, against the losing party, but by amendment (Laws 1889, ch. 37) the court was authorized to apportion them in its discretion. Cobb v. Rhea, 137 N.C. 295, 49 S.E. 161 (1904).

Where, in a suit to obtain advice and instruction of the court for the proper distribution of the assets of the estate, the cause is referred to a referee, the taxing of the referee's fee is within the discretion of the court, and order of the court prorating the referee's fee between the funds derived from sale of realty to make assets and the personal property of the estate will not be disturbed. Williams v. Johnson, 230 N.C. 338, 53 S.E.2d 277 (1949).

The apportionment of the compensation for a referee and the court reporter employed by him is within the discretionary power given the court by this section. Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1963).

Same — Analogy to Allowance to Receiver. — The allowance to the receiver is a part of the costs of the action, and usually taxable against the losing party. Whether the receiver's fees should be divided is a matter in the discretion of the presiding judge, as is now the case also with referees' fees. Simmons v. Allison, 119 N.C. 556, 26 S.E. 171 (1896).

Apportionment Not Precluded by Former Judgment. — A former judgment, Homer v. Oxford Water & Elec. Co., 153 N.C. 535, 65 S.E. 607, 138 Am. St. R. 681 (1910), appealed from and affirmed by the Supreme Court, "that the defendants do recover against the plaintiff and the surety on his prosecution bond the costs of this action," did not preclude a subsequent trial judge from taxing the cost of reference against either party or apportioning it among the parties in his discretion under this section. Horner v. Oxford Water & Elec. Co., 156 N.C. 494, 72 S.E. 624 (1911).

Award of Costs on Appeal Does Not Include Referee's Fee. — Where, upon the trial in the superior court upon appeal from the referee, judgment is entered in the superior court in favor of plaintiffs, entitling plaintiffs to recover costs in the trial, such recovery does not include compensation of the referee. Cody v. England, 221 N.C. 40, 19 S.E.2d 10 (1942).

Fee Ordered Paid by Estate Not to Be Taxed Against Executor. — Ordinarily, in litigation over a fund in the nature of an in rem proceeding, such items of costs as referee's allowances and stenographic reporter's bills are paid out of the fund, although taxable in the discretion of the court, but in Lighter v. Boone, 222 N.C. 421, 23 S.E.2d 313 (1942), it was held that when such costs have been ordered paid from the estate, they cannot afterwards be taxed against an executor personally.

Authority of Assistant Clerk to Tax Cost of Deposition. — An assistant clerk of the superior court had the authority to tax the cost of a deposition against a plaintiff who took a voluntary dismissal of his case before it reached the trial calendar. Thigpen v. Piver, 37 N.C. App. 382, 246 S.E.2d 67, cert. denied, 295 N.C. 653, 248 S.E.2d 257 (1978).

F. Partition or Sale of Property.

Costs in Partition. — The taxing of costs among the parties to proceedings to partition land is left in the discretion of the court, and will not be reviewed on appeal. Fortune v. Hunt, 152 N.C. 715, 68 S.E. 213 (1910).

Where, in a petition for partition, defendant pleads sole seizin, and the trial of such issue results in a verdict for plaintiffs, and in judgment that the parties are tenants in common and appointing a commissioner to make sale, plaintiff is entitled to all costs from the filing of the answer through the final judgment below, that is, while the case is pending on the civil issue docket. This does not include costs of reference, which may be taxed in the discretion of the court. Costs of the partition proceeding, exclusive of the issue of sole seizin, may be apportioned. Bailey v. Hayman, 222 N.C. 58, 22 S.E.2d 6 (1943).

G. Actions Not Covered by This Section.

A civil action to enjoin the issuance of county bonds and to restrain the disbursement of county funds is not one of the actions enumerated by this section in which attorneys' fees may be taxed as part of the costs. Rider v. Lenoir County, 238 N.C. 632, 78 S.E.2d 745 (1953).

Defense of Tort Action. — The expense of employing attorneys in the successful defense of a suit for damages for tort is not allowable as part of the costs or recoverable in the absence of an express agreement therefor. Queen City Coach Co. v. Lumberton Coach Co., 229 N.C. 534, 50 S.E.2d 288 (1948).

Specific Performance of Property Agreement. — An action between husband and wife seeking specific performance of an agreement between them to "pool" their property and assets, to declare a resulting trust, and for an accounting, did not involve construction of a trust agreement, and the attorneys' fees of the respective parties did not come within the statutory exceptions to the general rule and could not be taxed as a part of the costs. Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1963).

Writing Insufficient as Trust Instrument. — In a declaratory judgment action in which the paper writing in question was insufficient as a trust instrument and was not executed as a will, the trial judge erred in ordering that plaintiff's counsel fees should be taxed against decedent's estate, since the action did not involve a caveat or the construction of a trust instrument within the purview of this section. Baxter v. Jones, 283 N.C. 327, 196 S.E.2d 193 (1973).

Court's order that defendant pay legal fees incurred by executor after defendant's default at judicial sale of estate's real and personal property held unauthorized. Parker v. Lippard, 87 N.C. App. 43, 359 S.E.2d 492, modified, 87 N.C. App. 487, 361 S.E.2d 395 (1987).

In declaratory judgment action in which plaintiff sought division of a federal income tax refund pursuant to G.S. 28A-15-6 and 28A-15-9, plaintiff was not entitled to attorney's fees under this section. Brantley v. Watson, 115 N.C. App. 393, 445 S.E.2d 53 (1994).

H. Illegitimate Children.

Attorneys' fees incurred in prosecuting paternity actions may not be awarded under G.S. 50-13.6, but may only be assessed as costs under subdivision (10) of this section. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

III. PROCEDURE.

Caveat Proceeding. — A caveat proceeding has substantial merit if there is substantial evidence to support the claim. Dyer v. State, 102 N.C. App. 480, 402 S.E.2d 464, rev'd on other grounds, Dyer v. State, 331 N.C. 374, 416 S.E.2d 1 (1992).

Whether a caveat proceeding has substantial merit is a legal question reviewable by the appellate courts de novo. Dyer v. State, 102 N.C. App. 480, 402 S.E.2d 464, rev'd on other grounds, Dyer v. State, 331 N.C. 374, 416 S.E.2d 1 (1992).

§ 6-21.1. Allowance of counsel fees as part of costs in certain cases.

In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars ($10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs. (1959, c. 688; 1963, c. 1193; 1967, c. 927; 1969, c. 786; 1979, c. 401; 1985 (Reg. Sess., 1986), c. 976.)

Cross References. — As to costs where offer of judgment is made, see G.S. 1A-1, Rule 68.

Legal Periodicals. — For note on the availability of general and punitive damages for an insurer's unjustified failure to pay policy benefits, see 13 Wake Forest L. Rev. 685 (1977).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For article, "The Legal Theory of Attorney Fee Shifting: A Critical Overview," see 1982 Duke L.J. 651.

For note, "Bad Faith Refusal to Pay First-Party Insurance Claims: A Growing Recognition of Extra-Contract Damages," see 64 N.C.L. Rev. 1421 (1986).

For article, "North Carolina's Cautious Approach Toward the Imposition of Extracontract Liability on Insurers for Bad Faith," see 21 Wake Forest L. Rev. 957 (1986).

For note, "A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes," see 1989 Duke L.J. 438.

For article, "Court-Ordered Arbitration in North Carolina: Selected Issues of Practice and Procedure," see 21 Campbell L. Rev. 191 (1999).

CASE NOTES

I. General Consideration.
II. Who May Make Award.
III. Procedure.
IV. Settlement.

I. GENERAL CONSIDERATION.

The obvious purpose of this section is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that it is not economically feasible to bring suit on his claim. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973); Hubbard v. Lumbermen's Mut. Cas. Co., 24 N.C. App. 493, 211 S.E.2d 544, cert. denied, 286 N.C. 723, 213 S.E.2d 721 (1975); In re Kirkman, 302 N.C. 164, 273 S.E.2d 712 (1981); Purdy v. Brown, 307 N.C. 93, 296 S.E.2d 459 (1982); Hillman v. United States Liab. Ins. Co., 59 N.C. App. 145, 296 S.E.2d 302, cert. denied, 307 N.C. 468, 299 S.E.2d 221 (1982); McDaniel v. North Carolina Mut. Life Ins. Co., 70 N.C. App. 480, 319 S.E.2d 676, cert. denied, 312 N.C. 84, 321 S.E.2d 897 (1984); Boykin v. Morrison, 148 N.C. App. 98, 557 S.E.2d 583, 2001 N.C. App. LEXIS 1287 (2001).

In such a situation the legislature apparently concluded that the defendant, though at fault, would have an unjustly superior bargaining power in settlement negotiations. A great majority of such claims arise out of automobile accidents in which the alleged wrongdoer is insured and his insurance carrier controls the litigation. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

The policy behind this section is to provide relief for an injured party where it might not be feasible to bring suit if that party had to pay an attorney out of the proceeds. Martin v. Hartford Accident & Indem. Co., 68 N.C. App. 534, 316 S.E.2d 126, cert. denied, 311 N.C. 760, 321 S.E.2d 140, 321 S.E.2d 141 (1984).

The purpose of G.S. 6-21.1 is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that it is not economically feasible to bring suit on his claim, but the discretion accorded the trial court in awarding attorney fees pursuant to G.S. 6-21.1 is not unbridled. Phillips v. Warren, 152 N.C. App. 619, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002).

This section refers only to the amount of the judgment, not to the amount of the verdict. Wells v. Jackson, 85 N.C. App. 718, 355 S.E.2d 837 (1987).

Applicability Governed by Amount Obtained. — The amount of the judgment obtained, not the amount of the judgment sought, governs applicability of this section. Purdy v. Brown, 56 N.C. App. 792, 290 S.E.2d 397, rev'd on other grounds, 307 N.C. 93, 296 S.E.2d 459 (1982).

It was the amount of the judgment obtained, not the amount sought, that governed the applicability G.S. 6-21.1; an attorney's fees award was affirmed where judgment was rendered for $3,829.98, and the trial court considered the factors listed in Washington v. Horton, 132 N.C. App. 347, 513 S.E.2d 331 (1999), in making the award. Phillips v. Brackett, 156 N.C. App. 76, 575 S.E.2d 805, 2003 N.C. App. LEXIS 27 (2003).

G.S. 6-21.1 applies when a plaintiff recovers a judgment for zero dollars or less than zero dollars becase the precise amount of damages awarded is of no consequence as long as it is less than $10,000. Reinhold v. Lucas, 167 N.C. App. 735, 606 S.E.2d 412, 2005 N.C. App. LEXIS 10 (2005).

Amount Obtained Means Compensatory Damages. — "Damages" as used in G.S. 6-21.1 applied only to the compensatory damage amounts when determining whether the judgment amount was equal to or less than $10,000. Boykin v. Morrison, 148 N.C. App. 98, 557 S.E.2d 583, 2001 N.C. App. LEXIS 1287 (2001).

Trial court erred in including costs and prejudgment interest in a calculation of a "judgment obtained" by plaintiff in a personal injury suit for purposes of determining whether plaintiff was entitled to attorney's fees for a judgment not to exceed $10,000. Brown v. Millsap, 161 N.C. App. 282, 588 S.E.2d 71, 2003 N.C. App. LEXIS 2041 (2003).

Construing the phrase "judgment for recovery of damages" to include punitive damage award would decrease the number of cases to which G.S. 6-21.1 would apply. Boykin v. Morrison, 148 N.C. App. 98, 557 S.E.2d 583, 2001 N.C. App. LEXIS 1287 (2001).

This section, being remedial, should be construed liberally to accomplish the purpose of the legislature and to bring within it all cases fairly falling within its intended scope. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973); Hubbard v. Lumbermen's Mut. Cas. Co., 24 N.C. App. 493, 211 S.E.2d 544, cert. denied, 286 N.C. 723, 213 S.E.2d 721 (1975); In re Kirkman, 302 N.C. 164, 273 S.E.2d 712 (1981); Hillman v. United States Liab. Ins. Co., 59 N.C. App. 145, 296 S.E.2d 302, cert. denied, 307 N.C. 468, 299 S.E.2d 221 (1982); McDaniel v. North Carolina Mut. Life Ins. Co., 70 N.C. App. 480, 319 S.E.2d 676, cert. denied, 312 N.C. 84, 321 S.E.2d 897 (1984); West ex rel. Farris v. Tilley, 120 N.C. App. 145, 461 S.E.2d 1 (1995).

This section should be construed liberally by the presiding judge to accomplish the obvious purpose to provide relief for a person who has a claim so small that, if he must pay an attorney out of his recovery, it may not be economically feasible to bring suit. DeBerry v. American Motorists Ins. Co., 33 N.C. App. 639, 236 S.E.2d 380 (1977).

Attorneys' Fees Not Recoverable as Costs in Absence of Statute. — Attorneys' fees are not now regarded as part of court costs in this jurisdiction, except as otherwise provided by statute. Perkins v. American Mut. Fire Ins. Co., 4 N.C. App. 466, 167 S.E.2d 93 (1969).

Ordinarily, attorneys' fees are not recoverable as an item of damages or part of the costs in litigation. U.S. Piping, Inc. v. Travelers Indem. Co., 9 N.C. App. 561, 176 S.E.2d 835 (1970); Hicks v. Albertson, 18 N.C. App. 599, 197 S.E.2d 624, aff'd, 284 N.C. 236, 200 S.E.2d 40 (1973).

In the absence of statutory authority therefor, a court may not include an allowance of attorneys' fees as part of the costs recoverable by the successful party to an action or proceeding. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

Inmate, who had obtained a verdict against a deputy sheriff with regard to an assault and battery suit, was unable to recover litigation costs or attorney's fees, because no statutory authority existed allowing such recovery to a prevailing party in a civil assault case. Cunningham v. Riley, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 511 (Mar. 15, 2005).

But the legislature has enacted an exception to this general rule and allows the trial judge to award attorneys' fees in certain situations under this section. U.S. Piping, Inc. v. Travelers Indem. Co., 9 N.C. App. 561, 176 S.E.2d 835 (1970).

This section creates an exception to the general rule that attorneys' fees are not allowable as part of the costs in civil actions. Hill v. Jones, 26 N.C. App. 168, 215 S.E.2d 168, cert. denied, 288 N.C. 240, 217 S.E.2d 664 (1975).

This statute is an exception to the general rule that counsel fees may not be included in costs recoverable to a successful party in an action or proceeding. West ex rel. Farris v. Tilley, 120 N.C. App. 145, 461 S.E.2d 1 (1995).

Section Does Not Guarantee Compensation in All Cases. — While this section is aimed at encouraging injured parties to press their meritorious but pecuniarily small claims, it was not intended to encourage parties to refuse reasonable settlement offers and give rise to needless litigation by guaranteeing that counsel will, in all cases, be compensated. Harrison v. Herbin, 35 N.C. App. 259, 241 S.E.2d 108, cert. denied, 295 N.C. 90, 244 S.E.2d 258 (1978).

Discretion of Judge. — The allowance of counsel fees under the authority of this section is, by express language of this section, in the discretion of the presiding judge. Callicutt v. Hawkins, 11 N.C. App. 546, 181 S.E.2d 725 (1971); Hubbard v. Lumbermen's Mut. Cas. Co., 24 N.C. App. 493, 211 S.E.2d 544, cert. denied, 286 N.C. 723, 213 S.E.2d 721 (1975); Black v. Standard Guar. Ins. Co., 42 N.C. App. 50, 255 S.E.2d 782, cert. denied, 298 N.C. 293, 259 S.E.2d 910 (1979); Yates Motor Co. v. Simmons, 51 N.C. App. 339, 276 S.E.2d 496, cert. denied, 303 N.C. 320, 281 S.E.2d 660 (1981).

Without a showing of any abuse of the trial judge's discretion, an assignment of error to a denial of a motion for allowance of attorneys' fees will be overruled. Callicutt v. Hawkins, 11 N.C. App. 546, 181 S.E.2d 725 (1971).

Because this section provides for the award of "a reasonable attorney fee," the court has a large measure of discretion in fixing or recommending the amount to be paid. Hill v. Jones, 26 N.C. App. 168, 215 S.E.2d 168, cert. denied, 288 N.C. 240, 217 S.E.2d 664 (1975).

Decision to award attorney's fees pursuant to G.S. 6-21.1 is discretionary, but the trial court's discretion is not unbridled; if the trial court is shown to have abused its discretion, its decision will be overturned. House v. Stone, 163 N.C. App. 520, 594 S.E.2d 130, 2004 N.C. App. LEXIS 507 (2004).

To overturn trial judge's determination, defendant must show abuse of discretion. Hillman v. United States Liab. Ins. Co., 59 N.C. App. 145, 296 S.E.2d 302 (1982), cert. denied, 307 N.C. 468, 299 S.E.2d 221 (1983).

Without a showing of abuse of trial judge's discretion, trial judge's determination to award counsel fees will not be overturned. Whitfield v. Nationwide Mut. Ins. Co., 86 N.C. App. 466, 358 S.E.2d 92 (1987).

Trial Court's Award of Attorney's Fees Supported by the Whole Record. — Absence from a trial court's findings regarding an award of attorney's fees, under G.S. 6-21.1, of a finding regarding unjust exercise of superior bargaining power did not require reversal when the trial court made adequate findings on the whole record to support an award of attorney's fees. Messina v. Bell, 158 N.C. App. 111, 581 S.E.2d 80, 2003 N.C. App. LEXIS 978 (2003).

Section Contemplates Inquiry Before Awarding Fee to Counsel. — The wording of this section contemplates some type of inquiry by the presiding judge before the court may exercise its discretion in awarding a fee to plaintiff's counsel. Hillman v. United States Liab. Ins. Co., 59 N.C. App. 145, 296 S.E.2d 302 (1982), cert. denied, 307 N.C. 468, 299 S.E.2d 221 (1983).

Reasonableness as Key Factor. — Reasonableness, not arbitrary classification of attorney activity, is the key factor under all the attorneys' fees statutes. Coastal Prod. Credit Ass'n v. Goodson Farms, Inc., 70 N.C. App. 221, 319 S.E.2d 650, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Order denying motion pending remand to arbitrator was error. — Judge's order denying plaintiff's motion for attorney's fees "pending remand to the Arbitrator for a further determination" was error. This section requires the judge upon motion made to award attorney's fees as a part of the costs. Bass v. Goss, 105 N.C. App. 242, 412 S.E.2d 145 (1992).

This section permits the judge to allow

the successful plaintiff a reasonable attorneys' fee in a suit against an insurance company upon a finding by the court that there was an unwarranted refusal by the insurer to pay the claim of plaintiff-insured which constitutes the basis of the suit, where the judgment is $5,000 or less. Martin v. Hartford Accident & Indem. Co., 68 N.C. App. 534, 316 S.E.2d 126, cert. denied, 311 N.C. 760, 321 S.E.2d 140, 321 S.E.2d 141 (1984).

Denial of Attorney's Fee Held Proper. — Doctor who sued insurer for settlement proceeds owed to him under a valid medical lien was not entitled to attorney's fees, pursuant to this section, where he was not the "beneficiary" under the insurer's policy, and he did not bring his suit under the policy issued, but instead alleged that the insurer breached its duty to him by failing to retain sufficient funds from the settlement proceeds to satisfy his lien. Smith v. State Farm Mut. Auto. Ins. Co., 157 N.C. App. 596, 580 S.E.2d 46, 2003 N.C. App. LEXIS 933 (2003), cert. denied, 357 N.C. 507, 587 S.E.2d 674 (2003).

Grant of Attorneys' Fee Held Proper. — Trial court properly considered the factors required by North Carolina case law before it awarded over $32,000 in attorneys' fees to a pedestrian who recovered $7,000 in damages after he was struck by a truck, and the appellate court found that the award was not excessive. Overton v. Purvis, 162 N.C. App. 241, 591 S.E.2d 18, 2004 N.C. App. LEXIS 120 (2004).

Insurer's Refusal Unwarranted. — The automobile insurer's refusal to pay at least the undisputed amount of loss to the plaintiff was unwarranted, and the trial court properly awarded attorneys' fees. PHC, Inc. v. North Carolina Farm Bureau Mut. Ins. Co., 129 N.C. App. 801, 501 S.E.2d 701 (1998), cert. denied, 348 N.C. 694, 511 S.E.2d 648 (1998).

Insurer's Refusal Not "Unwarranted". — Insurer's refusal to pay the claim of an insured covered by a group medical insurance policy incident to an in-vitro fertilization procedure until approximately two months after insured filed suit was not "unwarranted" so as to authorize the imposition of attorneys' fees against the insurer under this section. Michael v. Metropolitan Life Ins. Co., 631 F. Supp. 451 (W.D.N.C. 1986).

Trial Court Need Not Make a Finding of Insurance Company's Refusal to Pay Policy. — Trial court's finding, when awarding attorney's fees, under G.S. 6-21.1, of an insurance company's unwarranted refusal to pay an insurance policy was not necessary in a suit involving an automobile accident which was not a suit directly against an insurance policy. Messina v. Bell, 158 N.C. App. 111, 581 S.E.2d 80, 2003 N.C. App. LEXIS 978 (2003).

Merit Bonus. — It is true that the quality of services rendered is properly considered in awarding fees, as well as the nature of the services required, and hence the scope and complexity of the case. However, there is no North Carolina authority for an award of a "merit bonus." Even assuming such bonuses are allowed, as under federal practice, that should occur only in the "rare case" where the applicant specifically shows superior quality representation and exceptional success. Coastal Prod. Credit Ass'n v. Goodson Farms, Inc., 70 N.C. App. 221, 319 S.E.2d 650, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Additional Attorneys' Fees on Appeal. — Authority to award additional attorneys' fees for an appeal falls within the purview of this section. Heins Tel. Co. v. Grain Dealers Mut. Ins. Co., 57 N.C. App. 695, 292 S.E.2d 281 (1982).

Trial court, in its discretion and upon appropriate findings of fact, could award reasonable attorney's fees for service performed during an appeal, under G.S. 6-21.1. Messina v. Bell, 158 N.C. App. 111, 581 S.E.2d 80, 2003 N.C. App. LEXIS 978 (2003).

Additional Attorneys' Fees on Reward. — Trial court's award of attorney fees to injured party in personal injury case was not an abuse of discretion as the trial court considered all the relevant factors, including the Washington factors, in making its decision; and the trial court had the discretion, after the case was remanded, to award appellate attorney fees, if it found such fees were warranted. Furmick v. Miner, 154 N.C. App. 460, 573 S.E.2d 172, 2002 N.C. App. LEXIS 1474 (2002).

Former G.S. 25-8 Became Part of Contracts. — Provisions in notes executed prior to the repeal in 1965 of former G.S. 25-8 that required the debtors to pay reasonable attorneys' fees for collection of the notes were rendered unenforceable by that section, notwithstanding the enactment in 1967 of this section permitting such provisions, since the former section became a part of the contracts between the parties and this section could not vary the terms of those contracts. Register v. Griffin, 10 N.C. App. 191, 178 S.E.2d 95 (1970).

When Insurance Company Not Required to Defend. — Where an insurance company utilized G.S. 20-279.21 (b)(3)a to provide a defense to the insured party, it was a party in the tort actions, although unnamed; therefore, although it was not required to defend the lawsuit, but chose to do so, by so doing it became a defendant and liable for attorney's fees and costs. Turnage ex rel. Turnage v. Nationwide Mut. Ins. Co., 109 N.C. App. 300, 426 S.E.2d 433, aff'd per curiam, 335 N.C. 168, 435 S.E.2d 772 (1993).

Section Not Applicable to Workers' Compensation Cases. — This section refers to personal injury damage suits and property damage suits tried in a court where there is a presiding trial judge and is not applicable in workers' compensation cases. Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

Action Heard Before Arbitrator. — In a civil action heard before an arbitrator where the plaintiff was awarded less than $10,000, a judge had discretion whether to and in what amount to award attorney's fees. Bass v. Goss, 105 N.C. App. 242, 412 S.E.2d 145 (1992).

The Uniform Arbitration Act does not forbid an award of attorney's fees for services provided by an attorney before the case is referred to binding arbitration. Lucas v. City of Charlotte, 123 N.C. App. 140, 472 S.E.2d 203 (1996).

Since former G.S. 1-567.11 has no application to work performed by an attorney before a case is referred to arbitration, the award of attorney's fees under this section was proper. Lucas v. City of Charlotte, 123 N.C. App. 140, 472 S.E.2d 203 (1996).

Attorney's Fees in Personal Injury Suit. — Trial court's findings supported its award of attorney's fees, in a personal injury suit, when those findings included (1) offers of settlement by both parties before and after suit was filed, (2) the defending motorist's offer of judgment, which was less than the judgment finally obtained, (3) no findings of an unjust exercise of superior bargaining power, which did not require reversal in light of adequate findings on the whole record supporting the award, (4) no findings of an unwarranted refusal to pay an insurance policy, which were not required as the suit involved an automobile accident and was not directly against an insurance policy, (5) the dates of either party's offers to settle before suit, in arbitration and mediation, in offers of judgment, and during trial, and (6) the amounts of the jury verdict, the judgment finally obtained, and the motorist's offers to settle. Messina v. Bell, 158 N.C. App. 111, 581 S.E.2d 80, 2003 N.C. App. LEXIS 978 (2003).

Attorneys' Fees in Actions Under Tort Claims Act. — The Industrial Commission has jurisdiction and authority to award attorneys' fees pursuant to this section for actions brought under the Tort Claims Act. Karp v. University of N.C., 88 N.C. App. 282, 362 S.E.2d 825 (1987), aff'd, 323 N.C. 473, 373 S.E.2d 430 (1988).

Costs and attorney fees were awarded to a property owner in error as, when read by themselves, G.S. 143-291 and G.S. 143-291.1 did not grant the North Carolina Industrial Commission the authority to award attorney fees; when read together with G.S. 6-21.1, the Commission had jurisdiction and authority to award attorney fees in a North Carolina Tort Claims Act case, but the owner's damages far exceeded the statutory maximum of $10,000. Watts v. N.C. Dep't of Env't & Natural Res., — N.C. App. —, 641 S.E.2d 811, 2007 N.C. App. LEXIS 595 (2007).

Defendants Prevailing on Counterclaim for Less Than Amount Sought. — Plaintiff's contention that the legislature did not intend for defendants to be able to collect attorneys' fees when they have prevailed on counterclaims for less than the stated amount was without merit. Mickens v. Robinson, 103 N.C. App. 52, 404 S.E.2d 359 (1991).

Abuse of Discretion. — Because defendant was not entitled to recover attorney's fees for defending against plaintiff's claim and because the amount of attorney's fees sought by defendant represented the cost for defending against plaintiff's claim as well as prosecuting defendant's counterclaim, the trial court necessarily abused its discretion in awarding defendant the full amount sought. Mishoe v. Sikes, 115 N.C. App. 697, 446 S.E.2d 114 (1994), aff'd, 340 N.C. 256, 456 S.E.2d 308 (1995).

To Receive Fees Party Must Be Litigant. — Although the court's amended judgment provided separately for recovery by plaintiff of $9,000.00 and by plaintiff's mother of $1,301.00, as the record reflected no formal motion by either plaintiff or defendant to add the mother as a party she did not function as a "litigant" therein and her recovery was not considered with daughter's for purposes of awarding attorney fees. West ex rel. Farris v. Tilley, 120 N.C. App. 145, 461 S.E.2d 1 (1995).

Section Not Applicable to Breach of Contract Case. — Attorney fees were not awardable in breach of contract case where homeowners received money damages from an exterminating firm for failure to detect termites. Hicks v. Clegg's Termite & Pest Control, Inc., 132 N.C. App. 383, 512 S.E.2d 85 (1999).

In taxpayers' suit against county commissioners for entering into a contract that benefitted one of the commissioners, it was within the trial court's discretion to allow or deny attorney's fees after hearing the taxpayers' evidence. Gibbs v. Mayo, 162 N.C. App. 549, 591 S.E.2d 905, 2004 N.C. App. LEXIS 252 (2004), cert. denied, 358 N.C. 543, 599 S.E.2d 45 (2004).

Award of Attorney's Fees Held Proper. — In an action for damages for personal injuries and medical expenses by the injured party and her parents, the trial court had the discretion to award attorney's fees since the damages awarded to the injured party and her parents were separate and each was less than $10,000. Moquin v. Hedrick, 163 N.C. App. 345, 593 S.E.2d 435, 2004 N.C. App. LEXIS 372 (2004).

Trial court did not err in awarding attorney's fees to a passenger pursuant to G.S. 6-21.1 in her action for personal injuries sustained in an automobile collision because she obtained a judgment against defendant for damages and was the prevailing party, notwithstanding the subsequent reduction of her judgment pursuant to G.S. 1B-4 by the amount of her settlement with a third-party defendant. Reinhold v. Lucas, 167 N.C. App. 735, 606 S.E.2d 412, 2005 N.C. App. LEXIS 10 (2005).

Trial court's denial of attorney fees was affirmed where the trial court made sufficient findings on the record, where it properly considered whether the judgment awarded was more favorable than offers of judgment made prior to trial, and where it properly considered the entire record before making a decision. House v. Stone, 163 N.C. App. 520, 594 S.E.2d 130, 2004 N.C. App. LEXIS 507 (2004).

Applied in Smith v. Whisenhunt, 259 N.C. 234, 130 S.E.2d 334 (1963); Brady v. Smith, 18 N.C. App. 293, 196 S.E.2d 580 (1973); First Union Nat'l Bank v. Richards, 90 N.C. App. 650, 369 S.E.2d 620 (1988); Phillips v. Warren, 152 N.C. App. 619, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002).

Cited in Whitley v. City of Durham, 256 N.C. 106, 122 S.E.2d 784 (1961); Foster v. Foster, 264 N.C. 694, 142 S.E.2d 638 (1965); Mims v. Dixon, 272 N.C. 256, 158 S.E.2d 91 (1967); In re King, 281 N.C. 533, 189 S.E.2d 158 (1972); City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972); Caison v. Nationwide Ins. Co., 36 N.C. App. 173, 243 S.E.2d 429 (1978); Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980); Plow v. Bug Man Exterminators, Inc., 57 N.C. App. 159, 290 S.E.2d 787 (1982); City Fin. Co. v. Boykin, 86 N.C. App. 466, 358 S.E.2d 83 (1987); Tay v. Flaherty, 100 N.C. App. 51, 394 S.E.2d 217 (1990); Davis v. Sellers, 115 N.C. App. 1, 443 S.E.2d 879 (1994), cert. denied, 339 N.C. 610, 454 S.E.2d 248 (1995); Benton v. Thomerson, 339 N.C. 598, 453 S.E.2d 161 (1995); Boykin v. Morrison, 148 N.C. App. 98, 557 S.E.2d 583, 2001 N.C. App. LEXIS 1287 (2001); Phillips v. Warren, 152 N.C. App. 619, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002); Overton v. Purvis, 154 N.C. App. 543, 573 S.E.2d 219, 2002 N.C. App. LEXIS 1519 (2002), cert. denied, 357 N.C. 63, 579 S.E.2d 391 (2003); Martin Architectural Prods. v. Meridian Constr. Co., 155 N.C. App. 176, 574 S.E.2d 189, 2002 N.C. App. LEXIS 1567 (2002); Johnson v. Piggly Wiggly of Pinetops, Inc., 156 N.C. App. 42, 575 S.E.2d 797, 2003 N.C. App. LEXIS 32 (2003), cert. denied, 357 N.C. 251, 582 S.E.2d 271 (2003); Guess v. Parrott, 160 N.C. App. 325, 585 S.E.2d 464, 2003 N.C. App. LEXIS 1798 (2003); Jane Doe 1 v. Swannanoa Valley Youth Dev. Ctr., 163 N.C. App. 136, 592 S.E.2d 715, 2004 N.C. App. LEXIS 299 (2004); House v. Stone, 163 N.C. App. 520, 594 S.E.2d 130, 2004 N.C. App. LEXIS 507 (2004); Calhoun v. WHA Med. Clinic, PLLC, 178 N.C. App. 585, 632 S.E.2d 563, 2006 N.C. App. LEXIS 1654 (2006); Kessler v. Shimp, — N.C. App. —, 640 S.E.2d 822, 2007 N.C. App. LEXIS 395 (2007).

II. WHO MAY MAKE AWARD.

"Presiding Judge" Means Judge Presiding over Court in Which Action Is Instituted. — The term "presiding judge" means the judge presiding over the court in which the action is instituted. Such judge can, without danger of injustice, fix a reasonable fee for the attorney of the party recovering damages by settlement prior to trial. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

The legislature contemplated that the judge who presided at the trial would determine whether a fee for the attorney of the party recovering damages should be allowed and, if so, the amount. Such judge would be in a better position than any other to make this determination. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

When Judge Other Than Trial Judge May Make Allowance. — While it is proper that the trial judge in an action which proceeds to trial may allow a reasonable attorney fee to the successful litigant under this section, the presiding judge of the court in which the suit is instituted may allow such fee when judgment is obtained without the necessity for trial. In cases where the judge who presided at the trial is unable because of death, disability, or other valid reason to make such allowance, the presiding judge of the court in which the suit is instituted would have such authority. Hicks v. Albertson, 18 N.C. App. 599, 197 S.E.2d 624, aff'd, 284 N.C. 236, 200 S.E.2d 40 (1973).

Presiding judge may award compensation for legal services rendered on appeal. Hill v. Jones, 26 N.C. App. 168, 215 S.E.2d 168, cert. denied, 288 N.C. 240, 217 S.E.2d 664 (1975).

The clerk has no authority to determine whether a fee should be allowed as part of the costs or to fix the amount of such fee. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

State Tort Claim. — Under G.S. 6-21.1, both the determination of whether to award attorney's fees and the amount of the attorney's fees is in the considerable discretion of a presiding judge; in the case of a state tort claim, the same discretion lies in the North Carolina Industrial Commission. Sprinkle v. N.C. Wildlife Res. Comm'n, 165 N.C. App. 721, 600 S.E.2d 473, 2004 N.C. App. LEXIS 1513 (2004).

III. PROCEDURE.

Plaintiff Need Not Plead for Award in Complaint. — This section does not require that a plaintiff seeking attorneys' fees under the statute affirmatively plead for such an award as a separate claim in the complaint. Black v. Standard Guar. Ins. Co., 42 N.C. App. 50, 255 S.E.2d 782, cert. denied, 298 N.C. 293, 259 S.E.2d 910 (1979).

Findings of Fact Required. — In awarding reasonable counsel fees under this section, the judge presiding must make some findings of fact to support the award. Hill v. Jones, 26 N.C. App. 168, 215 S.E.2d 168, cert. denied, 288 N.C. 240, 217 S.E.2d 664 (1975).

Findings Regarding the Allocation of Time. — Although a trial court is not necessarily required to make specific findings as to the allocation of time for attorney's fees in its award of attorney's fees under this section, the court must still carefully review the attorney's hours and determine the amount of fees to be awarded that represents, in the court's opinion, the legal fees to be awarded for obtaining a judgment whether from a complaint or a counterclaim. Mishoe v. Sikes, 115 N.C. App. 697, 446 S.E.2d 114 (1994), aff'd, 340 N.C. 256, 456 S.E.2d 308 (1995).

And Such Findings May Be Limited. — Since this section determines the nature of an action and limits the amount involved, the findings of fact may be limited to the quantity and quality of all the services rendered by the attorney for his client until the final determination of the action for which the judge presiding, in his discretion, allows an attorneys' fee. Hill v. Jones, 26 N.C. App. 168, 215 S.E.2d 168, cert. denied, 288 N.C. 240, 217 S.E.2d 664 (1975).

Because this statute defines the circumstances under which attorneys' fees may be awarded, the trial court is not required to make specific findings as to the plaintiff's entitlement to such an award. Epps v. Ewers, 90 N.C. App. 597, 369 S.E.2d 104 (1988).

Trial court was not required to make findings of fact allocating the time spent on a case between work required to defend against plaintiff's claim and that required to forward defendant's counterclaim when awarding attorneys' fees to defendant. Mickens v. Robinson, 103 N.C. App. 52, 404 S.E.2d 359 (1991).

But Separate Findings Under G.S. 1A-1, Rule 52(a) Not Required. — This section does not require the trial judge to make separate findings and conclusions to support an award of attorney fees in accordance with G.S. 1A-1, Rule 52(a). Black v. Standard Guar. Ins. Co., 42 N.C. App. 50, 255 S.E.2d 782, cert. denied, 298 N.C. 293, 259 S.E.2d 910 (1979).

When Finding of Unwarranted Refusal to Pay Claim Required. — It is only when suit is brought against an insurance company by the insured or beneficiary, as plaintiff, under a policy issued by such insurance company, that there must be a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim before attorneys' fees may be allowed as a part of the costs when the judgment for recovery of damages is for $1,000 or less (now $5,000 or less). Rogers v. Rogers, 2 N.C. App. 668, 163 S.E.2d 645 (1968).

A trial court improperly awarded attorneys' fees to a judgment holder in the latter's action against an automobile liability insurer, where it made no finding that there was an unwarranted refusal by the insurer to pay the claim constituting the basis of the judgment holder's suit against the insured. U.S. Piping, Inc. v. Travelers Indem. Co., 9 N.C. App. 561, 176 S.E.2d 835 (1970).

Under this section, to support an award for an attorneys' fee from an insurance company the presiding judge must first find "an unwarranted refusal" to pay the claim. DeBerry v. American Motorists Ins. Co., 33 N.C. App. 639, 236 S.E.2d 380 (1977).

A finding of an unwarranted refusal by defendants to pay plaintiff's claim is required only in suits by an insured or beneficiary against an insurance company. Yates Motor Co. v. Simmons, 51 N.C. App. 339, 276 S.E.2d 496, cert. denied, 303 N.C. 320, 281 S.E.2d 660 (1981).

Where an insurance company is not a named defendant, there is no requirement that the trial court make a finding that there was an unwarranted refusal to pay by the insurer in order to award attorneys' fees under G.S. 6-21.1. McDaniel v. McBrayer, 164 N.C. App. 379, 595 S.E.2d 784, 2004 N.C. App. LEXIS 817 (2004).

When Finding of Unwarranted Refusal to Pay Not Required. — In a damage action arising out of a motor vehicle collision, since the suit was not on an insurance policy, a finding that refusal to pay was unwarranted was not required. Crisp v. Cobb, 75 N.C. App. 652, 331 S.E.2d 255 (1985).

The trial court was not required to make an "unwarranted refusal" finding to award attorney fees in an automobile accident case, since such a finding is required only in suits brought by an insured or a beneficiary against an insurance company defendant. Washington v. Horton, 132 N.C. App. 347, 513 S.E.2d 331 (1999).

When Finding of Unfair Bargaining Power Not Required. — Trial court's failure to make a finding as to a defendant's exercise of unfair bargaining power in awarding attorneys' fees under G.S. 6-21.1 was not grounds for reversal. McDaniel v. McBrayer, 164 N.C. App. 379, 595 S.E.2d 784, 2004 N.C. App. LEXIS 817 (2004).

The trial court is to consider the entire record in properly exercising its discretion under this section, including but not limited to the following factors: (1) settlement offers made before institution of the action; (2) offers of judgment and whether the judgment finally obtained was more favorable than such offers; (3) whether defendant unjustly exercised superior bargaining power; (4) in the case of an unwarranted refusal by an insurance company, the context in which the dispute arose; (5) the timing of settlement offers; and (6) the amounts of the settlement offers as compared to the jury verdict. Washington v. Horton, 132 N.C. App. 347, 513 S.E.2d 331 (1999).

Trial court property excluded $6,180 in costs and attorney fees which plaintiff incurred to obtain judgment awarding her damages in the amount of $4,950 in a personal injury action, and trial court did not err by ordering the defendant to pay the plaintiff's attorney's fee. Sowell v. Clark, 151 N.C. App. 723, 567 S.E.2d 200, 2002 N.C. App. LEXIS 897 (2002).

When deciding whether to award attorneys' fees under G.S. 6-21.1, a trial court must examine the entire record, including but not limited to: (1) settlement offers made prior to institution of the action; (2) offers of judgment made pursuant to G.S. 1A-1, N.C. R. Civ. P. 68 and whether the judgment finally obtained was more favorable than such offers; (3) whether defendant unjustly exercised superior bargaining power; (4) in the case of an unwarranted refusal by an insurance company, the context in which the dispute arose; (5) the timing of settlement offers; and (6) the amounts of settlement offers as compared to the jury verdict. Phillips v. Warren, 152 N.C. App. 619, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002).

In determining whether to award attorneys' fees, the trial court must consider the entire record, including: (1) settlement offers made prior to the institution of the action; (2) offers of judgment pursuant to N.C. R. Civ. P. 68, and whether the judgment finally obtained was more favorable than such offers; (3) whether the defendant unjustly exercised superior bargaining power;(4) in the case of an unwarranted refusal by an insurance company, the context in which the dispute arose; (5) the timing of settlement offers; and (6) the amounts of the settlement offers as compared to the jury verdict. McDaniel v. McBrayer, 164 N.C. App. 379, 595 S.E.2d 784, 2004 N.C. App. LEXIS 817 (2004).

Trial Court Failed to Appreciate the Significance of Settlement Offers. — The trial court abused its discretion in awarding attorney's fees to counsel for plaintiff without considering the guidelines established by Horton; the trial court is required to make additional findings of fact regarding the timing and amount of any settlement offers, the bargaining position of the parties, and the amount of the settlement offers as compared to the jury verdict. Culler v. Hardy, 137 N.C. App. 155, 526 S.E.2d 698, 2000 N.C. App. LEXIS 251 (2000).

Trial Court's Discretion. — Trial court's decision to award attorneys' fees under G.S. 6-21.1 is discretionary and will not be overturned absent a showing of abuse of discretion. McDaniel v. McBrayer, 164 N.C. App. 379, 595 S.E.2d 784, 2004 N.C. App. LEXIS 817 (2004).

The plaintiff may properly move for an award of attorneys' fees after a verdict has been returned in its favor. Black v. Standard Guar. Inc., 42 N.C. App. 50, 255 S.E.2d 782, cert. denied, 298 N.C. 293, 259 S.E.2d 910 (1979).

No Fees Where Plaintiff Awarded New Trial. — Under this section, attorneys' fees are taxed as a part of the court costs, and where plaintiff was awarded a new trial by the appellate court, no judgment for damages was obtained, and, consequently, no attorneys' fees would be awarded as part of the cost. Craven v. Chambers, 56 N.C. App. 151, 287 S.E.2d 905 (1982).

Factors to Be Considered. — Several factors exist, denominated the "Washington factors," that a trial court must examine when determining whether to award attorney's fees. The trial court must consider the entire record in properly exercising its discretion, including but not limited to the following factors: (1) settlement offers made prior to the institution of the action; (2) offers of judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 68, and whether the judgment finally obtained was more favorable than such offers; (3) whether defendant unjustly exercised superior bargaining power; (4) in the case of an unwarranted refusal by an insurance company, the context in which the dispute arose; (5) the timing of settlement offers; (6) the amounts of the settlement offers as compared to the jury verdict; and (7) the whole record. House v. Stone, 163 N.C. App. 520, 594 S.E.2d 130, 2004 N.C. App. LEXIS 507 (2004).

Finding Insufficient to Award Attorneys' Fees. — Where the only findings of fact in support of the amount of the award for attorneys' fees were that plaintiff's attorney "provided good and valuable services"; that the reasonable value of the services provided by plaintiff's attorney was $2,000.00; and that plaintiff's fee contract with her attorney provided for a contingent fee of one-third of the damage award, those findings were not sufficient to support an award of $2,000. Epps v. Ewers, 90 N.C. App. 597, 369 S.E.2d 104 (1988).

The court abused its discretion in failing to make the required findings of fact to support the fee award pursuant to this section where no findings appear in the written judgment, and the hearing transcript reveals, at most, findings that a settlement offer "right prior to trial" was rejected and no meaningful negotiations were held due to the parties' intransigence. Porterfield v. Goldkuhle, 137 N.C. App. 376, 528 S.E.2d 71, 2000 N.C. App. LEXIS 320 (2000).

Award Upheld. — Where defendant's attorneys presented evidence tending to show that they were entitled to a fee of $8000 for their work, and the trial court, after having carefully reviewed petitioner's hours, awarded $5000, there was no abuse of discretion in the award. Mickens v. Robinson, 103 N.C. App. 52, 404 S.E.2d 359 (1991).

Attorney's fee award in a suit arising from an automobile accident was proper; although the jury's verdict was less than an offer of judgment, the offer did not exceed the amount of the judgment finally obtained, which included costs and attorney's fees. Robinson v. Shue, 145 N.C. App. 60, 550 S.E.2d 830, 2001 N.C. App. LEXIS 572 (2001).

Award Reversed. — The trial court erred in awarding $5,000 in attorney's fees to counsel for plaintiff after the jury returned a verdict for plaintiff in the amount of $62; the court failed to consider the guidelines established by Washington v. Horton, 132 N.C. App. 347, 513 S.E.2d 331 (1999). Williams v. Manus, 142 N.C. App. 384, 542 S.E.2d 680, 2001 N.C. App. LEXIS 98 (2001).

Interest Not Allowed on Attorney Fee Awards. — There is no provision for interest on court costs, and since attorney fees are taxed as part of court costs under this section, the trial court erred in awarding prejudgment and postjudgment interest on an award of attorney fees. Washington v. Horton, 132 N.C. App. 347, 513 S.E.2d 331 (1999).

IV. SETTLEMENT.

Effect of Settlement or Offer. — To hold that use of the adjective "presiding" shows that the legislature intended that no fee be allowed in any case settled without actual trial is to give this word an unreasonably strict construction and would defeat its purpose. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

This section refers specifically to the "institution" of a suit, not its trial, and allows an attorneys' fee to be awarded without regard to how that judgment is obtained. To permit an offer of judgment, or indeed any settlement prior to a completed trial, to avoid the payment of a reasonable attorneys' fee in the discretion of the court would defeat in large measure the purpose of the statute. Hicks v. Albertson, 18 N.C. App. 599, 197 S.E.2d 624, aff'd, 284 N.C. 236, 200 S.E.2d 40 (1973).

In referring to the "presiding" judge in this section as the official to assess attorneys' fees, the General Assembly did not contemplate that attorneys' fees would be properly allowed only if the case could not be settled prior to trial. Yates Motor Co. v. Simmons, 51 N.C. App. 339, 276 S.E.2d 496, cert. denied, 303 N.C. 320, 281 S.E.2d 660 (1981).

Attorneys' Fees Where Settlement Offer Made. — Attorneys' fees which were incurred prior to the time the offer of judgment was made are recoverable. The G.S. 1A-1, Rule 68 sanctions only provide protection against the costs incurred after the offer has been made. Purdy v. Brown, 307 N.C. 93, 296 S.E.2d 459 (1982).

Attorneys' fees may be awarded pursuant to this statute even when damages are recovered by settlement prior to trial. Epps v. Ewers, 90 N.C. App. 597, 369 S.E.2d 104 (1988); Benton v. Thomerson, 113 N.C. App. 293, 438 S.E.2d 434 (1994), rev'd on other grounds, 339 N.C. 598, 453 S.E.2d 161 (1995).

Attorneys' fees and costs were properly awarded to the plaintiff, notwithstanding that the defendant twice offered to settle the action for $5,000, where the jury awarded the plaintiff $5,000, plus $555 in costs, and attorneys' fees were also taxed as costs. Tew v. West, 143 N.C. App. 534, 546 S.E.2d 183, 2001 N.C. App. LEXIS 314 (2001).

Attorney's fees award was proper even though the tortfeasor made an offer of judgment which exceeded the jury's verdict because the jury's verdict was properly modified by adding the injured party's attorney's fees and costs in arriving at the "judgment finally obtained," which exceeded the tortfeasor's judgment offer. Thorpe v. Perry-Riddick, 144 N.C. App. 567, 551 S.E.2d 852, 2001 N.C. App. LEXIS 525 (2001).

Attorney fees upheld where a settlement offer was made but refused in personal injury case brought by an injured driver. Davis v. Kelly, 147 N.C. App. 102, 554 S.E.2d 402, 2001 N.C. App. LEXIS 1072 (2001).

Award of attorneys' fees and costs of $5,937 under G.S. 6-21.1 was upheld in favor of a personal injury plaintiff who was awarded $800 by a jury, although defendant made two offers of judgment for $5,000. McDaniel v. McBrayer, 164 N.C. App. 379, 595 S.E.2d 784, 2004 N.C. App. LEXIS 817 (2004).

Amount of Settlement Irrelevant to Determination to Award Attorneys' Fees. — The amount of the final settlements in a civil suit was irrelevant in determining whether to award attorneys' fees. Epps v. Ewers, 90 N.C. App. 597, 369 S.E.2d 104 (1988).

Offer of Judgment Exceeding $5,000. — An offer of judgment for more than $5,000, together with costs then accrued, but excluding attorneys' fees, is valid. This section would not apply in this case and "costs then accrued" would therefore not include attorneys' fees incurred after the offer of judgment was made. The mere fact that judgment for less than $5,000 is later obtained should have no bearing on costs accrued at the time the offer was made. The trial judge would have had no discretion to award an attorneys' fee, even if the defendant had not inserted language excluding them in his offer of judgment. Purdy v. Brown, 307 N.C. 93, 296 S.E.2d 459 (1982).

Refusal of Reasonable Settlement Offer May Affect Award of Attorney's Fees. — Where a substantial settlement offer was made well before trial, and that offer was increased through negotiations to an amount more than four times that recovered by plaintiff at trial, the trial court did not abuse its discretion in denying plaintiff's request for attorney's fees under this section. Blackmon v. Bumgardner, 135 N.C. App. 125, 519 S.E.2d 335 (1999).

The fact that third party plaintiff ultimately agreed to accept a judgment for less than the amount offered her by third party defendants' insurance carrier before plaintiff's suit and her cross-claim were filed did not ipso facto deny her the benefit of this section, and the trial judge did not abuse his discretion in awarding a reasonable attorneys' fee to third party plaintiff in her action against third party defendant. Yates Motor Co. v. Simmons, 51 N.C. App. 339, 276 S.E.2d 496, cert. denied, 303 N.C. 320, 281 S.E.2d 660 (1981).

Attorneys' Fees Allowed. — Where there is a clear indication in the record that an application for attorneys' fees as a part of the costs was to be considered by the court, and the settlement was effected with knowledge of this proposed application, allowance should be made for fees. Hicks v. Albertson, 18 N.C. App. 599, 197 S.E.2d 624, aff'd, 284 N.C. 236, 200 S.E.2d 40 (1973).

Fee Is Allowed as Part of Costs. — This section does not provide for the recovery of a reasonable attorneys' fee in addition to the court costs but "as a part of the court costs." Where the acceptance by the plaintiff of an offer of judgment for a specified sum plus "costs" proceeded from a reasonable interpretation by the plaintiff that "costs" included attorneys' fees, then if such interpretation was not intended by the defendant, the misunderstanding was due to ambiguous language used by the defendant in making his offer and the defendant must bear any loss resulting therefrom. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

If a party wishes to avoid payment of attorneys' fees in cases in which this section may be applicable, he should make his offer of settlement before the suit is instituted. Hicks v. Albertson, 18 N.C. App. 599, 197 S.E.2d 624, aff'd, 284 N.C. 236, 200 S.E.2d 40 (1973).

There was no unwarranted refusal to settle where insurance company settled within four months of the accident and for a reasonable amount, as evidenced by the similarity between the jury verdict and the settlement amount. Benton v. Thomerson, 113 N.C. App. 293, 438 S.E.2d 434 (1994), rev'd on other grounds, 339 N.C. 598, 453 S.E.2d 161 (1995).

OPINIONS OF ATTORNEY GENERAL

Section is applicable to actions against hospital service corporation organized under G.S. 57-1 (now G.S. 58-65-1). See opinion of Attorney General to Mr. Bobby H. Griffin, Union County Attorney, 43 N.C.A.G. 357 (1974).

§ 6-21.2. Attorneys' fees in notes, etc., in addition to interest.

Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:

(1) If such note, conditional sale contract or other evidence of indebtedness provides for attorneys' fees in some specific percentage of the "outstanding balance" as herein defined, such provision and obligation shall be valid and enforceable up to but not in excess of fifteen percent (15%) of said "outstanding balance" owing on said note, contract or other evidence of indebtedness.

(2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

(3) As to notes and other writing(s) evidencing an indebtedness arising out of a loan of money to the debtor, the "outstanding balance" shall mean the principal and interest owing at the time suit is instituted to

enforce any security agreement securing payment of the debt and/or to collect said debt.

(4) As to conditional sale contracts and other such security agreements which evidence both a monetary obligation and a security interest in or a lease of specific goods, the "outstanding balance" shall mean the "time price balance" owing as of the time suit is instituted by the secured party to enforce the said security agreement and/or to collect said debt.

(5) The holder of an unsecured note or other writing(s) evidencing an unsecured debt, and/or the holder of a note and chattel mortgage or other security agreement and/or the holder of a conditional sale contract or any other such security agreement which evidences both a monetary obligation and a security interest in or a lease of specific goods, or his attorney at law, shall, after maturity of the obligation by default or otherwise, notify the maker, debtor, account debtor, endorser or party sought to be held on said obligation that the provisions relative to payment of attorneys' fees in addition to the "outstanding balance" shall be enforced and that such maker, debtor, account debtor, endorser or party sought to be held on said obligation has five days from the mailing of such notice to pay the "outstanding balance" without the attorneys' fees. If such party shall pay the "outstanding balance" in full before the expiration of such time, then the obligation to pay the attorneys' fees shall be void, and no court shall enforce such provisions.

Notwithstanding the foregoing, however, if debtor has defaulted or violated the terms of the security agreement and has refused, on demand, to surrender possession of the collateral to the secured party as authorized by G.S. 25-9-609, with the result that said secured party is required to institute an ancillary claim and delivery proceeding to secure possession of said collateral; no such written notice shall be required before enforcement of the provisions relative to payment of attorneys' fees in addition to the outstanding balance. (1967, c. 562, s. 4; 2000-169, s. 27.)

Legal Periodicals. — For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

For note on contractual allocation of attorneys' fees as costs of litigation, see 17 Wake Forest L. Rev. 457 (1981).

For survey of 1981 property law, see 60 N.C.L. Rev. 1420 (1982).

For article, "The Legal Theory of Attorney Fee Shifting: A Critical Overview," see 1982 Duke L.J. 651.

For note, "Preemption of State Law Notice Provisions Governing the Recovery of Attorneys' Fees by Section 506(b) of the Bankruptcy Code," see 1 Duke L.J. 176 (1986).

For note, "A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes," see 1989 Duke L.J. 438.

For survey on the award of attorneys' fees for breach of a separation agreement, see 70 N.C.L. Rev. 2016 (1992).

CASE NOTES

Purpose. — Some of the purposes underlying the enactment of this section are to simplify, clarify, and modernize the law governing commercial transactions among the various jurisdictions, and to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties. Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

The purpose of this section is to allow the debtor a last chance to pay the outstanding balance without attorneys' fees. Coastal Prod. Credit Ass'n v. Goodson Farms, Inc., 70 N.C. App. 221, 319 S.E.2d 650, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Written Agreement Required. — This section does not apply in the absence of a written agreement. Jacobs v. Central Transp., Inc., 891 F. Supp. 1120 (E.D.N.C. 1995).

This Section Compared to former G.S.

1-567.11. — This section generally relates to and concerns the subject of attorneys' fees for legal work performed in the collection of indebtedness under various contractual arrangements and, unlike former G.S. 1-567.11, does not specifically address or relate to the subject of arbitration or attorneys' fees through arbitration. Nucor Corp. v. General Bearing Corp., 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

Reasonableness is the key factor under all attorney's fees statutes. Institution Food House, Inc. v. Circus Hall of Cream, Inc., 107 N.C. App. 552, 421 S.E.2d 370 (1992).

Supplements Principles Applicable to Commercial Transactions. — Although this section was not itself codified as a constituent section of Chapter 25 (the Uniform Commercial Code), its legislative history clearly demonstrates that it was intended to supplement those principles of law generally applicable to commercial transactions. Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

Liberal Construction. — This section, being remedial, should be construed liberally to accomplish the purpose of the legislature and to bring within it all cases fairly falling within its intended scope. Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

Section Not Applicable for Recovery upon Default of Purchase Money Deed of Trust. — This section deals in general and comprehensive terms with the propriety of attorneys' fees arising from the collection of indebtedness and, therefore, was not controlling in a case in which a seller of real property had accepted a purchase money deed of trust from his buyer and then sought recovery upon default; G.S. 45-21.38 deals with just such a particular situation. Merritt v. Ridge, 323 N.C. 330, 372 S.E.2d 559 (1988).

This section does not apply to arbitration proceedings; thus, in arbitration proceedings, both the arbitrator or arbitration panel and the superior courts upon confirmation are limited to applying only former G.S. 1-567.11 in determining whether attorneys' fees should be or were properly awarded. Nucor Corp. v. General Bearing Corp., 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

Attorneys' Fees of Purchase Money Creditor Not Secured Obligation. — Where a promissory note states on its face that it is "given as purchase money, and is secured by a purchase money deed of trust," and the note is incorporated by reference into the deed of trust, attorneys' fees are not part of the purchase price. Hence, even if the trustee were to foreclose on the purchase money deed of trust, the purchase money creditor's attorneys' fees would not be a secured obligation. Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991).

Attorneys' fees provided for in an agreement to settle litigation already underway were not "obligations to pay attorneys' fees upon any note ... or other evidence of indebtedness" under this section. Without undermining the intent or force of this section, parties may, in settling disputes, agree to the payment of attorneys' fees; such a case is not controlled by this section. Carter v. Foster, 103 N.C. App. 110, 404 S.E.2d 484 (1991).

Choice of Law. — The issue of a party's entitlement to attorneys' fees is a question of substantive law. Tolaram Fibers, Inc. v. Tandy Corp., 92 N.C. App. 713, 375 S.E.2d 673, cert. denied, 324 N.C. 436, 379 S.E.2d 249 (1989).

Attorneys' fees are not now regarded as part of court costs in this jurisdiction, except as otherwise provided by statute. Perkins v. American Mut. Fire Ins. Co., 4 N.C. App. 466, 167 S.E.2d 93 (1969).

This section represents a far reaching exception to the well-established rule against attorneys' fees obligations. State Whsle. Supply, Inc. v. Allen, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

This section represents a far-reaching exception to the well-established rule against attorneys' fees obligations, and approves specifically an obligation to pay reasonable attorneys' fees found in any note or other evidence of indebtedness. Reavis v. Ecological Dev., Inc., 53 N.C. App. 496, 281 S.E.2d 78 (1981).

But this section only validates attorneys' fees obligations in certain carefully defined instances and imposes a ceiling on the amount of attorneys' fees a party can obtain. State Whsle. Supply, Inc. v. Allen, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

Attorneys' Fees Provisions Enforceable When Specifically Authorized. — Although provisions calling for a debtor to pay attorneys' fees incurred by a creditor in the collection of a debt have long been considered against public policy, such provisions are enforceable when specifically authorized by statute. Reavis v. Ecological Dev., Inc., 53 N.C. App. 496, 281 S.E.2d 78 (1981).

Counsel fees are not a subject of arbitration, even where the contract provides that the owner will pay reasonable attorneys' fees incurred by the contractor for the collection of any defaulted payment due to the contractor by the owner as a result of the contract. In North Carolina, such attorneys' fees are collectible only under this section. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815 (1987), cert. denied, 320 N.C. 798, 361 S.E.2d 75 (1987), aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1989).

Recovery of Attorneys' Fees Pursuant to

Promissory Note Not a Deficiency. — Where a provision for attorneys' fees in a promissory note given by defendant to plaintiffs and incorporated in deeds of trust is properly authorized by this section, recovery of the fees does not represent a deficiency in violation of G.S. 45-21.38. Reavis v. Ecological Dev., Inc., 53 N.C. App. 496, 281 S.E.2d 78 (1981).

Award in Proceeding Under G.S. 105-374 Unaffected. — The amount of an attorneys' fee awarded in a tax foreclosure proceeding under G.S. 105-374 is to be determined pursuant to subsection (i) of that section in the discretion of the trial court and is not limited by the provisions of this section. Town of Sylva v. Gibson, 51 N.C. App. 545, 277 S.E.2d 115, appeal dismissed and cert. denied, 303 N.C. 319, 281 S.E.2d 659 (1981).

Fees in Amount Less than 15 Percent of Damages Award Proper. — Trial court did not err in granting attorney fees in an amount less than 15 percent of the damages award under a stock sales contract; attorney testimony, affidavits, and billing statements supported the attorney fees award. Bombardier Capital, Inc. v. Lake Hickory Watercraft, Inc., 178 N.C. App. 535, 632 S.E.2d 192, 2006 N.C. App. LEXIS 1570 (2006).

Meaning of "Evidence of Indebtedness". — The term "evidence of indebtedness," as used in this section, has reference to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money. Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 N.E.2d 812; Four Seasons Homeowners Ass'n v. Sellers, 72 N.C. App. 189, 323 S.E.2d 735 (1984); G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75 (1987), aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1989).

Evidence of indebtedness within the meaning of this section signifies a written agreement or acknowledgment of debt, such as a promissory note or conditional sales contract, which is executed and signed by the party obligated under the terms of the instrument. State Whsle. Supply, Inc. v. Allen, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

Landlord was properly awarded attorney fees as a lease was evidence of indebtedness under G.S. 6-21.2 since "evidence of indebtedness" as used in G.S. 6-21.2 referred to any printed or written instrument, signed or otherwise executed by the obligors, which evidenced on its face a legally enforceable obligation to pay money, and the appellate court had applied G.S. 6-21.2 to disputes regarding the lease of real property. WRI/Raleigh, L.P. v. Shaikh, — N.C. App. —, 644 S.E.2d 245, 2007 N.C. App. LEXIS 1039 (2007).

Same — Paragraph of a construction contract providing for a 10 percent attorneys' fee in the event of litigation was held not to be "other evidence of indebtedness" within the meaning of this section. Yeargin Constr. Co. v. Futren Dev. Corp., 29 N.C. App. 731, 225 S.E.2d 623, cert. denied, 290 N.C. 660, 228 S.E.2d 459 (1976). But see Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

Same — "Note" and "conditional sales contract" are the primary types of "evidence of indebtedness" contemplated by this section. State Whsle. Supply, Inc. v. Allen, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

Same — Sales receipt and three-day invoice containing provision for attorneys' fees is not an "evidence of indebtedness" within the meaning of this section. State Whsle. Supply, Inc. v. Allen, 30 N.C. App. 272, 227 S.E.2d 120 (1976). But see Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

Same — Formal credit agreement executed by the parties prior to the establishment of the open account would suffice as an evidence of indebtedness; and if such an agreement contains a provision for attorneys' fees, it will be valid and enforceable pursuant to this section. State Whsle. Supply, Inc. v. Allen, 30 N.C. App. 272, 227 S.E.2d 120 (1976); W.S. Clark & Sons v. Ruiz, 87 N.C. App. 420, 360 S.E.2d 814 (1987).

Same — Lease Contract. — A contract for the lease of personalty constitutes an "evidence of indebtedness" within the meaning of this section, since the contract acknowledges a legally enforceable obligation by the lessee to remit rental payments to the lessor as they become due in exchange for the use of the property which is the subject of the lease. Therefore, a provision of the lease allowing the lessor reasonable attorneys' fees should the lease obligation be collected by an attorney after maturity is enforceable under this section. Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

A lease does not constitute evidence of indebtedness within the meaning of this section, and attorneys' fees may not be allowed, even though they were expressly provided for in the contract. Equitable Leasing Co. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980). But see Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

Same — Stock Purchase Agreement. — A stock purchase agreement was an "evidence of indebtedness" within the contemplation of this section. Nucor Corp. v. General Bearing Corp., 103 N.C. App. 518, 405 S.E.2d 776 (1991), rev'd on other grounds, 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

Meaning of "Security Agreement". — As used in the Commercial Code, the general term "security agreement" is ordinarily understood to embrace chattel mortgages, conditional sales contracts, assignments of accounts receivable, trust receipts, etc. The term has a similar connotation in subdivision (5) of this section. EAC Credit Corp. v. Wilson, 281 N.C. 140, 187 S.E.2d 752 (1972).

A guaranty contract is not a "security agreement" within the language of subdivision (5) of this section. EAC Credit Corp. v. Wilson, 281 N.C. 140, 187 S.E.2d 752 (1972).

Guaranty of Payment Alone Does Not Render Guarantors Liable for Attorneys' Fees. — This section does not authorize collection of attorneys' fees if the guaranty contract sued upon does not so provide. Guaranty of payment alone does not render the guarantors liable for attorneys' fees which the principal debtor, by the terms of the note, is bound to pay. EAC Credit Corp. v. Wilson, 281 N.C. 140, 187 S.E.2d 752 (1972).

Nor Does Provision in Promissory Note Requiring Debtor to Pay Attorneys' Fees. — Where a promissory note contained a provision requiring the debtor to pay reasonable attorneys' fees of the creditor in collection of the note, but a guaranty of payment of the note contained no such provision, the guarantors were not liable under this section for attorneys' fees incurred by the creditor in an action on the guaranty contract. EAC Credit Corp. v. Wilson, 281 N.C. 140, 187 S.E.2d 752 (1972).

This section contemplates liability on the part of endorsers of a note since it provides for the giving of notice to endorsers by the holder or his attorney that the provision for attorneys' fees, in addition to the outstanding balance, shall be enforced. Wachovia Bank & Trust Co. v. Peace Broadcasting Corp., 32 N.C. App. 655, 233 S.E.2d 687, cert. denied, 292 N.C. 734, 235 S.E.2d 788 (1977).

Specific Percentage Not Specified in Unsecured Promissory Note. — Where an unsecured promissory note provided for the payment of reasonable attorneys' fees upon default by the debtor, without specifying any specific percentage, the trial court properly allowed the plaintiff to recover as reasonable attorneys' fees 15% of the balance due on the note, as provided by this section. Binning's, Inc. v. Roberts Constr. Co., 9 N.C. App. 569, 177 S.E.2d 1 (1970).

Notice Need Not Be Given Prior to Institution of Action. — The only requirement in this section as to when notice is to be given is that it be given "after maturity of the obligation by default or otherwise." This does not mean that the notice must be given prior to the institution of an action. Binning's, Inc. v. Roberts Constr. Co., 9 N.C. App. 569, 177 S.E.2d 1 (1970).

Construction of Subdivision (2). — The General Assembly apparently intended subdivision (2) of this section as a fall-back only in case the agreement contained nothing regarding the parties' intent as to what constituted a reasonable percentage. It apparently did not intend it as a means of legislating a total end to hearings on attorneys' fees. Coastal Prod. Credit Ass'n v. Goodson Farms, Inc., 70 N.C. App. 221, 319 S.E.2d 650, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Limits on Attorney's Fees. — The trial court exceeded its statutory authority in awarding plaintiff an attorneys' fee which exceeded 32% of the recovery allowed and was clearly excessive and not permissible under this statute. Southland Amusements & Vending, Inc. v. Rourk, 143 N.C. App. 88, 545 S.E.2d 254, 2001 N.C. App. LEXIS 231 (2001).

Award of Percentage Specified in Subdivision (2). — Subdivision (2) of section expressly provides that when a contract authorizing attorneys' fees does not specify the fee percentage, that it shall be construed to mean 15% of the "outstanding balance" owed on the obligation involved. A court which, in setting the fee, merely followed the statutory mandate would not be reversed. Nucor Corp. v. General Bearing Corp., 103 N.C. App. 518, 405 S.E.2d 776 (1991), rev'd on other grounds, 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

If a lease refers to "reasonable attorney's fees" and does not stipulate a specific percentage, subdivision (2) applies and the amount of attorneys' fees is 15% of the outstanding balance. Devereux Properties, Inc. v. BBM & W, Inc., 114 N.C. App. 621, 442 S.E.2d 555, cert. denied, 337 N.C. 690, 448 S.E.2d 519 (1994).

When reasonable attorneys' fees are authorized in property owners' association's bylaws without specifying a certain percentage, the provision shall be construed to mean 15% of the balance outstanding on the assessments. McGinnis Point Owners Ass'n v. Joyner, 135 N.C. App. 752, 522 S.E.2d 317, 1999 N.C. App. LEXIS 1242 (1999).

Subdivision (5) Is Mandatory. — The statutory use of "shall" renders the provision in subdivision (5) of this section requiring notice mandatory. Although the form of notice required is not specified by the statute, it is clear that the notice must be written and that such notice must advise the debtor of his right under subdivision (5) to pay the outstanding balance on the note without incurring attorneys' fees. Blanton v. Sisk, 70 N.C. App. 70, 318 S.E.2d 560 (1984).

Construction of Subdivision (5). — The notice provision of subdivision (5) of this section simply provides that the obligor will have five days' notice to pay any outstanding balance on the debt before the claimant goes to the expense of employing counsel to collect the bal-

ance due. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 458, 356 S.E.2d 75 (1987), aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1989).

Notice Prerequisite to Collection of Attorneys' Fees Under Subdivision (5). — Subdivision (5) of this section allows recovery of attorneys' fees incurred in the collection of a note, provided written notice is sent to the debtor advising him of his right under the statute to pay the outstanding balance on the note without incurring the attorneys' fees; but where the record failed to contain any evidence of such notice to the debtor, attorneys' fees were improperly granted. Northwestern Bank v. Barber, 79 N.C. App. 425, 339 S.E.2d 452, cert. denied, 316 N.C. 733, 345 S.E.2d 391 (1986).

The case law is clear that a party seeking to collect attorneys' fees incurred in the enforcement of a note must notify in writing the opposing party of this intent. Thomas v. Miller, 105 N.C. App. 589, 414 S.E.2d 58, cert. denied, 331 N.C. 557, 417 S.E.2d 807 (1992).

Summary judgment was inappropriate where there were genuine issues of material fact with respect to plaintiff's claim for attorney's fees, specifically, the forecast of evidence produced by both parties did not establish whether plaintiff complied with the statutory notice requirement in G.S. 6-21.2(5). Davis Lake Cmty. Ass'n v. Feldmann, 138 N.C. App. 292, 530 S.E.2d 865, 2000 N.C. App. LEXIS 598 (2000).

Subdivision (5) of this section sets no time limit on the giving of the notice required. First Citizens Bank & Trust Co. v. Larson, 22 N.C. App. 371, 206 S.E.2d 775, cert. denied, 286 N.C. 214, 209 S.E.2d 315 (1974); Gillespie v. DeWitt, 53 N.C. App. 252, 280 S.E.2d 736, cert. denied, 304 N.C. 390, 285 S.E.2d 832 (1981).

Findings on Notice Requirements. — Where nothing in the record indicated that plaintiffs/property owners' association did or did not provide defendants/property owners written notice in accord with this section, the trial court was unauthorized to award attorneys' fees and case was remanded for findings on the issue of notice. McGinnis Point Owners Ass'n v. Joyner, 135 N.C. App. 752, 522 S.E.2d 317, 1999 N.C. App. LEXIS 1242 (1999).

Reasonableness as Key Factor. — Reasonableness, not arbitrary classification of attorney activity, is the key factor under all the attorneys' fees statutes. Coastal Prod. Credit Ass'n v. Goodson Farms, Inc., 70 N.C. App. 221, 319 S.E.2d 650, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Where a lease agreement provided for the payment of "reasonable attorney's fees" should the landlord have needed to employ an attorney to collect rent or enforce its other rights and remedies under the lease, but did not refer to any specific percentage, subdivision (2) of this section predetermined that fifteen percent (15%) was a reasonable amount. RC Assocs. v. Regency Ventures, Inc., 111 N.C. App. 367, 432 S.E.2d 394 (1993).

Notice Held Sufficient. — Notice of intent to enforce attorneys' fees provision of note held sufficient. Federal Land Bank v. Lieben, 86 N.C. App. 342, 357 S.E.2d 700 (1987).

Language in a guaranty contract was sufficient to put a guarantor on notice that he would be liable for attorney's fees if he failed to make the guaranteed payment before the creditor found it necessary to employ an attorney to collect the debt. RC Assocs. v. Regency Ventures, Inc., 111 N.C. App. 367, 432 S.E.2d 394 (1993).

Where an agreement only mentioned reasonable attorneys' fees and did not specify an exact amount to be paid, this section governed, and the trial court properly allowed the plaintiff to recover reasonable fees amounting to 15% of the outstanding balance owed on defendants' account. W.S. Clark & Sons v. Ruiz, 87 N.C. App. 420, 360 S.E.2d 814 (1987).

Demand by Obligor for Arbitration. — The notice provisions of subdivision (5) of this section have no application in a situation where the obligor has refused to pay obligee's claim and demanded arbitration pursuant to the terms of the contract. Moreover, when obligee filed its response to obligor's demand for arbitration, and its own claim for the balance due on the contract, it clearly notified obligor that it was demanding attorneys' fees under the terms of the contract. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75 (1987), aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1989).

Evidence of Indebtedness Held Sufficient. — Credit application signed by partner was sufficient evidence of indebtedness under this section to obligate partnership to pay attorneys' fees. Hedgecock Bldrs. Supply Co. v. White, 92 N.C. App. 535, 375 S.E.2d 164 (1989).

Notice in Bankruptcy Case. — Where the notice issue was first raised on appeal it was not too late for the creditor to give notice that it was seeking attorneys' fees for involvement in bankruptcy case. Three Sisters Partners v. Harden (In re Shangra-La, Inc.), 167 F.3d 843 (4th Cir. 1999).

No Award of Attorneys' Fees Where Plaintiff Failed to Notify. — Where provision in note provided for payment of note holder's costs and expenses in enforcing note if makers failed to pay as required, and these costs and expenses specifically included "reasonable" attorneys' fees, but there was no evidence that plaintiff notified defendants of its intention to collect attorneys' fees pursuant to this section, award of attorneys' fees was in error. Raleigh Fed. Sav. Bank v. Godwin, 99 N.C. App. 761, 394 S.E.2d 294 (1990).

There was sufficient evidence to support award of attorneys' fee of $24,308.00 where the award was supported by the affidavit of plaintiff's attorney, and billing statements showing the actual work performed and the attorneys' hourly rates, and the trial court made findings of fact as to the reasonable amount of time required for the services and the reasonableness of the hourly rates. Barker v. Agee, 93 N.C. App. 537, 378 S.E.2d 566 (1989), rev'd on other grounds, 326 N.C. 470, 389 S.E.2d 803 (1990).

The defendants/homeowners pled a valid state law counter-claim of unfair debt collector's practices, and a violation of this section, against the plaintiff/homeowners' association where the defendants were consumers who incurred a debt which the homeowners' association was trying to collect, where the defendants claimed that the amount collected included an excessive attorneys' fee, and where the plaintiffs' dues collecting activities affected commerce. Davis Lake Cmty. Ass'n v. Feldmann, 138 N.C. App. 292, 530 S.E.2d 865, 2000 N.C. App. LEXIS 598 (2000).

Attorney's Fees Provision in Credit Agreement Held Enforceable. — Where, although no supporting affidavit was presented, there was a formal credit agreement which provided for reasonable attorney's fees for the collection of past due debts, and the trial court had before it the pleadings, depositions, and interrogatories, enabling it to make a determination as to the extent of work performed by counsel and the reasonableness of the fees assessed, the attorney's fees provision was legally enforceable. Institution Food House, Inc. v. Circus Hall of Cream, Inc., 107 N.C. App. 552, 421 S.E.2d 370 (1992).

Recovery of Percentage of Outstanding Balance. — Where contract provided that owner would pay reasonable attorneys' fees incurred by the contractor for the collection of any defaulted payment, under the provisions of this section, contractor could recover as attorneys' fees 15% of the "outstanding balance" due on the contract. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75 (1987).

Fees in Related Actions. — Since attorneys may engage in an infinite variety of activities to bring a case to successful settlement or verdict, when other actions are reasonably related to the collection of the underlying note sued upon, attorneys' fees incurred therein may properly be awarded under this section. Coastal Prod. Credit Ass'n v. Goodson Farms, Inc., 70 N.C. App. 221, 319 S.E.2d 650, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

When the trial court awarded a lessee attorney fees for the breach of a commercial lease, it was not required to award attorney fees for an underlying summary ejectment action; a reasonable relationship between actions did not require an award of fees. N.C. Indus. Capital, LLC v. Clayton, — N.C. App. —, 649 S.E.2d 14, 2007 N.C. App. LEXIS 1825 (2007).

Fee Where Percentage Not Specified. — Where a credit agreement between the creditor and the grocery store and an indemnity agreement between the creditor and the debtor did not specify the percentage of the outstanding balance that would be allowable as reasonable attorney fees for the enforcement of the agreements, reasonable attorney fees would be construed to mean 15 percent of the outstanding balance under the agreement. MEMO Money Order Co. v. Davis (In re Davis), 371 B.R. 127, 2007 Bankr. LEXIS 1786 (Bankr. E.D.N.C. 2007).

No Error in Fee Calculation. — In a suit for the breach of a commercial lease, the trial court did not err in calculating the amount of attorney fees owed to the lessor; because the lessee presented testimonial and documentary evidence that raised doubts about the extent of the lessor's damages under the contract, the "outstanding balance" due under the lease was a question for the jury. N.C. Indus. Capital, LLC v. Clayton, — N.C. App. —, 649 S.E.2d 14, 2007 N.C. App. LEXIS 1825 (2007).

Third Party Must Be Transactionally Related. — This section does not authorize attorneys' fees against a third party who is not transactionally related to the document containing the fees provision. Mountain Farm Credit Serv. v. Purina Mills, Inc., 119 N.C. App. 508, 459 S.E.2d 75 (1995).

Merit Bonus. — It is true that the quality of services rendered is properly considered in awarding fees, as well as the nature of the services required, and hence the scope and complexity of the case. However, there is no North Carolina authority for an award of a "merit bonus." Even assuming such bonuses are allowed, as under federal practice, that should occur only in the "rare case" where the applicant specifically shows superior quality representation and exceptional success. Coastal Prod. Credit Ass'n v. Goodson Farms, Inc., 70 N.C. App. 221, 319 S.E.2d 650, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Attorney Fees Permitted. — Fees incurred by bank's attorneys in prior foreclosure proceeding or in any action "connected" with the collection of debt owed by plaintiff were permissible under this section. Trull v. Central Carolina Bank & Trust, 124 N.C. App. 486, 478 S.E.2d 39 (1996), aff'd in part and discretionary review improvidently allowed in part, 347 N.C. 262, 490 S.E.2d 238 (1997).

In an action regarding the purchase and sale of a business, when the sellers counterclaimed on the promissory note executed by the buyer, the sellers were entitled to attorney's fees under the provisions of that note, and G.S. 6-21.2(1), as the amount of the note was clear, the buyer defaulted, and the mandatory notice requirement of G.S. 6-21.2(5) was satisfied. Kindred of N.C., Inc. v. Bond, 160 N.C. App. 90, 584 S.E.2d 846, 2003 N.C. App. LEXIS 1765 (2003).

Guaranty agreement was written, signed by the trustee, and, in the event of the principal obligor's default, was a legally enforceable obligation to pay money; therefore, the agreement constituted evidence of indebtedness under G.S. 6-21.2, and the award of attorneys fees was appropriate. FNB Southeast v. Lane, 160 N.C. App. 535, 586 S.E.2d 530, 2003 N.C. App. LEXIS 1821 (2003), cert. denied, 358 N.C. 153, 592 S.E.2d 558 (2004).

Qualification As Prevailing Party Not Required. — This section does not require that a party seeking attorneys' fees under this section qualify as a "prevailing party" in litigation. Trull v. Central Carolina Bank & Trust, 124 N.C. App. 486, 478 S.E.2d 39 (1996), aff'd in part and discretionary review improvidently allowed in part, 347 N.C. 262, 490 S.E.2d 238 (1997).

Not Applicable to Condominium Act. — Had the General Assembly wished that the recovery of attorney's fees under the Condominium Act be governed by this section, they could have included language to that effect. Brookwood Unit Ownership Ass'n v. Delon, 124 N.C. App. 446, 477 S.E.2d 225 (1996).

This section could not form the statutory basis to award plaintiffs attorneys' fees, where the defendants, the parties owed the debt, were not seeking to recover attorneys' fees and where the debt had not matured. Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc., 143 N.C. App. 1, 545 S.E.2d 745, 2001 N.C. App. LEXIS 228 (2001).

Citing Provision Did Not Waive Parties' Choice of Law Election. — National bank did not elect to apply North Carolina law by citing G.S. 6-21.2 in its complaint, as the parties clearly intended federal law and South Dakota law to govern, the bank charged the customer interest and fees in accordance with federal and South Dakota law, and the presumption of lex loci contractus was not rebutted; further, the bank did not waive its right to apply federal or South Dakota law. Citibank, S.D., N.A. v. Palma, — N.C. App. —, 646 S.E.2d 635, 2007 N.C. App. LEXIS 1425 (2007).

Applied in Armel Mgt. Corp. v. Stanhagen, 35 N.C. App. 571, 241 S.E.2d 713 (1978); Independence Nat'l Bank v. Dye Master Realty, Inc., 15 Bankr. 932 (Bankr. W.D.N.C. 1981); Colonial Lincoln-Mercury, Inc. v. Musgrave, 749 F.2d 1092 (4th Cir. 1984); L. Harvey & Son Co. v. Jarman, 76 N.C. App. 191, 333 S.E.2d 47 (1985); Unsecured Creditors' Comm. 82-00261c-11A v. Walter E. Heller & Co. S.E., Inc., 768 F.2d 580 (4th Cir. 1985); Lawrence v. Wetherington, 108 N.C. App. 543, 423 S.E.2d 829 (1993); Jennings Communications Corp. v. PCG of Golden Strand, Inc., 126 N.C. App. 637, 486 S.E.2d 229 (1997); First-Citizens Bank & Trust Co. v. 4325 Park Rd. Assocs., 133 N.C. App. 153, 515 S.E.2d 51 (1999).

Cited in International Harvester Credit Corp. v. Ricks, 16 N.C. App. 491, 192 S.E.2d 707 (1972); Phil Mechanic Constr. Co. v. Gibson, 30 N.C. App. 385, 226 S.E.2d 837 (1976); Nytco Leasing, Inc. v. Dan-Cleve Corp., 31 N.C. App. 634, 230 S.E.2d 559 (1976); North Carolina Nat'l Bank v. Burnette, 38 N.C. App. 120, 247 S.E.2d 648 (1978); American Foods, Inc. v. Goodson Farms, Inc., 50 N.C. App. 591, 275 S.E.2d 184 (1981); In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97 (1985); Coe v. Thermasol, Ltd., 615 F. Supp. 316 (W.D.N.C. 1985); Bryant v. Pitt, 78 N.C. App. 801, 338 S.E.2d 588 (1986); Merritt v. Knox, 94 N.C. App. 340, 380 S.E.2d 160 (1989); Thorneburg Hosiery Co. v. G.L. Wilson Bldg. Co., 94 N.C. App. 769, 381 S.E.2d 718 (1989); First Am. Bank v. Carley Capital Group, 99 N.C. App. 667, 394 S.E.2d 237 (1990); West End III Ltd. Partners v. Lamb, 102 N.C. App. 458, 402 S.E.2d 472 (1991); Pinnacle Group, Inc. v. Shrader, 105 N.C. App. 168, 412 S.E.2d 117 (1992); Wachovia Bank v. Bob Dunn Jaguar, Inc., 117 N.C. App. 165, 450 S.E.2d 527 (1994); Smith v. Martin, 124 N.C. App. 592, 478 S.E.2d 228 (1996); Reid v. Ayers, 138 N.C. App. 261, 531 S.E.2d 231, 2000 N.C. App. LEXIS 606 (2000); Harborgate Property Owners Ass'n v. Mountain Lake Shores Dev. Corp., 145 N.C. App. 290, 551 S.E.2d 207, 2001 N.C. App. LEXIS 647 (2001).

§ 6-21.3. Remedies for returned check.

(a) Notwithstanding any criminal sanctions that may apply, a person, firm, or corporation who knowingly draws, makes, utters, or issues and delivers to another any check or draft drawn on any bank or depository that refuses to honor the same because the maker or drawer does not have sufficient funds on deposit in or credit with the bank or depository with which to pay the check or draft upon presentation, and who fails to pay the same amount, any service charges imposed on the payee by a bank or depository for processing the dishonored check, and any processing fees imposed by the payee pursuant to G.S. 25-3-506 in cash to the payee within 30 days following written demand therefor, shall be liable to the payee (i) for the amount owing on the check, the service charges, and processing fees and (ii) for additional damages of three times the amount owing on the check, not to exceed five hundred dollars ($500.00) or to be less than one hundred dollars ($100.00). If the amount claimed in the first demand letter is not paid, the claim for the amount of the check, the service charges and processing fees, and the treble damages provided for in this subsection may be made by a subsequent letter of demand prior to filing an action. In an action under this section the court or jury may, however, waive all or part of the additional damages upon a finding that the defendant's failure to satisfy the dishonored check or draft was due to economic hardship.

The initial written demand for the amount of the check, the service charges, and processing fees shall be mailed by certified mail to the defendant at the defendant's last known address and shall be in the form set out in subsection (a1) of this section. The subsequent demand letter demanding the amount of the check, the service charges, the processing fees, and treble damages shall be mailed by certified mail to the defendant at the defendant's last known address and shall be in the form set out in subsection (a2) of this section. If the payee chooses to send the demand letter set out in subsection (a2) of this section, then the payee may not file an action to collect the amount of the check, the service charges, the processing fees, or treble damages until 30 days following the written demand set out in subsection (a2) of this section.

(a1) The first notification letter shall be substantially in the following form:

This letter is written pursuant to G.S. 6-21.3 to inform you that on ______________________, you made and delivered to the business listed above a check payable to this business containing your name and address in the sum of $__________, drawn upon ____________________ (bank or institution), account #__________. **[If the check was received in a face-to-face transaction insert this sentence:** This check contained a drivers license identification number from a card with your photograph and mailing address, which was used to identify you at the time the check was accepted.] **[If the check was delivered by mail insert this sentence:** We have compared your name, address, and signature on the check with the name, address, and signature on file in the account previously established by you or on your behalf, and the signature on the check appears to be genuine.] Also, we have received no information that this was a stolen check, if that is the circumstance.

The check has been dishonored by the bank for the following reasons:

____

As acceptor of the check, we give you notice to rectify any bank error or other error in connection with the transaction, and to pay the face value of the check, plus the fees as authorized under G.S. 25-3-506 and G.S. 6-21.3(a) as follows:

Face value of the check #	$ ______________
Processing fee authorized under G.S. 25-3-506	$ ______________
Bank service fees authorized under G.S. 6-21.3	$ ______________
Total amount due:	$ ______________

If the total amount due listed above is not paid within 30 days of the mailing of this letter, thereafter we may file a civil action to seek civil damages of three times the amount of the check (with a minimum damage of one hundred dollars ($100.00) and a maximum damage of five hundred dollars ($500.00)) for allegedly giving a worthless check in violation of law (G.S. 6-21.3), in addition to the amount of the check and the fees specified above.

Appropriate relief will then be sought before a court of proper jurisdiction for full payment of the check plus all costs, treble damages, and witness fees.

If you do not believe you are liable for these amounts, you will have a right to present your defense in court. To pay the check or obtain information, contact the undersigned at the above business location. Cash or a bank official check will be the only acceptable means of redeeming the dishonored check.

If you do not believe that you owe the amount claimed in this letter or if you believe you have received this letter in error, please notify the undersigned at the above business location as soon as possible.

(a2) If the total amount due in subsection (a1) has not been paid within 30 days after the mailing of the notification letter, a subsequent demand letter may be sent and shall be substantially in the following form:

On ____________________, we informed you that we received a check payable to this business containing your name and address in the sum of $__________, drawn upon ____________________ (bank or institution), account #______________________________. This check contained identification information which was used to identify you as the maker of the check. Also, we have received no information that this was a stolen check, if that is the circumstance.

The check has been dishonored by the bank for the following reasons:

____

We notified you that you were responsible for the face value of the check ($__________) plus the fees authorized under G.S. 25-3-506 ($__________) and G.S. 6-21.3(a) ($__________) for a total amount due of $__________. Thirty days have passed since the mailing of that notification letter, and you have not made payment to us for that total amount due.

Under G.S. 6-21.3, we claim you are now liable for the face value of the check, the fees, and treble damages. The damages we claim are three times the amount of the check or one hundred dollars ($100.00), whichever is greater, but cannot exceed five hundred dollars ($500.00). The total amount we claim now due is:

Face value of the check $ ____________________
Processing fee authorized under G.S. 25-3-506 $ ____________________
Bank service fees authorized under G.S. 6-21.3 $ ____________________
Three times the face value of the check, with a minimum of $100.00 and a maximum of $500.00 $ ____________________
Total amount due: $ ____________________

Payment of the total amount claimed above within 30 days of the mailing of this letter shall satisfy this civil remedy for the returned check.

If payment has not been received within this 30-day period, we will seek appropriate relief before a court of proper jurisdiction for full payment of the check plus all costs, treble damages, and witness fees.

If you do not believe you are liable for these amounts, you will have a right to present your defense in court. To pay the check or obtain information, contact the undersigned at the above business location. Cash or a bank official check will be the only acceptable means of redeeming the dishonored check.

If you do not believe that you owe the amount claimed in this letter or if you believe you have received this letter in error, please notify the undersigned at the above business location as soon as possible.

(b) In an action under subsection (a) of this section, the presiding judge or magistrate may award the prevailing party, as part of the court costs payable, a reasonable attorney's fee to the duly licensed attorney representing the prevailing party in such suit.

(c) It shall be an affirmative defense, in addition to other defenses, to an action under this section if it is found that: (i) full satisfaction of the amount of the check or draft was made prior to the commencement of the action, or (ii) that the bank or depository erred in dishonoring the check or draft, or (iii) that the acceptor of the check knew at the time of acceptance that there were insufficient funds on deposit in the bank or depository with which to cause the check to be honored.

(d) The remedy provided for herein shall apply only if the check was drawn, made, uttered or issued with knowledge there were insufficient funds in the account or that no credit existed with the bank or depository with which to pay the check or draft upon presentation. (1975, c. 129, s. 1; 1981, c. 781, s. 2; 1985, c. 643; 1993, c. 374, s. 1; 1995, c. 356, s. 1; 1995 (Reg. Sess., 1996), c. 742, s. 5.)

§ 6-21.4. Allowance of counsel fees and costs in certain cases involving principals or teachers.

In any civil action brought against a public school principal or teacher as defined in G.S. 115C-390 arising or resulting from the use of corporal punishment, upon a determination that the principal or teacher has prevailed and that the plaintiff's action was frivolous or without substantial merit, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the principal or teacher. The attorney's fee shall be taxed as part of the court costs. (1981, c. 381, s. 1; c. 682, s. 22.)

Legal Periodicals. — For article, "The Legal Theory of Attorney Fee Shifting: A Critical Overview," see 1982 Duke L.J. 651.

For note, "A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes," see 1989 Duke L.J. 438.

CASE NOTES

Reasonableness as Key Factor. — Reasonableness, not arbitrary classification of attorney activity, is the key factor under all the attorneys' fees statutes. Coastal Prod. Credit Ass'n v. Goodson Farms, Inc., 70 N.C. App. 221, 319 S.E.2d 650, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Merit Bonus. — It is true that the quality of services rendered is properly considered in awarding fees, as well as the nature of the services required, and hence the scope and complexity of the case. However, there is no North Carolina authority for an award of a "merit bonus." Even assuming such bonuses are allowed, as under federal practice, that should occur only in the "rare case" where the applicant specifically shows superior quality representation and exceptional success. Coastal Prod. Credit Ass'n v. Goodson Farms, Inc., 70 N.C. App. 221, 319 S.E.2d 650 (1984).

§ 6-21.5. Attorney's fees in nonjusticiable cases.

In any civil action, special proceeding, or estate or trust proceeding, the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. The filing of a general denial or the granting of any preliminary motion, such as a motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12, a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50, or a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award. A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees. The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section. (1983 (Reg. Sess., 1984), c. 1039, s. 1; 2006-259, s. 13(*l*).)

Editor's Note. — Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

Effect of Amendments. — Session Laws 2006-259, s. 13(*l*), effective October 1, 2006, substituted "civil action, special proceeding, or estate or trust proceeding," for "civil action or special proceeding" in the first sentence. For applicability provisions, see Editor's note.

Legal Periodicals. — For note, "A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes," see 1989 Duke L.J. 438.

CASE NOTES

The purpose of this statute is not served by treating those who bring frivolous suits against indigent parties differently from those who bring frivolous suits against parties who can afford to retain their own counsel; therefore, the trial court's limitation of the attorneys' fee award to the court-appointed rate of $35.00 per hour was error. Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

Absence of Justiciable Issue. — To recover attorneys' fees under G.S. 6-21.5, the party claiming attorney fees must be the "prevailing party," and there must be "a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

The mere filing of an affirmative defense without more is not sufficient to establish the absence of a justiciable issue, nor is the grant of a G.S. 1A-1, Rule 12(b)(6) motion, nor the entry of summary judgment. These events may only be evidence of the absence of a justiciable issue. However, action by the losing party which perpetuated litigation in the face of events substantially establishing that the pleadings no longer presented a justiciable controversy may also serve as evidence for purposes of G.S. 6-21.5. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

When defendant's answer raising the statute of limitations defense was filed and served, it should have become apparent to plaintiff that, barring circumstances permitting the statute of limitations to be tolled, the complaint no longer contained a justiciable issue. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Absence of Justiciable Controversy. — It is possible that a pleading which, when read alone set forth a justiciable controversy, may, when read with a responsive pleading, no longer present a justiciable controversy. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Section Not Limited to Initial Pleadings. — The legislative purpose of this section is to discourage frivolous legal action, and that purpose may not be circumvented by limiting the section's application to initial pleadings. Short v. Bryant, 97 N.C. App. 327, 388 S.E.2d 205 (1990).

Strict Construction of This Section. — Because statutes awarding an attorneys' fee to the prevailing party are in derogation of the common law, this section must be strictly construed. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Reasonable Attorneys' Fee. — Since this section authorizes the court to award "a reasonable attorney's fee," the trial court was not limited to the amount fixed by the district court in its payment of counsel appointed to indigent parties. Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

The only basis for the award of attorneys' fees under this section is the complete absence of a justiciable issue. Bryant v. Short, 84 N.C. App. 285, 352 S.E.2d 245, cert. denied, 319 N.C. 458, 356 S.E.2d 2 (1987), upholding order awarding attorneys' fees.

Before a court may tax attorneys' fees against a losing party under G.S. 6-21.5 based upon the complete absence of a justiciable legal issue, the prevailing party must provide proof that the losing party should reasonably have been aware of the complaint's legal deficiencies. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Limiting Damages Pursuant to This Sec-

tion. — The case was remanded to the trial court for findings as to when plaintiffs should have reasonably determined that their claim against the employer of defendant driver was not justiciable so as to limit an award of attorneys' fees pursuant to this section from that point forward. Fox-Kirk v. Hannon, 142 N.C. App. 267, 542 S.E.2d 346, 2001 N.C. App. LEXIS 92 (2001), review denied, 353 N.C. 725, 551 S.E.2d 437 (2001), review dismissed, 353 N.C. 725, 551 S.E.2d 437 (2001).

A motion for attorney's fees pursuant to pursuant to G.S. 1A-1-11(a) or this section is not a continuation of adversary proceedings. VSD Communications, Inc. v. Lone Wolf Publishing Group, Inc., 124 N.C. App. 642, 478 S.E.2d 214 (1996).

With regard to determining whether attorneys' fees may be awarded under this section, the first issue is whether the pleading, when read in conjunction with all the responsive pleadings, facially presents a justiciable issue of law. If not, the second issue is whether the losing party should reasonably have been aware that the pleading he filed contained no justiciable issue of law. dePasquale v. O'Rahilly, 102 N.C. App. 240, 401 S.E.2d 827 (1991).

Instead of acknowledging that the defendant's answer raised a virtually unassailable defense which foreclosed any reasonable expectation of an affirmative recovery by plaintiff, plaintiff forged on frivolously attempting to create a controversy. Under these facts the trial court could have found that such frivolous litigation constitutes a reckless waste of judicial resources as well as the time and money of the prevailing litigants. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

This section appears to be based on deterring frivolous and bad faith lawsuits by the use of attorneys' fees. Daniels v. Montgomery Mut. Ins. Co., 81 N.C. App. 600, 344 S.E.2d 847 (1986), rev'd in part, aff'd in part, 320 N.C. 669, 360 S.E.2d 772 (1987).

"Justiciable issues" are those which are real and present, as opposed to imagined or fanciful. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

"Complete absence of a justiciable issue" suggests that it must conclusively appear that such issues are absent, even giving the losing party's pleadings the indulgent treatment which they receive on motions for summary judgment or to dismiss. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

Justiciable Issue Found. — Defendants were not entitled to attorney's fees because there was not a complete absence of a justiciable issue of either law or fact raised by plaintiffs' complaint even though the action was dismissed. Brittain v. Cinnoca, 111 N.C. App. 656, 433 S.E.2d 244 (1993), cert. denied, 339 N.C. 736, 454 S.E.2d 646 (1995).

Where plaintiffs' complaint contained a justiciable issue, the court erred in granting defendants' motions for attorneys' fees pursuant to this section. Village Creek Property Owners Ass'n v. Town of Edenton, 135 N.C. App. 482, 520 S.E.2d 793, 1999 N.C. App. LEXIS 1159 (1999).

Where a contractor unsuccessfully asserted claims against a surety for bad faith and deceptive trade practices based on the surety's status as an insurer, the contractor's claims, although weak, were not frivolous, and the surety was not entitled to an award of attorney fees; the distinction between a relationship of insurance and a relationship of suretyship was an unsettled area of state law, and a finding that the one state case on point was determined to be controlling did not render the contractor's claims contrary to settled law. Cincinnati Ins. Co. v. Dynamic Dev. Group, LLC, 336 F. Supp. 2d 552, 2004 U.S. Dist. LEXIS 19181 (M.D.N.C. 2004).

Denial of attorney fees to a former employee after the employer voluntarily dismissed its action for breach of a non-competition agreement against him with prejudice was not an abuse of discretion; the employee did not establish the lack of any justiciable issues of law and fact in the action. Kohler Co. v. McIvor, 177 N.C. App. 396, 628 S.E.2d 817, 2006 N.C. App. LEXIS 981 (2006).

Court Required to Make Findings. — Trial court was required to evaluate whether the losing party persisted in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue. Winston-Salem Wrecker Ass'n v. Barker, 148 N.C. App. 114, 557 S.E.2d 614, 2001 N.C. App. LEXIS 1282 (2001).

Costs and attorney fees were awarded to a property owner in error as the North Carolina Industrial Commission made no findings to support a conclusion that the North Carolina Department of Environment and Natural Resources presented no justiciable issue; G.S. 6-21.5 was inapplicable. Watts v. N.C. Dep't of Env't & Natural Res., — N.C. App. —, 641 S.E.2d 811, 2007 N.C. App. LEXIS 595 (2007).

Specific Findings Not Required Absent Justiciable Issue. — The sufficiency of a pleading is a question of law for the court, and the trial court need not make its findings more detailed if it states that the pleading raised no justiciable issue of law or fact. Bryant v. Short, 84 N.C. App. 285, 352 S.E.2d 245, cert. denied, 319 N.C. 458, 356 S.E.2d 2 (1987).

Failure to Participate in Arbitration in Good Faith. — Failure of defendant in auto accident case to appear at arbitration hearing, and lack of evidence regarding attorney's authority, resulted in conclusion that defendant failed to participate in arbitration hearing in good faith and meaningful manner; the failure or refusal to participate in an arbitration proceeding in good faith and meaningful manner was subject to sanctions by the court on motion of a party, or report of the arbitrator. Bledsole v. Johnson, 150 N.C. App. 619, 564 S.E.2d 902, 2002 N.C. App. LEXIS 652 (2002), cert. granted, 356 N.C. 297, 570 S.E.2d 498 (2002).

The granting of defendants' motion for summary judgment was not in itself a sufficient reason for the court's decision to award attorney's fees under this section; it could be evidence to support the court's decision to make such an award. Brooks v. Giesey, 334 N.C. 303, 432 S.E.2d 339 (1993).

Appeals. — Under a statute such as this section, which contains "prevailing party" requirement, the parties should not be required to litigate fees when the appeal could moot the issue. Furthermore, upon filing of a notice of appeal, a trial court in North Carolina is divested of jurisdiction with regard to all matters embraced within or affected by the judgment which is the subject of the appeal. Brooks v. Giesey, 106 N.C. App. 586, 418 S.E.2d 236 (1992), aff'd, 334 N.C. 303, 432 S.E.2d 339 (1993).

Award of attorneys' fees under this section held proper. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986); Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

Trial court's findings of fact and conclusions of law, which established that from the initiation of this suit, there was never any factual or legal basis for finding defendants liable for any alleged injury suffered by plaintiffs from purchase of real property, were sufficient to uphold order awarding defendants costs (including reasonable attorney's fees) under this section. Brooks v. Giesey, 334 N.C. 303, 432 S.E.2d 339 (1993).

Court's order that defendant pay legal fees incurred by executor after defendant's default at judicial sale of estate's real and personal property held unauthorized. Parker v. Lippard, 87 N.C. App. 43, 359 S.E.2d 492, modified, 87 N.C. App. 487, 361 S.E.2d 395 (1987).

Fees Not Authorized Where Case Settled by Arbitration. — Where, although building owner filed complaint in civil court, case had already been submitted for arbitration and was settled by the award of the arbitrators, this section did not apply to authorize the trial court to award attorneys' fees incurred in the arbitration hearing; in order for the trial court to make such an award, the "civil action" or "special proceeding" providing the basis for the award must have been held before that tribunal or pursuant to its authority, and no order other than the order which placed the case in inactive status had been entered, nor had any action been taken in the superior court. Thorneburg Hosiery Co. v. G.L. Wilson Bldg. Co., 94 N.C. App. 769, 381 S.E.2d 718 (1989).

Collateral Issues. — Attorneys' fee requests under G.S. 1A-1, Rule 11 and G.S. 6-21.5 raise collateral issues which often require consideration by the trial court after the action has been terminated, and a voluntary dismissal under G.S. 1A-1, Rule 41(a) does not deprive the trial court of jurisdiction to determine these collateral issues. To hold otherwise would allow a litigant or attorney to purge his violation of Rule 11 or G.S. 6-211.5 merely by taking a dismissal, and thereby lose all incentive to stop, think and investigate more carefully before serving and filing papers. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Voluntary Dismissal. — Where the plaintiffs filed a voluntary dismissal with prejudice pursuant to G.S. 1A-1, Rule 41(a)(1), the trial court was not deprived of jurisdiction to determine the appropriateness of attorneys' fees under G.S. 1A-1, Rule 11 or G.S. 6-21.5. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

After a voluntary dismissal the broad limitation on the trial court's power to enter orders does not extend so far as to bar the trial court from awarding attorney's fees pursuant to 1A-1-11(a) or this section. VSD Communications, Inc. v. Lone Wolf Publishing Group, Inc., 124 N.C. App. 642, 478 S.E.2d 214 (1996).

Applied in Harris v. Harris, 93 N.C. App. 67, 376 S.E.2d 502 (1989); Barnes v. Ford Motor Co., 95 N.C. App. 367, 382 S.E.2d 842 (1989); K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan Ass'n, 96 N.C. App. 474, 386 S.E.2d 226 (1989).

Cited in T'ai Co. v. Market Square Ltd. Partnership, 92 N.C. App. 234, 373 S.E.2d 885 (1988); Nichols v. Carolina Tel. & Tel. Co., 93 N.C. App. 503, 378 S.E.2d 230 (1989); Tay v. Flaherty, 100 N.C. App. 51, 394 S.E.2d 217 (1990); Tittle v. Case, 101 N.C. App. 346, 399 S.E.2d 373 (1991); Smith v. McDonald, 767 F. Supp. 732 (M.D.N.C. 1991); Freese v. Smith, 110 N.C. App. 28, 428 S.E.2d 841 (1993); DeMent v. Nationwide Mut. Ins. Co., 142 N.C. App. 598, 544 S.E.2d 797, 2001 N.C. App. LEXIS 189 (2001); Chandak v. Electronic Interconnect Corp., 144 N.C. App. 258, 550 S.E.2d 25, 2001 N.C. App. LEXIS 413 (2001); Martin Architectural Prods. v. Meridian Constr. Co., 155 N.C. App. 176, 574 S.E.2d 189, 2002 N.C. App. LEXIS 1567 (2002); Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc., 160 N.C. App. 520, 586 S.E.2d 507, 2003 N.C. App. LEXIS

1825 (2003); N.C. State Bar v. Rossabi, — N.C. App. —, 645 S.E.2d 387, 2007 N.C. App. LEXIS 1173 (2007); McClure v. County of Jackson, — N.C. App. —, 648 S.E.2d 546, 2007 N.C. App. LEXIS 1814 (2007).

§ 6-22. Petitioner to pay costs in certain cases.

The petitioner shall pay the costs in the following proceedings:

(1) In petitions for draining or damming lowlands where the petitioner alone is benefited.

(2) In petitions for condemnation of water millsites when the petitioner is allowed to erect the mill; but when he is not allowed to erect the mill, the costs shall be paid by the person who is allowed to do so.

(3) In petitions for condemnation of land for railroads, street railways, telegraph, telephone or electric power or light companies, or for water supplies for public institutions, or for the use of other quasi-public or municipal corporations; unless in the opinion of the superior court the defendant improperly refused the privilege, use or easement demanded, in which case the costs must be adjudged as to the court may appear equitable and just.

(4) When the petition is refused. (Code, ss. 1299, 1855, 2013; 1893, c. 63; 1903, c. 562; Rev., s. 1269; C.S., s. 1245; 1945, c. 635.)

CASE NOTES

Condemnation Proceedings. — In proceedings brought by a railroad, where it was found by the jury on appeal that the defendant's benefit exceeded his damages and then found they were equal, it was held that the plaintiff was taxable with costs up to the time of appeal. Madison County Ry. v. Gahagan, 161 N.C. 190, 76 S.E. 696 (1912).

§ 6-23. Defendant unreasonably defending after notice of no personal claim to pay costs.

In case of a defendant, against whom no personal claim is made, the plaintiff may deliver to such defendant with the summons, a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects real or personal property, and that no personal claim is made against such defendant. If a defendant on whom such notice is served unreasonably defends the action, he shall pay costs to the plaintiff. (Code, s. 216; Rev., s. 1270; C.S., s. 1246.)

CASE NOTES

Cited in City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

§ 6-24. Suits by an indigent; payment of costs by an indigent.

A person who sues as an indigent is not required to advance the required court costs and no officer shall require any fee of the person. If a court enters a judgment in favor of a person suing as an indigent and does not require another party to the suit to pay the costs of the suit, the court may require the indigent person to pay any costs of the suit that were not required to be paid because the person was indigent. (1868-9, c. 96, s. 3; Code, s. 212; 1895, c. 149; Rev., s. 1265; C.S., s. 1247; 1993, c. 435, s. 5.)

Cross References. — As to when suits in forma pauperis may be permitted, see G.S. 1-110.

Legal Periodicals. — For comment on access of indigents into the civil courtroom, see 49 N.C.L. Rev. 683 (1971).

CASE NOTES

Right Not Extended Beyond Trial. — The leave to sue as a pauper does not extend in civil actions beyond the trial in the superior court. Speller v. Speller, 119 N.C. 356, 26 S.E. 160 (1896).

Costs of Witnesses Not to Be Recovered. — One suing in forma pauperis is not entitled to recover costs of his witnesses. Draper v. Buxton, 90 N.C. 182 (1884). This section does not excuse the pauper from liability for his witnesses. Bailey v. Brown, 105 N.C. 127, 10 S.E. 1054 (1890).

This provision deprives all officers of costs, and the last clause is very sweeping, and manifestly embraces the costs of witnesses. Compensation to witnesses is part of the cost of an action, as much so as any other statutory charges in and about the same. Booshee v. Surles, 85 N.C. 90 (1881); Hall v. Younts, 87 N.C. 285 (1882); Draper v. J.A. Buxton & Co., 90 N.C. 182 (1884).

§ 6-25. Party seeking recovery on usurious contracts; no costs.

No costs shall be recovered by any party, whether plaintiff or defendant, who may endeavor to recover upon any usurious contract. (1895, c. 69; Rev., s. 1271; C.S., s. 1248.)

Cross References. — As to usury generally, see G.S. 24-1, 24-2.

§ 6-26. Costs in special proceedings.

The costs in special proceedings shall be as allowed in civil actions, unless otherwise specially provided. (Code, s. 541; Rev., s. 1272; C.S., s. 1249.)

Cross References. — As to special proceedings generally, see G.S. 1-393 et seq.

§ 6-27: Repealed by Session Laws 1971, c. 269, s. 15.

§ 6-28. Costs of laying off homestead and exemption.

The costs and expenses of appraising and laying off the homestead or personal property exemptions, when the same is made under execution, shall be charged and included in the officer's bill of fees upon such execution or other final process; and when made upon the petition of the owner, they shall be paid by such owner, and the latter costs shall be a lien on said homestead. (Code, s. 510; Rev., s. 1274; C.S., s. 1251.)

Local Modification. — Pitt: 1953, c. 1276.

Cross References. — As to exempt property and setting aside such property, see G.S. 1C-1601 et seq. As to costs in reallotment of homestead for increase in value, see G.S. 6-21, subdivision (9).

CASE NOTES

Payment of Fees as Condition. — Where the judgment debtor claims his personal property from execution, the sheriff is justified in refusing to proceed further till such exemptions are properly set apart, and the payment of his fees for the purpose by the plaintiff in the action, except when the suit is brought in forma pauperis. Whitmore-Ligon Co. v. Hyatt, 175 N.C. 117, 95 S.E. 38 (1918).

Applied in Beavans v. Goodrich, 98 N.C. 217, 3 S.E. 516 (1887); Long v. Walker, 105 N.C. 90, 10 S.E. 658 (1890).

§ 6-29. Costs of reassessment of homestead.

If the superior court at term shall confirm the appraisal or assessment, or shall increase the exemption allowed the debtor or claimant, the levy shall stand only upon the excess remaining, and the creditor shall pay all the costs of the proceeding in court. If the amount allowed the debtor or claimant is reduced, the costs of the proceeding in court shall be paid by the debtor or claimant, and the levy shall cover the excess then remaining. (Code, s. 521; Rev., s. 1275; C.S., s. 1252.)

Cross References. — As to costs in reallotment of homestead for increase in value, see G.S. 6-21, subdivision (9).

CASE NOTES

Applied in Beavans v. Goodrich, 98 N.C. 217, 3 S.E. 516 (1887).

§ 6-30. Costs against infant plaintiff; guardian responsible.

When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action shall be responsible therefor. (Code, s. 534; Rev., s. 1276; C.S., s. 1253.)

§ 6-31. Costs where executor, administrator, trustee of express trust, or person authorized by statute a party.

In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon or collected out of the estate, fund or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in such action or defense. And when any claim against a deceased person is referred, the prevailing party shall be entitled to recover the fees of referees and witnesses, and other necessary disbursements, to be taxed according to law. (Code, s. 535; Rev., s. 1277; C.S., s. 1254.)

Cross References. — As to liability of personal representative for denial of claim, see G.S. 28A-13-10, 28A-19-18. As to reference of disputed claim generally, see G.S. 28A-19-15, 28A-19-16. As to when costs against representative are allowed, see G.S. 28A-19-18.

CASE NOTES

When Fiduciary Personally Liable. — By virtue of this section costs should be taxed against the estate in the hands of a trustee, and not against him personally, except when the court adjudges that the trustee has been guilty of mismanagement or bad faith in an action or defense. Smith v. King, 107 N.C. 273, 12 S.E. 57 (1890); Sugg v. Bernard, 122 N.C. 155, 29 S.E. 221 (1898); Lance v. Russell, 165 N.C. 626, 81 S.E. 922 (1914).

The same rule is applied to actions against administrators and executors, State v. Roberts, 106 N.C. 662, 10 S.E. 900 (1890); Varner v. Johnston, 112 N.C. 570, 17 S.E. 483 (1893), with the additional limitation prescribed by G.S. 28-115 (see now G.S. 28A-19-18), Whitaker v. Whitaker, 138 N.C. 205, 50 S.E.2d 630 (1905). See G.S. 28A-19-18 and note.

This Section Includes Next Friends. — While "next friends" may not be embraced in the strict letter of this section, they come within its purview. Smith v. Smith, 108 N.C. 365, 12 S.E. 1045, 13 S.E. 113 (1891). It is error to tax "next friends" who are not parties without a finding of mismanagement or bad faith. Hockoday v. Lawrence, 156 N.C. 319, 72 S.E. 387 (1911).

Limitation on Payment of Costs. — A trustee, as against those for whose benefit the trust is created, will be allowed to apply so much of the funds to the payment of costs and expenses, including counsel fees, as may be necessary to protect it, but he will not be allowed such disbursements against one who establishes an adverse title to the property. Chemical Co. v. Johnson, 101 N.C. 223, 7 S.E. 770 (1888).

Cited in Will of Hargrove, 206 N.C. 307, 173 S.E. 577 (1934).

§ 6-32. Costs against assignee after action brought.

In actions in which the cause of action becomes by assignment after the commencement of the action, or in any other manner, the property of a person not a party to the action, such person shall be liable for the costs in the same manner as if he were a party. (Code, s. 539; Rev., s. 1278; C.S., s. 1255.)

CASE NOTES

Assignments Must Be Absolute and Complete. — The assignments contemplated by this section are only such as are absolute, and such as are intended to be a collateral security only for a continuing obligation or claim are not within the purview of the section. Nor does the section apply when the assignment is only of a part and not of the whole cause of action. Davis & Schenck v. Higgins, 92 N.C. 203 (1885).

Article 4.

Costs on Appeal.

§ 6-33. Costs on appeal generally.

On appeal from a magistrate or any court of the General Court of Justice, if the appellant recovers judgment, he shall recover the costs of the appeal and also those costs he ought to have recovered below had the judgment of that court been correct. If in any court of appeal there is judgment for a new trial, or for a new jury, or if the judgment appealed from is not wholly reversed, but partly affirmed and partly disaffirmed, the costs shall be in the discretion of the appellate court. (Code, s. 540; Rev., s. 1279; C.S., s. 1256; 1969, c. 44, s. 19; 1971, c. 269, s. 7.)

CASE NOTES

Judgment Prerequisite to Awarding of Costs. — The first part of this section manifestly refers not only to a reversal of the judgment below, but to a judgment in favor of the appellant on the merits and not merely to an order for a new trial. The trial court cannot ordinarily tax the costs of an action in favor of either party unless there is a judgment, costs being an incident of the judgment. Williams v. Hughes, 139 N.C. 17, 51 S.E. 790 (1905).

Where the subject matter of the action is destroyed before the appeal is heard, the judgment below is presumed to be correct until reversed, and no part of the costs should be adjudged against the appellee. Taylor v. Vann, 127 N.C. 243, 37 S.E. 263 (1900).

Where Lower Court Judgment Modified. — In McLean v. Breece, 113 N.C. 390, 18 S.E. 694 (1893), where the judgment was modified in the Supreme Court, the costs were taxed against the appellee. And where the plaintiffs recovered a part judgment on their demand, by establishing a mechanic's lien, they were entitled to costs of appeal. See Hogsed v. Gloucester Lumber Co., 170 N.C. 529, 87 S.E. 337 (1915).

Where the judgment of the court below is modified and affirmed, the appellate division may apportion the costs on appeal between the parties in the exercise of its discretion. Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1963).

The superior court is without power to modify former orders of the appellate court taxing costs on former appeals, as costs thus incurred are no part of superior court costs, but are taxed by, and executions issue out of, the appellate court. Bailey v. Hayman, 222 N.C. 58, 22 S.E.2d 6 (1942).

Partial Affirmance and Partial Reversal. — Where the judgment appealed from is partly affirmed and partly reversed, in the exercise of the discretion permitted by this section, the costs in the appellate court may be divided so that each party pays his own costs. Smith v. Old Dominion Bldg. & Loan Ass'n, 119 N.C. 249, 26 S.E. 41 (1896); Hawkins v. Richmond Cedar Works, 122 N.C. 87, 30 S.E. 13 (1898).

Reversal Necessary to Tax Costs Against Appellee. — Unless the court upon the merits reverses the judgment below, it cannot adjudge any part of the costs against the appellee. Commissioners of Vance County v. Gill, 126 N.C. 86, 35 S.E. 228 (1900).

Case Remanded. — Where an appellant fails to show that he was prejudiced by the order appealed from, he may be taxed with the costs of the appeal, though the case be remanded. Harrington v. Rawls, 136 N.C. 65, 48 S.E. 571 (1904).

New Trial. — The taxing of the costs on appeal, by partial new trial being granted, is in the discretion of the court. Satterthwaite v. Goodyear, 137 N.C. 302, 49 S.E. 205 (1904).

Under this section, where the appellant was awarded a partial new trial only, as to one issue only out of several, the costs of the appeal are in the discretion of the court. Rayburn v. Casualty Co., 142 N.C. 376, 55 S.E. 296 (1906).

Where a new trial is granted, the awarding of costs is discretionary. Universal Metal Co. v. Durham & C.R.R., 145 N.C. 293, 59 S.E. 50 (1907).

Motion in Superior Court to Recover Costs of Appellate Transcript Prohibited. — The cost of preparing the transcription of the record is a part of the costs in the appellate division, and the judge of the superior court upon the subsequent trial is without jurisdiction to entertain a motion for the recovery of such costs. Ward v. Cruse, 236 N.C. 400, 72 S.E.2d 835 (1952).

Applied in Kincaid v. Graham, 92 N.C. 154 (1885); Ebert v. Disher, 216 N.C. 546, 5 S.E.2d 716 (1939).

§§ **6-34, 6-35:** Repealed by Session Laws 1971, c. 269, s. 15.

ARTICLE 5.

Liability of Counties in Criminal Actions.

§§ **6-36 through 6-39:** Repealed by Session Laws 1971, c. 269, s. 15.

§ 6-40. Liability of counties, where trial removed from one county to another.

When a prisoner is sent from one county to another to be held for trial, or for any other cause or purpose, the county from which he is sent shall pay his jail expenses, unless they are collected from the prisoner. (1889, c. 354; 1901, c. 718; Rev., s. 1285; C.S., s. 1263; 1971, c. 269, s. 8.)

CASE NOTES

Cited in In re Dunlap, 66 N.C. App. 152, 310 S.E.2d 415 (1984).

§§ 6-41 through 6-44: Repealed by Session Laws 1971, c. 269, s. 15.

ARTICLE 6.

Liability of Defendant in Criminal Actions.

§§ 6-45, 6-46: Repealed by Session Laws 1971, c. 269, s. 15.

§ 6-47. Judgment confessed; bond given to secure fine and costs.

In cases where a court permits a defendant convicted of any criminal offense to give bond or confess judgment, with sureties to secure the fine and costs which may be imposed, the acceptance of such security shall be upon the condition that it shall not operate as a discharge of the original judgment against the defendant nor as a discharge of his person from the custody of the law until the fine and costs are paid. (1879, c. 264; Code, s. 749; 1885, c. 364; Rev., s. 1293; C.S., s. 1269; 1971, c. 269, s. 9.)

CASE NOTES

The power of the courts to suspend judgment in criminal cases should only be upheld when sanctioned by usage, and where the consent of the defendant was expressly given or would be implied from the fact that the order was made in the defendant's presence without his objection and that its evident purpose was to save the defendant from a more grievous penalty permitted or required by law. State v. Hilton, 151 N.C. 687, 65 S.E. 1011 (1909).

Cited in State v. Smith, 196 N.C. 438, 146 S.E. 73 (1929); State v. Bryant, 251 N.C. 423, 111 S.E.2d 591 (1959).

§ 6-48. Arrest for nonpayment of fine and costs.

In default of payment of such fine and costs, it is the duty of the court at any subsequent term thereof, on motion of the solicitor of the State, to order a capias to issue to the end that such defendant may be again arrested and held for the fine and costs until discharged according to law. (1879, c. 264; Code, s. 750; 1885, c. 364; Rev., s. 1294; C.S., s. 1270; 1971, c. 269, s. 10.)

CASE NOTES

Cited in State v. Smith, 196 N.C. 438, 146 S.E. 73 (1929).

ARTICLE 7.

Liability of Prosecuting Witness for Costs.

§ 6-49. Prosecuting witness liable for costs in certain cases; court determines prosecuting witness.

In all criminal actions in any court, if the defendant is acquitted, nolle prosequi entered, or judgment against him is arrested, or if the defendant is discharged from arrest for want of probable cause, the costs, including the fees of all witnesses whom the judge before whom the trial took place shall certify to have been proper for the defense and prosecution, shall be paid by the prosecuting witness, whether marked on the bill or warrant or not, whenever the judge is of the opinion that there was not reasonable ground for the prosecution, or that it was not required by the public interest. If a greater number of witnesses have been summoned than were, in the opinion of the court, necessary to support the charge, the court may, even though it is of the opinion that there was reasonable ground for the prosecution, order the prosecuting witness to pay the attendance fees of such witnesses, if it appear that they were summoned at the prosecuting witness's special request.

Every judge is authorized to determine who the prosecuting witness is at any stage of a criminal proceeding, whether before or after the bill of indictment has been found, or the defendant acquitted: Provided, that no person shall be made a prosecuting witness after the finding of the bill, unless he shall have been notified to show cause why he should not be made the prosecuting witness of record. (1799, c. 4, s. 19, P.R.; 1880, c. 558, P.R.; R.C., c. 35, s. 37; 1868-9, c. 277; 1874-5, c. 151; 1879, c. 49; Code, s. 737; 1889, c. 34; Rev., s. 1295; C.S., s. 1271; 1947, c. 781; 1953, c. 675, s. 1; 1971, c. 269, s. 11.)

CASE NOTES

This section was intended to enlarge the power of the courts over the question of costs in criminal actions. State v. Norwood, 84 N.C. 794 (1881).

Enactment of this section was within the power of the legislature. State v. Cannady, 78 N.C. 539 (1878).

Standing to Challenge Constitutionality of Section. — The plaintiff lacks standing to put in issue the constitutionality of this section where he is under no present threat of prosecution under these statutes, the likelihood that he will run afoul of them in the future is remote and speculative in the extreme, and it can be safely assumed that he does not contemplate either presently or in the future the institution of a prosecution in this State. Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973).

The mere fact that earlier the plaintiff was caught in the net of the challenged statutes gives him no standing, where his earlier encounter with the statutes has become moot, the costs assessed have been paid, and he is no longer restrained. Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973).

Intervention by Federal Court in Operation of Section. — The taxing of costs to a prosecuting witness is a constituent part of the criminal procedure of North Carolina. Comity precludes not only the injunction of criminal proceedings in the state courts, but also any disruptive interference thereof. Therefore only when the whole proceeding may be enjoined does the federal district court have jurisdiction to intervene in any way in the operation of this section. Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972), aff'd, 478 F.2d 694 (4th Cir. 1973).

Declaratory Judgment as to Validity of Section Denied. — A grant of declaratory relief that this section was invalid and unconstitutional was held to be outside the equitable jurisdiction of the court, for the reasons that no bad faith had been alleged, nor any harassment, nor was there shown any impediment to the resolution of the constitutional validity of this section in the general district courts of North Carolina. Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972), aff'd, 478 F.2d 694 (4th Cir. 1973).

Certifying Witnesses as Proper for Defense. — Where the court below taxed the costs of an unsuccessful prosecution against the prosecutor without finding that the defendant's witnesses were proper for the defense, as required by this section, judgment would still be allowed to stand if the court below would make and certify the requisite finding that the said witnesses were proper for the defense. State v. Jones, 117 N.C. 768, 23 S.E. 247 (1895).

In State v. Owens, 87 N.C. 565 (1882), it was stated that this section included such witnesses for the defense as were certified by the counsel to have been proper for the defense, and the Supreme Court approved that judgment. But this was not the point in the appeal, and was only incidentally presented. See State v. Massey, 104 N.C. 877, 10 S.E. 608 (1889). In State v. Roberts, 106 N.C. 662, 10 S.E. 900 (1890), which was a judgment taxing the prosecutor with the costs, the judge did not find and certify that the prosecution was frivolous, malicious or was not for the public good. The Supreme Court held that this judgment was erroneous, and that the statute only allowed a party to be taxed as prosecutor with the costs upon the findings of these facts. State v. Jones, 117 N.C. 768, 23 S.E. 247 (1895).

Notice to Prosecutor Prior to Taxing Costs. — It is necessary for the trial court, in order to adjudge the prosecution of a criminal action to be frivolous and malicious and tax the costs against the prosecutors who have employed attorneys to assist the solicitor, to give the prosecutors notice of such action and hear the matter according to the "law of the land." State v. Collins, 169 N.C. 323, 84 S.E. 1049 (1915).

The object of notice is only to give the party a day in court, and it matters not how he gets the notice, if he appears and defends under it. This may be done on motion of the defendant's counsel or by the court of its own motion. State v. Hughes, 83 N.C. 665 (1880); State v. Hamilton, 106 N.C. 660, 10 S.E. 854 (1890). The court should find the facts, and when this is done the findings are not reviewable in the appellate court. State v. Owens, 87 N.C. 565 (1882); State v. Roberts, 106 N.C. 662, 10 S.E. 900 (1890); State v. Jones, 117 N.C. 768, 23 S.E. 247 (1895).

A notice to mark one as prosecutor under this section need not be in writing. Where it was announced in open court, upon the calling and continuance of a State case, that a motion would be made at the next term to mark a witness as prosecutor (all the witnesses being present), and on the argument of the motion it was announced that all the parties were present, it was held to be sufficient evidence that such notice was given, and warranted the court in ordering the witness to be marked as prosecutor. State v. Norwood, 84 N.C. 794 (1881).

Not Required by the Public Interest. — A finding by the trial judge that a prosecution of a criminal action "was not for the public interest" is equivalent to a finding that it "was not required by the public interest." State v. Baker, 114 N.C. 812, 19 S.E. 145 (1894).

Conclusiveness of Court Finding. — A judgment that a prosecution is frivolous and not required by the public interest, and that the prosecutor pay the costs, is conclusive and not appealable. State v. Hamilton, 106 N.C. 660, 10 S.E. 854 (1890).

The finding by the judge below that a criminal prosecution was frivolous and malicious is conclusive, and will support a judgment that the prosecutor pay costs, or in default thereof be imprisoned. State v. Lance, 109 N.C. 789, 14 S.E. 110 (1891).

Order Set Aside. — Where the trial judge has dismissed a criminal action as being frivolous and malicious, and taxed the prosecutors with costs, and it appears from his findings of record that he has done so without any proper consideration of their affidavits in support of their position and relevant to the issue, so as to deprive them of the benefits of due process of law, his order will be set aside on appeal, leaving the matter open for proper adjudication. State v. Collins, 169 N.C. 323, 84 S.E. 1049 (1915).

Liability of County When Prosecutor Is Insolvent. — When a judge below orders an insolvent prosecutor to pay costs, and he fails or is unable to pay, the county in which the offense was committed becomes liable to pay the same. Pegram v. Commissioners of Guilford County, 75 N.C. 120 (1876).

Applied in State v. Darr, 63 N.C. 516 (1869).

OPINIONS OF ATTORNEY GENERAL

Findings of Fact Required. — The presiding judge, prior to taxing costs against a prosecuting witness, is required to make specific findings of fact. See opinion of Attorney General to the Hon. Gary B. Tash, Judge, 21st Judicial District Court, 49 N.C.A.G. 142 (1980).

Mere Failure to Convict Not Ground for Assessment. — This section does not empower the court to assess costs against the prosecuting witness solely because prosecution does not result in a conviction of the accused. See opinion of Attorney General to the Hon. Gary B. Tash, Judge, 21st Judicial District Court, 49 N.C.A.G. 142 (1980).

§ 6-50. Imprisonment of prosecuting witness for willful nonpayment of costs if prosecution frivolous.

Every such prosecuting witness may be adjudged not only to pay the costs, but he shall also be imprisoned for the willful nonpayment thereof, when the judge before whom the case was tried shall adjudge that the prosecution was frivolous or malicious. (1800, c. 558; R.C., c. 35, s. 37; 1879, c. 49; 1881, c. 176; Code, s. 738; Rev., s. 1297; C.S., s. 1272; 1971, c. 269, s. 11.1.)

CASE NOTES

Constitutionality. — This section is constitutional. State v. Cannady, 78 N.C. 539 (1878); State v. Hamilton, 106 N.C. 660, 10 S.E. 854 (1890).

Standing to Challenge Section. — The plaintiff lacked standing to put in issue the constitutionality of this section where he was under no present threat of prosecution under these statutes, the likelihood that he would run afoul of them in the future was remote and speculative in the extreme, and it could be safely assumed that he did not contemplate either presently or in the future the institution of a prosecution in North Carolina. Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973).

The mere fact that earlier the plaintiff was caught in the net of the challenged statutes gave him no standing, where his earlier encounter with the statutes had become moot, the costs assessed were paid, and he was no longer restrained. Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973).

The mere fact that the statutes may chill in some indefinable way the urge to prosecute is of no moment in the absence of any real likelihood that plaintiff has or will have reason to prosecute someone in North Carolina. Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973).

Jurisdiction of Federal Court. — A grant of a declaratory judgment that this section was invalid and unconstitutional was held to be outside the equitable jurisdiction of the federal court for the reasons that no bad faith had been alleged, nor any harassment, nor any impediment to the resolution of the constitutional validity in the General Court of Justice of North Carolina. Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972), aff'd, 478 F.2d 694 (4th Cir. 1973).

The taxing of costs to a prosecuting witness is a constituent part of the criminal procedure of North Carolina. Comity precludes not only the injunction of criminal proceedings in the state courts, but also any disruptive interference thereof. Therefore, only when the whole proceeding may be enjoined does the federal district court have jurisdiction to intervene in any way in the operation of this section. Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972), aff'd, 478 F.2d 694 (4th Cir. 1973).

Costs of Prosecution Not a Debt. — Costs of prosecution against a prosecutor (upon acquittal of the accused or nolle prosequi entered), or against the accused upon a verdict of guilty, or a fine imposed, do not constitute a debt within the meaning of N.C. Const., Art. I, § 16, (now N.C. Const., Art. 1, § 28) and hence the defendant may be imprisoned for nonpayment of the same. State v. Wallin, 89 N.C. 578 (1883).

Where Bill Ignored. — No power is conferred by this section to tax a prosecutor with costs when the bill is ignored. State v. Cockerham, 23 N.C. 381 (1841); State v. Horton, 89 N.C. 581 (1883); State v. Gates, 107 N.C. 832, 12 S.E. 319 (1890).

ARTICLE 8.

Fees of Witnesses.

§ 6-51. Not entitled to fees in advance.

Witnesses are not entitled to receive their fees in advance; but no witness in a civil action or special proceeding, unless summoned on behalf of the State or a municipal corporation, shall be compelled to attend more than one day, if the party by or for whom he was summoned shall, after one day's attendance, on request and presentation of a certificate, fail or refuse to pay what then may be due for traveling to the place of examination and for the number of days of attendance. (1868-9, c. 279, subch. 11, s. 3; Code, s. 1368; Rev., s. 1298; C.S., s. 1273.)

Cross References. — As to attendance of witnesses, see G.S. 8-63.

§ 6-52: Repealed by Session Laws 1971, c. 269, s. 15.

§ 6-53. Witness to prove attendance; action for fees.

Every person summoned, who shall attend as a witness in any suit, shall, before the clerk of the court, or before the referee or officer taking the testimony, ascertain by his own oath or affirmation the sum due for traveling to and from court, attendance and ferriage, which shall be certified by the clerk; and on failure of the party, at whose instance such witness was summoned (witnesses for the State and municipal corporations excepted), to pay the same previous to the departure of the witness from court, such witness may at any time sue for and recover the same from the party summoning him; and the certificate of the clerk shall be sufficient evidence of the debt. (1777, c. 115, s. 46, P.R.; 1796, c. 458, P.R.; R.C., c. 31, s. 73; 1868-9, c. 279, subch. 11, ss. 2, 4; Code, s. 1369; Rev., s. 1299; C.S., s. 1274; 1971, c. 269, s. 12.)

Cross References. — As to attendance of witnesses generally, see G.S. 8-59.

CASE NOTES

Right to Payment Statutory. — Payment of witnesses by the sovereign is neither given by common law nor is it an inherent right. It is granted at the discretion of the court and only within the limits authorized by statute. State v. Massey, 104 N.C. 877, 10 S.E. 608 (1889). See State v. Wheeler, 141 N.C. 773, 53 S.E. 358 (1906).

Assignment of Witness Tickets Not Necessary. — The party to an action summoning witnesses to testify in his behalf is liable for their witness fees which may be recovered in an action against him, and when it appears of record entry of the judgment by the clerk of the superior court that these fees have been taxed against the party recovering the judgment, and paid by him, such party is entitled to recover them against the losing party to the action without showing that the witnesses had transferred or assigned their tickets to him. McClure v. Fulbright, 196 N.C. 450, 146 S.E. 74 (1929).

A pauper is not excused from liability for his witnesses. Bailey v. Brown, 105 N.C. 127, 10 S.E. 1054 (1890).

§§ 6-54 through 6-56: Repealed by Session Laws 1971, c. 269, s. 15.

§ 6-57: Repealed by Session Laws 1947, c. 781.

§§ 6-58, 6-59: Repealed by Session Laws 1971, c. 269, s. 15.

§ 6-60. No more than two witnesses may be subpoenaed to prove single material fact; liability for fees of such witnesses; one fee for day's attendance.

No district attorney shall direct that more than two witnesses be subpoenaed for the State to prove a single material fact, nor shall the State or defendant in any such prosecution be liable for the fees of more than two witnesses to prove a single material fact, unless the court, upon satisfactory reasons appearing, otherwise directs. And no witness subpoenaed in a criminal action shall be paid by the State for attendance in more than one case for any one day. (1871-2, c. 186; 1879, c. 264; Code, s. 744; Rev., s. 1303; C.S., s. 1284; 1971, c. 269, s. 13; 1973, c. 47, s. 2.)

CASE NOTES

Discretion of Trial Judge. — The number of witnesses who may testify to a particular fact is a matter within the sound discretion of the trial judge. State v. McClintick, 315 N.C. 649, 340 S.E.2d 41 (1986).

§ **6-61:** Repealed by Session Laws 1971, c. 269, s. 15.

§ 6-62. District attorney to announce discharge of State's witnesses.

It is the duty of all district attorneys prosecuting in the several courts, as each criminal prosecution is disposed of by trial, removal, continuance or otherwise, to call, in open court, and announce the discharge of witnesses for the State, either finally or otherwise as the disposition of the case may require. (1879, c. 264; 1881, c. 312; Code, s. 746; Rev., s. 1305; C.S., s. 1286; 1935, c. 26; 1971, c. 269, s. 14; 1973, c. 47, s. 2.)

Cross References. — As to discharge of witnesses generally, see G.S. 8-63.

§ **6-63:** Repealed by Session Laws 1971, c. 269, s. 15.

ARTICLE 9.

Criminal Costs Before Justices, Mayors, County or Recorders' Courts.

§§ **6-64, 6-65:** Repealed by Session Laws 1971, c. 269, s. 15.

Chapter 7.

Courts.

§§ 7-1 through 7-456: Repealed and transferred.

Cross References. — As to the judicial department, see now Chapter 7A.

Editor's Note. — The various sections of this chapter were repealed by Session Laws 1943, c. 746; 1955, c. 1317, s. 1; 1956, c. 1016, s. 2; 1965, c. 310, s. 4; 1967, c. 108, s. 12; c. 691, s. 59; c. 1049, s. 6; 1969, c. 1190, s. 57; and 1971, c. 377, s. 32.

Session Laws 1969, c. 1190, ss. 36 and 39 to 49 transferred G.S. 7-42, 7-52 to 7-55, 7-58, 7-60, 7-61.1, 7-62, 7-65, 7-70.2, 7-72, 7-73, 7-73.1, 7-76, 7-78, 7-80, and 7-83 to the following sections of Chapter 7A: G.S. 7A-42, 7A-44 to 7A-47.1, 7A-47.3 to 7A-49.2, and 7A-96. Session Laws 1971, c. 377, s. 1 transferred the seventh paragraph of G.S. 7-89 to G.S. 8-85. Session Laws 1971, c. 377, s. 1.1 transferred G.S. 7-448 to 7-456 to G.S. 7A-400 to 7A-408 (now repealed).

Chapter 7A.

Judicial Department.

SUBCHAPTER I. GENERAL COURT OF JUSTICE.

Article 1.

Judicial Power and Organization.

Sec.
7A-1. Short title.
7A-2. Purpose of Chapter.
7A-3. Judicial power; transition provisions.
7A-4. Composition and organization.

Article 1A.

[Reserved.]

7A-4.1 through 7A-4.19. [Reserved.]

Article 1B.

Age Limits for Service as Justice or Judge.

7A-4.20. Age limit for service as justice or judge: exception.
7A-4.21. Validation of official actions of district court judges of twenty-fifth judicial district performed after mandatory retirement age.

SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE.

Article 2.

Appellate Division Organization.

7A-5. Organization.
7A-6. Appellate division reporters; reports.
7A-7. Law clerks; secretaries and stenographers.
7A-8, 7A-9. [Reserved.]

Article 3.

The Supreme Court.

7A-10. Organization; compensation of justices.
7A-10.1. Authority to prescribe standards of judicial conduct.
7A-11. Clerk of the Supreme Court; salary; bond; fees; oath.
7A-12. Supreme Court marshal.
7A-13. Supreme Court library; functions; librarian; library committee; seal of office.
7A-14. Reprints of Supreme Court Reports.
7A-15. [Reserved.]

Article 4.

Court of Appeals.

7A-16. Creation and organization.
7A-17. [Repealed.]

Sec.
7A-18. Compensation of judges.
7A-19. Seats and sessions of court.
7A-20. Clerk; oath; bond; salary; assistants; fees.
7A-21. Marshal; powers; salary.
7A-22 through 7A-24. [Reserved.]

Article 5.

Jurisdiction.

7A-25. Original jurisdiction of the Supreme Court.
7A-26. Appellate jurisdiction of the Supreme Court and the Court of Appeals.
7A-27. Appeals of right from the courts of the trial divisions.
7A-28. Decisions of Court of Appeals on post-trial motions for appropriate relief final or valuation of exempt property.
7A-29. Appeals of right from certain administrative agencies.
7A-30. Appeals of right from certain decisions of the Court of Appeals.
7A-31. Discretionary review by the Supreme Court.
7A-32. Power of Supreme Court and Court of Appeals to issue remedial writs.
7A-33. Supreme Court to prescribe appellate division rules of practice and procedure.
7A-34. Rules of practice and procedure in trial courts.
7A-34.1. Unnecessary cover sheets.
7A-35 through 7A-37. [Repealed.]
7A-37.1. Statewide court-ordered, nonbinding arbitration in certain civil actions.
7A-38. [Repealed.]
7A-38.1. Mediated settlement conferences in superior court civil actions.
7A-38.2. Regulation of mediators and other neutrals.
7A-38.3. Prelitigation mediation of farm nuisance disputes.
7A-38.3A. Prelitigation mediation of insurance claims.
7A-38.3B. Mediation in matters within the jurisdiction of the clerk of superior court.
7A-38.3C. [Repealed.]
7A-38.3D. Mediation in matters within the jurisdiction of the district criminal courts.
7A-38.4. [Repealed.]
7A-38.4A. Settlement procedures in district court actions.
7A-38.5. Community mediation centers.

Sec.

7A-38.6. Report on community mediation centers.
7A-38.7. Dispute resolution fee for cases resolved in mediation.
7A-39. Cancellation of court sessions and closing court offices; extension of statutes of limitations in catastrophic conditions.

Article 6.

Retirement of Justices and Judges of the Appellate Division; Retirement Compensation; Recall to Emergency Service; Disability Retirement.

7A-39.1. Justice, emergency justice, judge and emergency judge defined.
7A-39.2. Age and service requirements for retirement of justices of the Supreme Court and judges of the Court of Appeals.
7A-39.3. Retired justices and judges may become emergency justices and judges subject to recall to active service; compensation for emergency justices and judges on recall.
7A-39.4. Retirement creates vacancy.
7A-39.5. Recall of emergency justice or emergency judge upon temporary incapacity of a justice or judge.
7A-39.6. Application to the Governor; commission as emergency justice or emergency judge.
7A-39.7. Jurisdiction and authority of emergency justices and emergency judges.
7A-39.8. Court authorized to adopt rules.
7A-39.9. Chief Justice and Chief Judge may recall and terminate recall of justices and judges; procedure when Chief Justice or Chief Judge incapacitated.
7A-39.10. Article applicable to previously retired justices.
7A-39.11. Retirement on account of total and permanent disability.
7A-39.12. Applicability of §§ 7A-39.2 and 7A-39.11.
7A-39.13. Recall of active and emergency justices and judges who have reached mandatory retirement age.
7A-39.14. Recall by Chief Justice of retired or emergency justices or judges for temporary vacancy.
7A-39.15. Emergency recall judges of the Court of Appeals.

SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

Article 7.

Organization.

Sec.

7A-40. Composition; judicial powers of clerk.
7A-41. Superior court divisions and districts; judges.
7A-41.1. District and set of districts defined; senior resident superior court judges and their authority.
7A-41.2. Nomination and election of regular superior court judges.
7A-42. Sessions of superior court in cities other than county seats.
7A-43. [Reserved.]
7A-43.1 through 7A-43.3. [Repealed.]
7A-44. Salary and expenses of superior court judge.
7A-44.1. Secretarial and clerical help.
7A-45. [Repealed.]
7A-45.1. Special judges.
7A-45.2. Emergency special judges of the superior court; qualifications, appointment, removal, and authority.
7A-45.3. Superior court judges designated for complex business cases.
7A-45.4. Designation of mandatory complex business cases.
7A-46. Special sessions.
7A-47. Powers of regular judges holding courts by assignment or exchange.
7A-47.1. Jurisdiction in vacation or in session.
7A-47.2. [Repealed.]
7A-47.3. Rotation and assignment; sessions.
7A-48. Jurisdiction of emergency judges.
7A-49. Orders returnable to another judge; notice.
7A-49.1. Disposition of motions when judge disqualified.
7A-49.2. Civil business at criminal sessions; criminal business at civil sessions.
7A-49.3. [Repealed.]
7A-49.4. Superior court criminal case docketing.
7A-49.5. Statewide electronic filing in courts.

Article 8.

Retirement of Judges of the Superior Court; Retirement Compensation for Superior Court Judges; Recall to Emergency Service of Judges of the District and Superior Court; Disability Retirement for Judges of the Superior Court.

7A-50. Emergency judge defined.
7A-51. Age and service requirements for re-

Sec.
tirement of judges of the superior court and of the Administrative Officer of the Courts.
7A-52. Retired district and superior court judges may become emergency judges subject to recall to active service; compensation for emergency judges on recall.
7A-53. Application to the Governor; commission as emergency judge.
7A-53.1. Jurisdiction of emergency district court judges.
7A-54. Article applicable to judges retired under prior law.
7A-55. Retirement on account of total and permanent disability.
7A-56. Applicability of §§ 7A-51 and 7A-55.
7A-57. Recall of active and emergency trial judges who have reached mandatory retirement age.
7A-58, 7A-59. [Reserved.]

Article 9.

District Attorneys and Judicial Districts.

7A-60. District attorneys and prosecutorial districts.
7A-61. Duties of district attorney.
7A-62. Acting district attorney.
7A-63. Assistant district attorneys.
7A-64. Temporary assistance for district attorneys.
7A-65. Compensation and allowances of district attorneys and assistant district attorneys.
7A-66. Removal of district attorneys.
7A-66.1. Office of solicitor may be denominated as office of district attorney; "solicitor" and "district attorney" made interchangeable; interchangeable use authorized in proceedings, documents, and quotations.
7A-67. [Repealed.]
7A-68. Administrative assistants.
7A-69. (Effective until January 1, 2009) Investigatorial assistants.
7A-69. (Effective January 1, 2009) Investigatorial assistants.
7A-69.1. [Repealed.]

Article 10.

[Reserved.]

7A-70 through 7A-94. [Reserved.]

Article 11.

Special Regulations.

7A-95. Reporting of trials.
7A-96. Court adjourned by sheriff when judge not present.
7A-97. Court's control of argument.
Sec.
7A-98, 7A-99. [Reserved.]

Article 12.

Clerk of Superior Court.

7A-100. Election; term of office; oath; vacancy; office and office hours; appointment of acting clerk.
7A-101. Compensation.
7A-102. Assistant and deputy clerks; appointment; number; salaries; duties.
7A-102.1. Transfer of sick leave earned as county or municipal employees by certain employees in offices of clerks of superior court.
7A-103. Authority of clerk of superior court.
7A-104. Disqualification; waiver; removal; when judge acts.
7A-105. Suspension, removal, and reinstatement of clerk.
7A-106. Custody of records and property of office.
7A-107. Bonds of clerks, assistant and deputy clerks, and employees of office.
7A-108. Accounting for fees and other receipts; annual audit.
7A-109. Record-keeping procedures.
7A-109.1. List of prisoners furnished to judges.
7A-109.2. (Contingent effective date — see notes) Records of dispositions in criminal cases.
7A-109.2. (Contingent effective date — see notes) Records of dispositions in criminal cases; impaired driving integrated data system.
7A-109.3. Delivery of commitment order.
7A-109.4. Records of offenses involving impaired driving.
7A-110. List of attorneys furnished to Secretary of Revenue.
7A-111. Receipt and disbursement of insurance and other moneys for minors and incapacitated adults.
7A-112. Investment of funds in clerk's hands.
7A-112.1. Deposit of money held by clerks.
7A-113. Bookkeeping and accounting systems equipment.
7A-114. Where practical, provision of secure area for domestic violence victims waiting for hearing.
7A-115 through 7A-129. [Reserved.]

SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

Article 13.

Creation and Organization of the District Court Division.

7A-130. Creation of district court division and district court districts; seats of court.

Sec.
7A-131. Establishment of district courts.
7A-132. Judges, district attorneys, full-time assistant district attorneys and magistrates for district court districts.
7A-133. Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties.
7A-134. [Repealed.]
7A-135. Transfer of pending cases when present inferior courts replaced by district courts.
7A-136 through 7A-139. [Reserved.]

Article 14.

District Judges.

7A-140. Number; election; term; qualification; oath.
7A-141. Designation of chief judge; assignment of judge to another district for temporary or specialized duty.
7A-142. Vacancies in office.
7A-143. [Repealed.]
7A-144. Compensation.
7A-145. [Repealed.]
7A-146. Administrative authority and duties of chief district judge.
7A-147. Specialized judgeships.
7A-148. Annual conference of chief district judges.
7A-149. Jurisdiction; sessions.
7A-150 through 7A-159. [Reserved.]

Article 15.

District Prosecutors.

7A-160 through 7A-165. [Repealed.]
7A-166 through 7A-169. [Reserved.]

Article 16.

Magistrates.

7A-170. Nature of office and oath.
7A-171. Numbers; appointment and terms; vacancies.
7A-171.1. Duty hours, salary, and travel expenses within county.
7A-171.2. Qualifications for nomination or renomination.
7A-172. [Repealed.]
7A-173. Suspension; removal; reinstatement.
7A-174. Bonds.
7A-175. Records to be kept.
7A-176. Office of justice of the peace abolished.
7A-177. Training course in duties of magistrate.
7A-178. Magistrate as child support hearing officer.
7A-179. [Reserved.]

Article 17.

Clerical Functions in the District Court.

Sec.
7A-180. Functions of clerk of superior court in district court matters.
7A-181. Functions of assistant and deputy clerks of superior court in district court matters.
7A-182. Clerical functions at additional seats of court.
7A-183. Clerk or assistant clerk as child support hearing officer.
7A-184 through 7A-189. [Reserved.]

Article 18.

District Court Practice and Procedure Generally.

7A-190. District courts always open.
7A-191. Trials; hearings and orders in chambers.
7A-191.1. Recording of proceeding in which defendant pleads guilty or no contest to felony in district court.
7A-192. By whom power of district court to enter interlocutory orders exercised.
7A-193. Civil procedure generally.
7A-194, 7A-195. [Repealed.]
7A-196. Jury trials.
7A-197. Petit jurors.
7A-198. Reporting of civil trials.
7A-199. Special venue rule when district court sits without jury in seat of court lying in more than one county; where judgments recorded.
7A-200. District and set of districts defined; chief district court judges and their authority.
7A-201 through 7A-209. [Reserved.]

Article 19.

Small Claim Actions in District Court.

7A-210. Small claim action defined.
7A-211. Small claim actions assignable to magistrates.
7A-211.1. Actions to enforce motor vehicle mechanic and storage liens.
7A-212. Judgment of magistrate in civil action improperly assigned or not assigned.
7A-213. Procedure for commencement of action; request for and notice of assignment.
7A-214. Time within which trial is set.
7A-215. Procedure upon nonassignment of small claim action.
7A-216. Form of complaint.
7A-217. Methods of subjecting person of defendant to jurisdiction.
7A-218. Answer of defendant.

Sec.
7A-219. Certain counterclaims; cross claims; third-party claims not permissible.
7A-220. No required pleadings other than complaint.
7A-221. Objections to venue and jurisdiction over person.
7A-222. General trial practice and procedure.
7A-223. Practice and procedure in small claim actions for summary ejectment.
7A-224. Rendition and entry of judgment.
7A-225. Lien and execution of judgment.
7A-226. Priority of judgment when appeal taken.
7A-227. Stay of execution on appeal.
7A-228. New trial before magistrate; appeal for trial de novo; how appeal perfected; oral notice; dismissal.
7A-229. Trial de novo on appeal.
7A-230. Jury trial on appeal.
7A-231. Provisional and incidental remedies.
7A-232. Forms.
7A-233 through 7A-239. [Reserved.]

SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE.

Article 20.

Original Civil Jurisdiction of the Trial Divisions.

7A-240. Original civil jurisdiction generally.
7A-241. Original jurisdiction in probate and administration of decedents' estates.
7A-242. Concurrently held original jurisdiction allocated between trial divisions.
7A-243. Proper division for trial of civil actions generally determined by amount in controversy.
7A-244. Domestic relations.
7A-245. Injunctive and declaratory relief to enforce or invalidate statutes; constitutional rights.
7A-246. Special proceedings; exceptions; guardianship and trust administration.
7A-247. Quo warranto.
7A-248. Condemnation actions and proceedings.
7A-249. Corporate receiverships.
7A-250. Review of decisions of administrative agencies.
7A-251. Appeal from clerk to judge.
7A-252. [Repealed.]
7A-253. Infractions.
7A-254. [Reserved.]

Article 21.

Institution, Docketing, and Transferring Civil Causes in the Trial Divisions.

Sec.
7A-255. Clerk of superior court processes all actions and proceedings.
7A-256. Causes docketed and retained in originally designated trial division until transferred.
7A-257. Waiver of proper division.
7A-258. Motion to transfer.
7A-259. Transfer on judge's own motion.
7A-260. Review of transfer matters.
7A-261. [Repealed.]
7A-262 through 7A-269. [Reserved.]

Article 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

7A-270. Generally.
7A-271. Jurisdiction of superior court.
7A-272. Jurisdiction of district court; concurrent jurisdiction in guilty or no contest pleas for certain felony offenses; appellate and appropriate relief procedures applicable.
7A-273. Powers of magistrates in infractions or criminal actions.
7A-274. Power of mayors, law-enforcement officers, etc., to issue warrants and set bail restricted.
7A-275. [Repealed.]
7A-276. [Reserved.]

Article 22A.

Prohibited Orders.

7A-276.1. Court orders prohibiting publication or broadcast of reports of open court proceedings or reports of public records banned.

Article 23.

Jurisdiction and Procedure Applicable to Children.

7A-277 through 7A-289. [Repealed.]

Article 24.

Juvenile Services.

7A-289.1 through 7A-289.7. [Repealed.]
7A-289.8 through 7A-289.12. [Reserved.]

Article 24A.

Delinquency Prevention and Youth Services.

7A-289.13 through 7A-289.16. [Repealed.]
7A-289.17 through 7A-289.21. [Reserved.]

Article 24B.

Termination of Parental Rights.

Sec.
7A-289.22, 7A-289.23. [Repealed.]
7A-289.23A. [Recodified.]
7A-289.24 through 7A-289.35. [Repealed.]

Article 25.

Jurisdiction and Procedure in Criminal Appeals from District Courts.

7A-290. Appeals from district court in criminal cases; notice; appeal bond.

Article 26.

Additional Powers of District Court Judges and Magistrates.

7A-291. Additional powers of district court judges.
7A-292. Additional powers of magistrates.
7A-293. Special authority of a magistrate assigned to a municipality located in more than one county of a district court district.
7A-294 through 7A-299. [Reserved.]

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

Article 27.

Expenses of the Judicial Department.

7A-300. Expenses paid from State funds.
7A-301. Disbursement of expenses.
7A-302. (Effective until July 1, 2008) Counties and municipalities responsible for physical facilities.
7A-302. (Effective July 1, 2008) Counties and municipalities responsible for physical facilities.
7A-303. Equipment and supplies in clerk's office.

Article 28.

Uniform Costs and Fees in the Trial Divisions.

7A-304. Costs in criminal actions.
7A-305. Costs in civil actions.
7A-305.1. Discovery, fee on filing verified petition.
7A-306. Costs in special proceedings.
7A-307. Costs in administration of estates.
7A-308. Miscellaneous fees and commissions.
7A-308.1. Fees on deposits and investments.
7A-309. Magistrate's special fees.
7A-310. Fees of commissioners and assessors appointed by magistrate.
7A-311. Uniform civil process fees.

Sec.
7A-312. Uniform fees for jurors; meals.
7A-313. Uniform jail fees.
7A-314. Uniform fees for witnesses; experts; limit on number.
7A-314.1. Family court fees.
7A-315. Liability of State for witness fees in criminal cases when defendant not liable.
7A-316. Payment of witness fees in criminal actions.
7A-317. (Effective until July 1, 2008) Counties and municipalities not required to advance certain fees.
7A-317. (Effective July 1, 2008) Counties and municipalities not required to advance certain fees.
7A-317.1. Disposition of fees in counties with unincorporated seats of court.
7A-318. Determination and disbursement of costs on and after date district court established.
7A-319. [Repealed.]
7A-320. Costs are exclusive.
7A-321. Collection of offender fines and fees assessed by the court.
7A-322 through 7A-339. [Reserved.]

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

Article 29.

Administrative Office of the Courts.

7A-340. Administrative Office of the Courts; establishment; officers.
7A-341. Appointment and compensation of Director.
7A-342. Appointment and compensation of assistant director and other employees.
7A-343. Duties of Director.
7A-343.1. Distribution of copies of the appellate division reports.
7A-343.2. Court Information Technology Fund.
7A-343.3. Appellate Courts Printing and Computer Operations Fund.
7A-344. [Repealed.]
7A-345. Duties of assistant director.
7A-346. Information to be furnished to Administrative Officer.
7A-346.1. [Repealed.]
7A-346.2. Various reports to General Assembly.
7A-346.3. (Contingent effective date — see editor's note) Impaired driving integrated data system report.
7A-347. Assistants for administrative and victim and witness services.
7A-348. Training and supervision of assistants for administrative and victim and witness services.
7A-349. Criminal history record check; denial

Sec.

of employment, contract, or volunteer opportunity.
7A-350 through 7A-354. [Reserved.]

Article 29A.

Trial Court Administrators.

7A-355. Trial court administrators.
7A-356. Duties.
7A-357 through 7A-374. [Reserved.]

Article 30.

Judicial Standards Commission.

7A-374.1. Purpose.
7A-374.2. Definitions.
7A-375. Judicial Standards Commission.
7A-376. Grounds for discipline by Commission; censure, suspension, or removal by the Supreme Court.
7A-377. Procedures.
7A-378. Censure, suspension, or removal of justice of Supreme Court.
7A-379 through 7A-399. [Reserved.]

Article 31.

Judicial Council.

7A-400 through 7A-408. [Repealed.]

Article 31A.

State Judicial Council.

7A-409. Composition of State Judicial Council.
7A-409.1. Duties of the State Judicial Council.
7A-409.2. Compensation of the State Judicial Council.

Article 31B.

Declaration of Vacancy, Suspension of Salary.

7A-410. Vacancy exists on disbarment.
7A-410.1. Suspension of salary.

SUBCHAPTER VIII. CONFERENCE OF DISTRICT ATTORNEYS.

Article 32.

Conference of District Attorneys.

7A-411. Establishment and purpose.
7A-412. Annual meetings; organization; election of officers.
7A-413. Powers of Conference.
7A-414. Executive Secretary; clerical support.

Articles 33 to 35. [Reserved.]

7A-415 through 7A-449. [Reserved.]

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

Article 36.

Entitlement of Indigent Persons Generally.

7A-450. Indigency; definition; entitlement; determination; change of status.

Sec.

7A-450.1. Responsibility for payment by certain fiduciaries.
7A-450.2. Determination of fiduciaries at indigency determination; summons; service of process.
7A-450.3. Determination of responsibility at hearing.
7A-450.4. Exemptions.
7A-451. Scope of entitlement.
7A-451.1. Counsel fees for outpatient involuntary commitment proceedings.
7A-452. Source of counsel; fees; appellate records.
7A-453. Duty of custodian of a possibly indigent person; determination of indigency.
7A-454. Supporting services.
7A-455. Partial indigency; liens; acquittals.
7A-455.1. Appointment fee in criminal cases.
7A-456. False statements; penalty.
7A-457. Waiver of counsel; pleas of guilty.
7A-458. Counsel fees.
7A-459. [Repealed.]
7A-460 through 7A-464. [Reserved.]

Article 37.

The Public Defender.

7A-465 through 7A-471. [Repealed.]
7A-472 through 7A-474. [Reserved.]

Article 37A.

Access to Civil Justice Act.

7A-474.1. Legislative findings and purpose.
7A-474.2. Definitions.
7A-474.3. Eligible activities and limitations.
7A-474.4. Funds.
7A-474.5. Records and reports.
7A-474.6 through 7A-474.15. [Reserved.]

Article 37B.

Domestic Violence Victim Assistance Act.

7A-474.16. Legislative findings and purpose.
7A-474.17. Definitions.
7A-474.18. Eligible activities and limitations.
7A-474.19. Funds.
7A-474.20. Records and reports.

Article 38.

Appellate Defender Office.

7A-475 through 7A-485. [Expired.]

Article 38A.

Appellate Defender Office.

7A-486 through 7A-486.7. [Repealed.]
7A-487, 7A-488. [Reserved.]

Article 39.

Guardian Ad Litem Program.

Sec.
7A-489 through 7A-493. [Repealed.]

Article 39A.

Custody and Visitation Mediation Program.

7A-494. Custody and Visitation Mediation Program established.
7A-495. Implementation and administration.
7A-496, 7A-497. [Reserved.]

Article 39B.

Indigent Defense Services Act.

7A-498. Title.
7A-498.1. Purpose.
7A-498.2. Establishment of Office of Indigent Defense Services.
7A-498.3. Responsibilities of Office of Indigent Defense Services.
7A-498.4. Establishment of Commission on Indigent Defense Services.
7A-498.5. Responsibilities of Commission.
7A-498.6. Director of Indigent Defense Services.
7A-498.7. Public Defender Offices.
7A-498.8. Appellate Defender.
7A-499. [Reserved].

SUBCHAPTER X. NORTH CAROLINA COURTS COMMISSION.

Article 40.

North Carolina Courts Commission.

7A-500 through 7A-505. [Repealed.]

Article 40A.

North Carolina Courts Commission.

7A-506. Creation; members; terms; qualifications; vacancies.
7A-507. Ex officio members.
7A-508. Duties.
7A-509. Chair; meetings; compensation of members.
7A-510. Supporting services.
7A-511 through 7A-515. [Reserved.]

SUBCHAPTER XI. NORTH CAROLINA JUVENILE CODE.

Article 41.

Purpose; Definitions.

7A-516 through 7A-522. [Repealed.]

Article 42.

Jurisdiction.

Sec.
7A-523 through 7A-529. [Repealed.]

Article 43.

Screening of Delinquency and Undisciplined Petitions.

7A-530 through 7A-541. [Repealed.]

Article 44.

Screening of Abuse and Neglect Complaints.

7A-542 through 7A-557. [Repealed.]

Article 45.

Venue; Petition; Summons.

7A-558 through 7A-570. [Repealed.]

Article 46.

Temporary Custody; Secure and Nonsecure Custody; Custody Hearings.

7A-571 through 7A-577. [Repealed.]
7A-577.1. [Recodified.]
7A-578 through 7A-583. [Repealed.]

Article 47.

Basic Rights.

7A-584 through 7A-593. [Repealed.]

Article 48.

Law-Enforcement Procedures in Delinquency Proceedings.

7A-594 through 7A-607. [Repealed.]

Article 49.

Transfer to Superior Court.

7A-608 through 7A-617. [Repealed.]

Article 50.

Discovery.

7A-618 through 7A-626. [Repealed.]

Article 51.

Hearing Procedures.

7A-627 through 7A-645. [Repealed.]

Article 52.

Dispositions.

7A-646 through 7A-657. [Repealed.]
7A-657.1. [Recodified.]
7A-658 through 7A-663. [Repealed.]

Article 53.

Modification and Enforcement of Dispositional Orders; Appeals.

Sec.
7A-664 through 7A-674. [Repealed.]

Article 54.

Juvenile Records and Social Reports.

7A-675 through 7A-683. [Repealed.]

Article 55.

Interstate Compact on Juveniles.

7A-684 through 7A-716. [Repealed.]

Article 56.

Emancipation.

7A-717 through 7A-731. [Repealed.]

Article 57.

Judicial Consent for Emergency Surgical or Medical Treatment.

7A-732 through 7A-739. [Repealed.]

Article 58.

Juvenile Law Study Commission.

7A-740 through 7A-744. [Repealed.]

Article 59.

[Repealed.]

7A-745 through 7A-749. [Repealed.]

SUBCHAPTER XII. ADMINISTRATIVE HEARINGS.

Article 60.

Office of Administrative Hearings.

7A-750. Creation; status; purpose.
7A-751. Agency head; powers and duties; salaries of Chief Administrative Law Judge and other administrative law judges.
7A-752. Chief Administrative Law Judge; appointments; vacancy.
7A-753. Additional administrative law judges; appointment; specialization.
7A-754. Qualifications; standards of conduct; removal.
7A-755. Expenses reimbursed.
7A-756. Power to administer oaths and issue subpoenas.
7A-757. Temporary administrative law judges; appointments; powers and standards; fees.
7A-758. Availability of administrative law judge to exempt agencies.
Sec.
7A-759. Role as deferral agency.
7A-760. Number and status of employees; staff assignments; role of State Personnel Commission.
7A-761 through 7A-769. [Reserved.]

SUBCHAPTER XIII. SENTENCING SERVICES PROGRAM.

Article 61.

Sentencing Services Program.

7A-770. Purpose.
7A-771. Definitions.
7A-772. Allocation of funds.
7A-773. Responsibilities of a sentencing services program.
7A-773.1. Who may request plans; disposition of plans; contents of plans.
7A-774. Requirements for a comprehensive sentencing services program plan.
7A-775. Sentencing services board.
7A-776. Limitation on use of funds.
7A-777. Evaluation.
7A-778 through 7A-789. [Reserved.]

SUBCHAPTER XIV. DRUG TREATMENT COURTS.

Article 62.

North Carolina Drug Treatment Court Act.

7A-790. Short title.
7A-791. Purpose.
7A-792. Goals.
7A-793. Establishment of Program.
7A-794. Fund administration.
7A-795. State Drug Treatment Court Advisory Committee.
7A-796. Local drug treatment court management committee.
7A-797. Eligible population; drug treatment court procedures.
7A-798. [Repealed.]
7A-799. Treatment not guaranteed.
7A-800. Payment of costs of treatment program.
7A-801. Monitoring and annual report.
7A-802 through 7A-804. [Reserved.]

SUBCHAPTER XV. CONFERENCE OF CLERKS OF SUPERIOR COURT.

Article 63.

Conference of Clerks of Superior Court.

7A-805. Establishment and purpose.
7A-806. Annual meetings; organization; election of officers.
7A-807. Powers of Conference.
7A-808. Executive secretary; clerical support.

SUBCHAPTER I. GENERAL COURT OF JUSTICE.

Article 1.

Judicial Power and Organization.

§ 7A-1. Short title.

This Chapter shall be known and may be cited as the "Judicial Department Act of 1965." (1965, c. 310, s. 1.)

Editor's Note. — Session Laws 2007-323, s. 14.17(b), provides: "The Administrative Office of the Courts may conduct a pilot project in multiple counties to evaluate a system for the electronic filing, case processing, and case management of civil cases and special proceedings filed in the General Court of Justice. The Administrative Office of the Courts may designate the case types that will be subject to mandatory electronic filing, case processing, and case management during the pilot project. No county may be selected without the concurrence of the senior resident superior court judge, the chief district court judge, and the clerk of superior court. Notwithstanding the requirements of Chapters 1A and Chapter 7A of the General Statutes, the North Carolina Supreme Court and the Administrative Office of the Courts shall establish rules, costs, procedures, and specifications for electronic filing, case processing, and case management under the pilot. However, Rule 4 of the Rules of Civil Procedure shall govern service of process of pleadings that are currently required to be served pursuant to Rule 4 of the Rules of Civil Procedure. The terms of any contract entered into for the purpose of implementing the provisions of this subsection shall provide that the State retains the ownership of all electronic data received by the vendor as part of the pilot project."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

CASE NOTES

Method of Electing Superior Court Judges Held Constitutional. — The method of electing superior court judges does not infringe upon republicans' rights to free speech and association in violation of the First Amendment. Republican Party v. Martin, 980 F.2d 943 (4th Cir. 1992), rehearing denied, 991 F.2d 1202 (4th Cir.), cert. denied, 510 U.S. 828, 114 S. Ct. 93, 126 L. Ed. 2d 60 (1993).

Chapter 50 of the General Statutes was extensively rewritten during the 1967 session of the General Assembly and is not a part of the Judicial Department Act of 1965, although in some respects they must be construed with reference to each other. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Cited in Kinney v. Goley, 4 N.C. App. 325, 167 S.E.2d 97 (1969); State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132 (1988); Cail v. Cerwin, — N.C. App. —, 648 S.E.2d 510, 2007 N.C. App. LEXIS 1684 (2007).

§ 7A-2. Purpose of Chapter.

This Chapter is intended to implement Article IV of the Constitution of North Carolina and promote the just and prompt disposition of litigation by:

(1) Providing a new chapter in the General Statutes into which, at a time not later than January 1, 1971, when the General Court of Justice is fully operational in all counties of the State, all statutes concerning the organization, jurisdiction and administration of each division of the General Court of Justice may be placed;

(2) Amending certain laws with respect to the superior court division to conform them to the laws set forth in this Chapter, to the end that

each trial division may be a harmonious part of the General Court of Justice;

(3) Creating the district court division of the General Court of Justice, and the Administrative Office of the Courts;
(4) Establishing in accordance with a fixed schedule the various district courts of the district court division;
(5) Providing for the organization, jurisdiction and procedures necessary for the operation of the district court division;
(6) Providing for the financial support of the judicial department, and for uniform costs and fees in the trial divisions of the General Court of Justice;
(7) Providing for an orderly transition from the present system of courts to a uniform system completely operational in all counties of the State not later than January 1, 1971;
(8) Repealing certain laws inconsistent with the foregoing purposes; and
(9) Effectuating other purposes incidental and supplemental to the foregoing enumerated purposes. (1965, c. 310, s. 1.)

CASE NOTES

Cited in State v. Pennington, 327 N.C. 89, 393 S.E.2d 847 (1990).

§ 7A-3. Judicial power; transition provisions.

Except for the judicial power vested in the court for the trial of impeachments, and except for such judicial power as may from time to time be vested by the General Assembly in administrative agencies, the judicial power of the State is vested exclusively in the General Court of Justice. Provided, that all existing courts of the State inferior to the superior courts, including justice of the peace courts and mayor's courts, shall continue to exist and to exercise the judicial powers vested in them by law until specifically abolished by law, or until the establishment within the county of their situs of a district court, or until January 1, 1971, whichever event shall first occur. Judgments of inferior courts which cease to exist under the provisions of this section continue in force and effect as though the issuing court continued to exist, and the General Court of Justice is hereby vested with jurisdiction to enforce such judgments. (1965, c. 310, s. 1.)

§ 7A-4. Composition and organization.

The General Court of Justice constitutes a unified judicial system for purposes of jurisdiction, operation and administration, and consists of an appellate division, a superior court division, and a district court division. (1965, c. 310, s. 1.)

CASE NOTES

Cited in Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970); Smith v. Beaufort County Hosp. Ass'n, 141 N.C. App. 203, 540 S.E.2d 775, 2000 N.C. App. LEXIS 1391 (2000), cert denied, 353 N.C. 381, 547 S.E.2d 435 (2001), aff'd, 354 N.C. 212, 552 S.E.2d 139 (2001); United States v. Allen, 446 F.3d 522, 2006 U.S. App. LEXIS 11193 (4th Cir. 2006).

ARTICLE 1A.

§§ 7A-4.1 through 7A-4.19: Reserved for future codification purposes.

ARTICLE 1B.

Age Limits for Service as Justice or Judge.

§ 7A-4.20. Age limit for service as justice or judge: exception.

No justice or judge of the General Court of Justice may continue in office beyond the last day of the month in which he attains his seventy-second birthday, but justices and judges so retired may be recalled for periods of temporary service as provided in Subchapters II and III of this chapter. (1971, c. 508, s. 1; c. 1194; 1973, c. 248; 1977, c. 736, s. 5; 1981, c. 455, s. 1; 1991 (Reg. Sess., 1992), c. 873, s. 1.)

CASE NOTES

Resignation of District Judge Created Legal and Actual Vacancy. — Where a district court judge resigned upon the discovery of his legal infirmity, his resignation from office created an actual vacancy in that position. Hence, upon the resignation, there was no one legally entitled to hold office by virtue of an election, nor under G.S. 128-7 was there an incumbent with the legal right to continue in office until a successor was elected or appointed. The judge, therefore, created a legal as well as an actual vacancy in office under N.C. Const., Art. IV, § 19. People ex rel. Duncan v. Beach, 294 N.C. 713, 242 S.E.2d 796 (1978).

Cited in Martin v. State, 330 N.C. 412, 410 S.E.2d 474 (1991).

§ 7A-4.21. Validation of official actions of district court judges of twenty-fifth judicial district performed after mandatory retirement age.

No official action performed by any judge of the twenty-fifth judicial district of the district court division of the General Court of Justice shall be declared to be invalid by reason of the fact that the judge was beyond the mandatory retirement age set out in G.S. 7A-4.20 at the time of his performing any such act; provided this section shall only apply to those official actions performed prior to May 1, 1977. (1977, c. 389.)

SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 2.

Appellate Division Organization.

§ 7A-5. Organization.

The appellate division of the General Court of Justice consists of the Supreme Court and the Court of Appeals. (1965, c. 310, s. 1; 1967, c. 108, s. 1.)

Editor's Note. — As enacted in 1965, this article was designated "Article 1A. Appellate Division Organization and Terms," and consisted of former G.S. 7A-5, which read, "The appellate division of the General Court of Justice consists of the Supreme Court of North Carolina. (Chapter 7, subchapter I, articles 1-6, of the General Statutes, is applicable.)" The former section derived from c. 310, s. 1, Session Laws 1965.

CASE NOTES

Cited in State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968); Fetherbay v. Sharpe Motor Lines, 8 N.C. App. 58, 173 S.E.2d 589 (1970); Adams-Millis Corp. v. Town of Kernersville, 281 N.C. 147, 187 S.E.2d 704 (1972); In re Annexation Ordinance, 300 N.C. 337, 266 S.E.2d 661 (1980).

§ 7A-6. Appellate division reporters; reports.

(a) The Supreme Court shall appoint one or more reporters for the appellate division, to serve at its pleasure. It shall be the duty of the reporters to prepare for publication the opinions of the Supreme Court and the Court of Appeals. The salary of the reporters shall be fixed by the Administrative Officer of the Courts, subject to the approval of the Supreme Court.

(b) The Administrative Officer of the Courts shall contract for the printing of the reports of the Supreme Court and the Court of Appeals, and for the advance sheets of each court. He shall select a printer for the reports and prescribe such contract terms as will insure issuance of the reports as soon as practicable after a sufficient number of opinions are filed. He shall make such contract after consultation with the Department of Administration and comparison of prices for similar work in other states to such an extent as may be practicable. He shall also sell the reports and advance sheets of the appellate division, to the general public, at a price not less than cost nor more than cost plus ten percent (10%), to be fixed by him in his discretion. Proceeds of such sales shall be remitted to the State treasury.

(b1) In addition to and as an alternative to the provisions for the publication and sale of the appellate division reports of subsection (a) and subsection (b) of this section, the Supreme Court may designate a commercial law publisher's reports and advance sheets of the opinions of the Supreme Court and the Court of Appeals as the Official Reports of the Appellate Division, or the Administrative Officer of the Courts, with the approval of the Supreme Court, may contract with a commercial law publisher or publishers to act as printer and vendor of the reports and advance sheets of the Supreme Court and the Court of Appeals upon such terms as the Supreme Court deems advisable after consultation with the Department of Administration.

(c) The Administrative Officer of the Courts shall furnish, without charge, one copy of the advance sheets of the appellate division to each justice and judge of the General Court of Justice, to each superior court district attorney, to each superior court clerk, to each district court prosecutor, to each special counsel at regional psychiatric facilities, and, in such numbers as may be reasonably necessary, to the Supreme Court library. (1967, c. 108, s. 1; c. 691, s. 57; 1969, c. 1190, s. 1; 1971, c. 377, s. 2; 1975, c. 879, s. 46; 1977, c. 721, s. 1; 1987, c. 404.)

§ 7A-7. Law clerks; secretaries and stenographers.

(a) Each justice and judge of the appellate division is entitled to the services of not more than two research assistants, who must be graduates of an accredited law school. The salaries of research assistants shall be set by the Administrative Officer of the Courts, subject to the approval of the Supreme Court.

(b) The Administrative Officer of the Courts shall determine the number and salaries of all secretaries and stenographers in the appellate division. (1967, c. 108, s. 1; 1985, c. 698, s. 8(a).)

CASE NOTES

Cited in Thrift v. Food Lion, Inc., 111 N.C. App. 758, 433 S.E.2d 481 (1993).

§§ 7A-8, 7A-9: Reserved for future codification purposes.

ARTICLE 3.

The Supreme Court.

§ 7A-10. Organization; compensation of justices.

(a) The Supreme Court shall consist of a Chief Justice and six associate justices, elected by the qualified voters of the State for terms of eight years. Before entering upon the duties of his office, each justice shall take an oath of office. Four justices shall constitute a quorum for the transaction of the business of the court. Except as otherwise provided in this subsection, sessions of the court shall be held in the city of Raleigh, and scheduled by rule of court so as to discharge expeditiously the court's business. The court may by rule hold sessions not more than twice annually in the Old Chowan County Courthouse (1767) in the Town of Edenton, which is a State-owned court facility that is designated as a National Historic Landmark by the United States Department of the Interior.

(b) The Chief Justice and each of the associate justices shall receive the annual salary provided in Current Operations Appropriations Act. Each justice is entitled to reimbursement for travel and subsistence expenses at the rate allowed State employees generally.

(b1) In addition to the reimbursement for travel and subsistence expenses authorized by subsection (b) of this section, and notwithstanding G.S. 138-6, each justice whose permanent residence is at least 50 miles from the City of Raleigh shall also be reimbursed for the mileage the justice travels each week to the City of Raleigh from the justice's home for business of the court. The reimbursement authorized by this subsection shall be calculated for each justice by multiplying the actual round-trip mileage from that justice's home to the City of Raleigh by a rate-per-mile established by the Director of the Administrative Office of the Courts, but not to exceed the business standard mileage rate set by the Internal Revenue Service.

(c) In lieu of merit and other increment raises paid to regular State employees, the Chief Justice and each of the Associate Justices shall receive as longevity pay an annual amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, nineteen and two-tenths percent (19.2%) after 20 years of service, and twenty-four percent (24%) after 25 years of service. "Service" means service as a justice or judge of the General Court of Justice or as a member of the Utilities Commission. Service shall also mean service as a district attorney or as a clerk of superior court. (1967, c. 108, s. 1; 1983, c. 761, s. 242; 1983 (Reg. Sess., 1984), c. 1034, s. 165; c. 1109, ss. 11, 13.1; 1985, c. 698, s. 10(a); 1997-56, s. 1; 2007-323, ss. 14.21(a), 28.18A(a).)

Editor's Note. — Session Laws 2006-253, s. 29, provides: "The North Carolina General Assembly requests that the Chief Justice of the North Carolina Supreme Court encourage the judges of this State to obtain continuing legal education on the laws of this State relating to driving while impaired offenses and related issues, and to promulgate any rules necessary to ensure that the judiciary receives necessary training and education on these laws."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, ss. 14.21(a) and 28.18A(a), effective July 1, 2007, added subsection (b1) and in the first sentence of subsection (c), deleted "and" preceding "nineteen" and added "and twenty-four percent (24%) after 25 years of service" at the end.

CASE NOTES

Cited in Bradshaw v. Administrative Office of Courts, 83 N.C. App. 237, 349 S.E.2d 621 (1986); State v. Smith, 359 N.C. 199, 607 S.E.2d 607, 2005 N.C. LEXIS 28 (2005), cert. denied, — U.S. —, 126 S. Ct. 109, 163 L. Ed. 2d 121 (2005).

OPINIONS OF ATTORNEY GENERAL

Length of Service of Supreme Court Justice. — Upon taking office as an Associate Justice of the North Carolina Supreme Court, a justice was entitled to have his service as Director and Assistant Director of the Administrative Office of the Courts to be taken into account in calculating his service for longevity purposes, but his service as assistant district attorney could not be taken into account. See opinion of Attorney General to The Honorable Thomas W. Ross, Director, The Administrative Office of the Courts, 1999 N.C. AG LEXIS 28 (9/28/99).

§ 7A-10.1. Authority to prescribe standards of judicial conduct.

The Supreme Court is authorized, by rule, to prescribe standards of judicial conduct for the guidance of all justices and judges of the General Court of Justice. (1973, c. 89.)

Legal Periodicals. — For article, "The Discipline and Removal of Judges in North Carolina," see 4 Campbell L. Rev. 1 (1981).

CASE NOTES

Adoption of Rule Regarding Limitation of Proceedings Did Not Affect Action Already Pending. — Given the unique constitutional and statutory responsibilities of the Supreme Court of North Carolina to promulgate rules of appellate procedure, as well as rules and standards of conduct for the judiciary, the Supreme Court of North Carolina did not exceed its authority in adopting N.C. Code Jud. Conduct Limitation of Proceedings; however, where a judicial disciplinary action was already pending when N.C. Code Jud. Conduct Limitation of Proceedings came into effect, the action was not barred. In re Inquiry Concerning a Judge (Brown), 358 N.C. 711, 599 S.E.2d 502, 2004 N.C. LEXIS 910 (2004).

§ 7A-11. Clerk of the Supreme Court; salary; bond; fees; oath.

The clerk of the Supreme Court shall be appointed by the Supreme Court to serve at its pleasure. The annual salary of the clerk shall be fixed by the Administrative Officer of the Courts, subject to the approval of the Supreme Court. The clerk may appoint assistants in the number and at the salaries fixed by the Administrative Officer of the Courts. The clerk shall perform such duties as the Supreme Court may assign, and shall be bonded to the State, for faithful performance of duty, in the same manner as the clerk of the superior court, and in such amount as the Administrative Officer of the Courts shall determine. He shall adopt a seal of office, to be approved by the Supreme Court. A fee bill for services rendered by the clerk shall be fixed by rules of the Supreme Court, and all such fees shall be remitted to the State treasury. Charges to litigants for the reproduction of appellate records and briefs shall be fixed by rule of the Supreme Court and remitted to the Appellate Courts Printing and Computer Operations Fund established in G.S. 7A-343.3. The operations of the Clerk of the Supreme Court shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. Before entering upon the duties of his office, the clerk shall take the oath of office prescribed by law. (1967, c. 108, s. 1; 1969, c. 1190, s. 2; 1973, c. 750; 1983, c. 913, s. 3; 2002-126, s. 2.2(j).)

Cross References. — As to remission of moneys collected through charges to litigants for the reproduction of appellate records and briefs under G.S. 7A-11 and G.S. 7A-20(b) to the State Treasurer to be held in the Appellate Courts Printing and Computer Operations Fund, see G.S. 7A-343.3.

§ 7A-12. Supreme Court marshal.

The Supreme Court may appoint a marshal to serve at its pleasure, and to perform such duties as it may assign. The marshal shall have the criminal and civil powers of a sheriff, and any additional powers necessary to execute the orders of the appellate division in any county of the State. His salary shall be fixed by the Administrative Officer, subject to the approval of the Supreme Court. The marshal may appoint such assistants, and at such salaries, as may be authorized by the Administrative Officer of the Courts. The Supreme Court, in its discretion, may appoint the Supreme Court librarian, or some other suitable employee of the court, to serve in the additional capacity of marshal. (1967, c. 108, s. 1.)

§ 7A-13. Supreme Court library; functions; librarian; library committee; seal of office.

(a) The Supreme Court shall appoint a librarian of the Supreme Court library, to serve at the pleasure of the court. The annual salary of the librarian shall be fixed by the Administrative Officer of the Courts, subject to the approval of the Supreme Court. The librarian may appoint assistants in numbers and at salaries to be fixed by the Administrative Officer of the Courts.

(b) The primary function of the Supreme Court library is to serve the appellate division of the General Court of Justice, but it may render service to the trial divisions of the General Court of Justice, to State agencies, and to the general public, under such regulations as the librarian, subject to the approval of the library committee, may promulgate.

(c) The library shall be maintained in the city of Raleigh, except that if the Court of Appeals sits regularly in locations other than the city of Raleigh, branch libraries may be established at such locations for the use of the Court of Appeals.

(d) The librarian shall promulgate rules and regulations for the use of the library, subject to the approval of a library committee, to be composed of two justices of the Supreme Court appointed by the Chief Justice, and one judge of the Court of Appeals appointed by the Chief Judge.

(e) The librarian may adopt a seal of office.

(f) The librarian may operate a copying service by means of which he may furnish certified or uncertified copies of all or portions of any document, paper, book, or other writing in the library that legally may be copied. When a certificate is made under his hand and attested by his official seal, it shall be received as prima facie evidence of the correctness of the matter therein contained, and as such shall receive full faith and credit. The fees for copies shall be approved by the library committee, and the fees so collected shall be administered in the same manner as the charges to litigants for the reproduction of appellate records and briefs. (1967, c. 108, s. 1.)

Cross References. — For the North Carolina Supreme Court Library Rules, see the Annotated Rules of North Carolina.

§ 7A-14. Reprints of Supreme Court Reports.

The Supreme Court is authorized to have such of the Reports of the Supreme Court of the State of North Carolina as are not on hand for sale, republished and numbered consecutively, retaining the present numbers and names of the reporters and by means of star pages in the margin retaining the original numbering of the pages. The Supreme Court is authorized to have such Reports reprinted without any alteration from the original edition thereof, except as may be directed by the Supreme Court. The contract for such reprinting and republishing shall be made by the Administrative Office of the Courts in the manner prescribed in G.S. 7A-6. Such republication shall thus continue until the State shall have for sale all of such Reports; and hereafter when the editions of any number or volume of the Supreme Court Reports shall be exhausted, it shall be the duty of the Supreme Court to have the same reprinted under the provisions of this section and G.S. 7A-6. In reprinting the Reports that have already been annotated, the annotations and the additional indexes therein shall be retained. (Code, s. 3634; 1885, c. 309; 1889, c. 473, ss. 1-4, 6; Rev., s. 5361; 1907, c. 503; 1917, cc. 201, 292; C.S., s. 7671; 1923, c. 176; 1929, c. 39, s. 2; 1975, c. 328.)

Editor's Note. — This section was formerly G.S. 147-52. It was revised and transferred to its present position by Session Laws 1975, c. 328.

§ 7A-15: Reserved for future codification purposes.

ARTICLE 4.

Court of Appeals.

§ 7A-16. Creation and organization.

The Court of Appeals is created effective January 1, 1967. It shall consist initially of six judges, elected by the qualified voters of the State for terms of eight years. The Chief Justice of the Supreme Court shall designate one of the judges as Chief Judge, to serve in such capacity at the pleasure of the Chief Justice. Before entering upon the duties of his office, a judge of the Court of Appeals shall take the oath of office prescribed for a judge of the General Court of Justice.

The Governor on or after July 1, 1967, shall make temporary appointments to the six initial judgeships. The appointees shall serve until January 1, 1969. Their successors shall be elected at the general election for members of the

General Assembly in November, 1968, and shall take office on January 1, 1969, to serve for the remainder of the unexpired term which began on January 1, 1967.

Upon the appointment of at least five judges, and the designation of a Chief Judge, the court is authorized to convene, organize, and promulgate, subject to the approval of the Supreme Court, such supplementary rules as it deems necessary and appropriate for the discharge of the judicial business lawfully assigned to it.

Effective January 1, 1969, the number of judges is increased to nine, and the Governor, on or after March 1, 1969, shall make temporary appointments to the additional judgeships thus created. The appointees shall serve until January 1, 1971. Their successors shall be elected at the general election for members of the General Assembly in November, 1970, and shall take office on January 1, 1971, to serve for the remainder of the unexpired term which began on January 1, 1969.

Effective January 1, 1977, the number of judges is increased to 12; and the Governor, on or after July 1, 1977, shall make temporary appointments to the additional judgeships thus created. The appointees shall serve until January 1, 1979. Their successors shall be elected at the general election for members of the General Assembly in November, 1978, and shall take office on January 1, 1979, to serve the remainder of the unexpired term which began on January 1, 1977.

On or after December 15, 2000, the Governor shall appoint three additional judges to increase the number of judges to 15.

The Court of Appeals shall sit in panels of three judges each. The Chief Judge insofar as practicable shall assign the members to panels in such fashion that each member sits a substantially equal number of times with each other member. He shall preside over the panel of which he is a member, and shall designate the presiding judge of the other panel or panels.

Three judges shall constitute a quorum for the transaction of the business of the court, except as may be provided in G.S. 7A-32.

In the event the Chief Judge is unable, on account of absence or temporary incapacity, to perform the duties placed upon him as Chief Judge, the Chief Justice shall appoint an acting Chief Judge from the other judges of the Court, to temporarily discharge the duties of Chief Judge. (1967, c. 108, s. 1; 1969, c. 1190, s. 3; 1973, c. 301; 1977, c. 1047; 2000-67, s. 15.5(a); 2004-203, s. 16.)

Legal Periodicals. — For article, "The North Carolina Court of Appeals — An Outline of Appellate Procedure," see 46 N.C.L. Rev. 705 (1968).

For article, "Why the North Carolina Court of Appeals Should Have a Procedure for Sitting En Banc," see 75 N.C.L. Rev. 1981 (1997).

CASE NOTES

Amendment Held Unconstitutional. — Amendment to G.S. 7A-16 effected by Session Laws 2000-67, G.S. 15.5, which expanded the size of the state Court of Appeals from 12 judges to 15 and which allowed the newly appointed judges to serve until the year 2005 before being required to face a retention election, was unconstitutional to the extent that it conflicted with the provisions of N.C. Const., Art. IV, § 19, requiring a judge appointed to a judicial vacancy to stand for election at the next general election; remaining portions of the amendment by Session Laws 2000-67 were constitutional and could properly be severed from the unconstitutional clause. Pope v. Easley, 354 N.C. 544, 556 S.E.2d 265, 2001 N.C. LEXIS 1237 (2001).

In enacting the provisions in Session Laws 2000-67, G.S. 15.5, making the creation of the new judgeships effective upon gubernatorial appointment and allowing the appointees to serve for nearly four years before facing election, the General Assembly devised a statutory framework that does not comport with the limitation in N.C. Const. art. IV, § 19, requiring that judicial appointees hold their places only until the next election for members of the General Assembly; section 15.5.(a) operated to create a vacancy at the Court of Appeals, thereby requiring an election to fill the vacancy in the 2002 election cycle. Pope v. Easley, 354 N.C. 544, 556 S.E.2d 265, 2001 N.C. LEXIS 1237 (2001).

The addition of three new Court of Appeals judgeships by Session Laws 2000-67 was constitutionally permissible and severable from the unconstitutional provision of that act. Pope v. Easley, 354 N.C. 544, 556 S.E.2d 265, 2001 N.C. LEXIS 1237 (2001).

Cited in State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968); Adams-Millis Corp. v. Town of Kernersville, 281 N.C. 147, 187 S.E.2d 704 (1972); In re Annexation Ordinance, 300 N.C. 337, 266 S.E.2d 661 (1980); Bradshaw v. Administrative Office of Courts, 83 N.C. App. 237, 349 S.E.2d 621 (1986).

§ 7A-17: Repealed by Session Laws 1969, c. 1190, s. 57.

§ 7A-18. Compensation of judges.

(a) The Chief Judge and each associate judge of the Court of Appeals shall receive the annual salary provided in the Current Operations Appropriations Act. Each judge is entitled to reimbursement for travel and subsistence expenses at the rate allowed State employees generally.

(a1) In addition to the reimbursement for travel and subsistence expenses authorized by subsection (a) of this section, and notwithstanding G.S. 138-6, each judge whose permanent residence is at least 50 miles from the City of Raleigh shall also be reimbursed for the mileage the judge travels each week to the City of Raleigh from the judge's home for business of the court. The reimbursement authorized by this subsection shall be calculated for each judge by multiplying the actual round-trip mileage from that judge's home to the City of Raleigh by a rate-per-mile established by the Director of the Administrative Office of the Courts, but not to exceed the business standard mileage rate set by the Internal Revenue Service.

(b) In lieu of merit and other increment raises paid to regular State employees, a judge of the Court of Appeals shall receive as longevity pay an annual amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, nineteen and two-tenths percent (19.2%) after 20 years of service, and twenty-four percent (24%) after 25 years of service. "Service" means service as a justice or judge of the General Court of Justice or as a member of the Utilities Commission. Service shall also mean service as a district attorney or as a clerk of superior court. (1967, c. 108, s. 1; 1983, c. 761, s. 243; 1983 (Reg. Sess., 1984), c. 1034, s. 165; c. 1109, ss. 11, 13.1; 1985, c. 698, s. 10(a); 2007-323, ss. 14.21(b), 28.18A(b).)

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, ss. 14.21(b) and 28.18A(b), effective July 1, 2007, added subsection (a1); in the first sentence of subsection (b), deleted "and" preceding "nineteen" and added "and twenty-four percent (24%) after 25 years of service" at the end.

§ 7A-19. Seats and sessions of court.

(a) The Court of Appeals shall sit in Raleigh, and at such other locations within the State as the Supreme Court may designate.

(b) The Department of Administration shall provide adequate quarters for the Court of Appeals.

(c) The Chief Judge shall schedule sessions of the court as required to discharge expeditiously the court's business. (1967, c. 108, s. 1.)

§ 7A-20. Clerk; oath; bond; salary; assistants; fees.

(a) The Court of Appeals shall appoint a clerk to serve at its pleasure. Before entering upon his duties, the clerk shall take the oath of office prescribed for the clerk of the Supreme Court, conformed to the office of clerk of the Court of Appeals, and shall be bonded, in the same manner as the clerk of superior court, in an amount prescribed by the Administrative Officer of the Courts, payable to the State, for the faithful performance of his duties. The salary of the clerk shall be fixed by the Administrative Officer of the Courts, subject to the approval of the Court of Appeals. The number and salaries of his assistants, and their bonds, if required, shall be fixed by the Administrative Officer of the Courts. The clerk shall adopt a seal of office, to be approved by the Court of Appeals.

(b) Subject to approval of the Supreme Court, the Court of Appeals shall promulgate from time to time a fee bill for services rendered by the clerk, and such fees shall be remitted to the State Treasurer. Charges to litigants for the reproduction of appellate records and briefs shall be fixed by rule of the Supreme Court and remitted to the Appellate Courts Printing and Computer Operations Fund established in G.S. 7A-343.3. The operations of the Court of Appeals shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. (1967, c. 108, s. 1; 1983, c. 913, s. 4; 2002-126, s. 2.2(k).)

Cross References. — As to remission of moneys collected through charges to litigants for the reproduction of appellate records and briefs under G.S. 7A-11 and G.S. 7A-20(b) to the State Treasurer to be held in the Appellate Courts Printing and Computer Operations Fund, see G.S. 7A-343.3.

§ 7A-21. Marshal; powers; salary.

The Court of Appeals may appoint a marshal to serve at its pleasure and to perform such duties as it may assign. The marshal shall have the criminal and civil powers of a sheriff and any additional powers necessary to execute the orders of the appellate division in any county of the State. His salary shall be fixed by the Administrative Officer, subject to the approval of the Court of Appeals. (1981, c. 485.)

§§ 7A-22 through 7A-24: Reserved for future codification purposes.

Article 5.

Jurisdiction.

§ 7A-25. Original jurisdiction of the Supreme Court.

The Supreme Court has original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; the decisions shall be reported to the next session of the General Assembly for its action. The court shall by rule prescribe the procedures to be followed in the proper exercise of the jurisdiction conferred by this section. (1967, c. 108, s. 1.)

CASE NOTES

Section Unconstitutional. — Even if the General Assembly did not intend to repeal this section by ratification of the 1971 revision of N.C. Const., Art. IV, this section is unconstitutional. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

This section was rendered null and void when the electorate approved revised N.C. Const., Art. IV, which deleted the provision granting the Supreme Court original jurisdiction of claims against the State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Legislative Intent to Repeal. — It was the intent of the General Assembly that upon the ratification of the 1971 revision of N.C. Const., Art. IV, this section be repealed, since the jurisdiction which this section purports to give to the Supreme Court exceeded that granted to it in the 1971 revision of N.C. Const., Art. IV. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

No Execution to Enforce Judgment Available from Supreme Court. — In the event a plaintiff is successful in establishing a claim for breach of contract against the State, he cannot obtain execution from the Supreme Court to enforce the judgment. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

§ 7A-26. Appellate jurisdiction of the Supreme Court and the Court of Appeals.

The Supreme Court and the Court of Appeals respectively have jurisdiction to review upon appeal decisions of the several courts of the General Court of Justice and of administrative agencies, upon matters of law or legal inference, in accordance with the system of appeals provided in this Article. (1967, c. 108, s. 1.)

Legal Periodicals. — For article, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

For article, "Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion," see 64 N.C.L. Rev. 993 (1986).

CASE NOTES

Appeals in Civil Causes Distinguished from Appeals in Criminal Causes. — The constitutional and statutory structure of the General Court of Justice provides that, generally, appeals from the district court in civil causes go to the Court of Appeals, while appeals in criminal causes must first go to the superior court. State v. Killian, 25 N.C. App. 224, 212 S.E.2d 419 (1975).

Supreme Court Has Authority to Give Relief for Error of Law. — Supreme Court has authority to review the record on appeal and to give appropriate relief for an error of law committed by the trial court. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

But No Authority to Grant Relief from Criminal Trial Free from Error of Law. — Supreme Court has no authority to grant relief to a defendant convicted of a criminal offense in a trial free from an error of law for the reason that it disagrees with the jury concerning the credibility of a witness for the State. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

Supreme Court must accept as conclusive the verdict of the jury so far as the credibility of witnesses is concerned. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

Objections and Exceptions Necessary to Preserve Legal Questions on Appeal. — Jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference, which ordinarily must be presented by objections duly entered and exceptions duly taken to the rulings of the lower court. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

When Findings of Trial Court Are Conclusive on Appeal. — Where evidence properly in the record fully supports the findings of fact which the trial court made, and the record itself does not disclose that these findings were based on information obtained by the trial judge in a manner violative of plaintiff's rights, the trial court's findings are conclusive on appeal. Horton v. Horton, 12 N.C. App. 526, 183 S.E.2d 794, cert. denied, 279 N.C. 727, 184 S.E.2d 884 (1971).

It is not the function of the Court of

Appeals to make findings of fact. Horton v. Horton, 12 N.C. App. 526, 183 S.E.2d 794, cert. denied, 279 N.C. 727, 184 S.E.2d 884 (1971).

The Court of Appeals has no jurisdiction to entertain a motion for summary judgment made for the first time on appeal. Britt v. Allen, 12 N.C. App. 399, 183 S.E.2d 303 (1971).

Cited in State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968); State v. Morris, 41 N.C. App. 164, 254 S.E.2d 241 (1979).

§ 7A-27. Appeals of right from the courts of the trial divisions.

(a) Appeal lies of right directly to the Supreme Court in all cases in which the defendant is convicted of murder in the first degree and the judgment of the superior court includes a sentence of death.

(b) From any final judgment of a superior court, other than the one described in subsection (a) of this section, or one based on a plea of guilty or nolo contendere, including any final judgment entered upon review of a decision of an administrative agency, appeal lies of right to the Court of Appeals.

(c) From any final judgment of a district court in a civil action appeal lies of right directly to the Court of Appeals.

(d) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which

(1) Affects a substantial right, or
(2) In effect determines the action and prevents a judgment from which appeal might be taken, or
(3) Discontinues the action, or
(4) Grants or refuses a new trial, appeal lies of right directly to the Court of Appeals.

(e) From any other order or judgment of the superior court from which an appeal is authorized by statute, appeal lies of right directly to the Court of Appeals. (1967, c. 108, s. 1; 1971, c. 377, s. 3; 1973, c. 704; 1977, c. 711, s. 4; 1987, c. 679; 1995, c. 204, s. 1.)

Legal Periodicals. — For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For comment on capital sentencing statute, see 16 Wake Forest L. Rev. 765 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1062 (1981).

For survey of 1981 law on civil procedure, see 60 N.C.L. Rev. 1214 (1982).

For comment discussing interlocutory appeals in North Carolina in light of Stephenson v. Stephenson, 55 N.C. App. 250, 285 S.E.2d 281 (1981), see 18 Wake Forest L. Rev. 857 (1982).

For 1984 survey, "Double Jeopardy and Substantial Rights in North Carolina Appeals," see 63 N.C.L. Rev. 1061 (1985).

For article, "The Substantial Right Doctrine and Interlocutory Appeals," see 17 Campbell L. Rev. 71 (1995).

For article, "Functus Officio: Authority of the Trial Court after Notice of Appeal," see 81 N.C.L. Rev. 2331 (2003).

For recent development: "'Deference Does Not by Definition Preclude Relief': The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals," see 84 N.C. L. Rev. 1328 (2006).

CASE NOTES

I. General Consideration.
II. Sentence of Death or Life Imprisonment.
III. Final Judgments.
IV. Interlocutory Orders.
  A. Generally.
  B. Particular Orders.

I. GENERAL CONSIDERATION.

This section was not repealed or nullified by the enactment of Chapter 1A of the General Statutes prescribing the presently effective Rules of Civil Procedure. Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

There is no conflict between G.S. 15A-1444(e) and subsection (a) of this section. State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990).

An order is immediately appealable if the order affects a substantial right and the loss of that right will injure the party appealing if not corrected prior to final judgment. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 102 N.C. App. 659, 403 S.E.2d 593, aff'd, 332 N.C. 288, 420 S.E.2d 426 (1992).

Reliance upon a substantial rights analysis as the basis for appellate review appears contrary to the plain and unambiguous language of the statutes governing criminal appeals. State v. Shoff, 118 N.C. App. 724, 456 S.E.2d 875 (1995), appeal dismissed, 340 N.C. 572, 460 S.E.2d 328 (1995), aff'd, 342 N.C. 638, 466 S.E.2d 277 (1996).

The right to appeal is available through two channels. G.S. 1A-1, Rule 54(b) allows appeal if there has been a final judgment as to all of the claims and parties, or if the specific action of the trial court from which appeal is taken is final and the trial judge expressly determines that there is no just reason for delaying the appeal. The second channel to an appeal is by way of G.S. 1-277 or this section; an appeal will be permitted under these statutes if a substantial right would be affected by not allowing appeal before final judgment. Brown v. Brown, 77 N.C. App. 206, 334 S.E.2d 506, cert. denied, 315 N.C. 389, 338 S.E.2d 878 (1985).

Finality Requirement. — The statutes setting forth the appeals process do not include the same jurisdictional "finality" requirement as does the federal statute. Goldston v. AMC, 326 N.C. 723, 392 S.E.2d 735 (1990).

G.S. 1-277 and this section, considered together, provide that no appeal lies to an appellate court from an interlocutory judgment unless that ruling deprives the appellant of a substantial right which it would lose if the ruling were not reviewed before final judgment. State ex rel. Employment Sec. Comm'n v. IATSE Local 574, 114 N.C. App. 662, 442 S.E.2d 339 (1994).

There was no "substantial interest" exception present to permit appeal under G.S. 1-277 and this section of a court's order denying defendant's summary judgment. Cagle v. Teachy, 111 N.C. App. 244, 431 S.E.2d 801 (1993).

Appeals from other than final judgments are not absolutely barred by G.S. 1A-1, Rule 54(b) and subsection (c) of this section. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

For all practical purposes there is an unlimited right of appeal in North Carolina to the Appellate Division of the General Court of Justice from any final judgment of the superior court or the district court in civil and criminal cases. State v. Black, 7 N.C. App. 324, 172 S.E.2d 217 (1970).

The right to appeal must be exercised in accordance with the established rules of practice and procedure. State v. Black, 7 N.C. App. 324, 172 S.E.2d 217 (1970).

This statute should be strictly construed for the purpose of eliminating the unnecessary delay and expense of fragmented appeals and of presenting the whole case for determination in a single appeal from a final judgment. Buchanan v. Rose, 59 N.C. App. 351, 296 S.E.2d 508 (1982).

Particular Facts and Procedural Context Must Be Considered. — It is usually necessary to resolve the question of whether an appeal is premature in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered. Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982).

No Appeal from Voluntary Election to Serve Sentence. — Where the trial court activated defendant's sentence upon his voluntary election to serve the sentence in lieu of the remainder of his probation and not "as a result of a finding of a violation of probation," defendant had no right to appeal from his activated sentence. State v. Ikard, 117 N.C. App. 460, 450 S.E.2d 927 (1994).

Right to Counsel. — G.S. 7A-450 et seq. has generally been construed to limit the right to appointed counsel in criminal cases to direct appeals taken as of right. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

Duty to Dismiss Appeal. — It is the duty of an appellate court to dismiss an appeal if there is no right to appeal. Pasour v. Pierce, 46 N.C. App. 636, 265 S.E.2d 652 (1980).

Where an appealing party has no right to appeal, an appellate court should on its own motion dismiss the appeal even though the question of appealability has not been raised by the parties themselves. Metcalf v. Palmer, 46 N.C. App. 622, 265 S.E.2d 484 (1980).

Court would address plaintiffs' appeal, which was not certified pursuant to G.S. 1A-1, Rule 54(b), finding that plaintiffs have a substantial right to have the liability of all defendants determined in one proceeding. Camp v. Leonard, 133 N.C. App. 554, 515 S.E.2d 909 (1999).

Substantial evidence in the record supported an administrative law judge's find-

ings and its dismissal of a day care's petition for a contested case hearing where the day care filed nothing in nearly six months following the filing of the petition, despite receiving several orders from the administrative law judge to file and serve prehearing statements and other responses to motions. Lincoln v. N.C. HHS, 172 N.C. App. 567, 616 S.E.2d 622, 2005 N.C. App. LEXIS 1804 (2005).

Steps on Appeal. — While convictions that result in a judgment of death are automatically appealable to the Supreme Court of North Carolina, all other convictions are properly appealed to the Court of Appeals pursuant to G.S. 7A-27 and N.C. R. App. P. 4(d), and while neither party filed a motion to bypass the Court of Appeals as to defendant's non-capital conviction for burglary, when he appealed his conviction for murder and his death sentence, the Supreme Court of North Carolina, on its own initiative, and consistently with N.C. R. App. P. 2, considered defendant's assignments of error that concerned his burglary conviction under G.S. 14-51 because the issue also related to one of his arguments regarding an aggravating circumstance. State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

Applied in State v. Henry, 1 N.C. App. 409, 161 S.E.2d 622 (1968); State v. Lentz, 5 N.C. App. 177, 167 S.E.2d 887 (1969); Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969); State v. Moore, 276 N.C. 142, 171 S.E.2d 453 (1970); State v. Tomblin, 276 N.C. 273, 171 S.E.2d 901 (1970); State v. Henderson, 276 N.C. 430, 173 S.E.2d 291 (1970); State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972); State v. Cox, 281 N.C. 275, 188 S.E.2d 356 (1972); State v. Harris, 281 N.C. 542, 189 S.E.2d 249 (1972); State v. Lee, 282 N.C. 566, 193 S.E.2d 705 (1973); State v. Edwards, 282 N.C. 578, 193 S.E.2d 736 (1973); State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973); State v. Watkins, 283 N.C. 17, 194 S.E.2d 800 (1973); State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973); State v. Davis, 284 N.C. 701, 202 S.E.2d 770 (1974); Spartan Leasing, Inc. v. Brown, 285 N.C. 689, 208 S.E.2d 649 (1974); State v. Little, 286 N.C. 185, 209 S.E.2d 749 (1974); State v. Ward, 286 N.C. 304, 210 S.E.2d 407 (1974); National Home Life Assurance Co. v. Ingram, 21 N.C. App. 591, 205 S.E.2d 313 (1974); State v. Lowery, 286 N.C. 698, 213 S.E.2d 255 (1975); State v. Smathers, 287 N.C. 226, 214 S.E.2d 112 (1975); State v. Buchanan, 287 N.C. 408, 215 S.E.2d 80 (1975); State v. Brunson, 287 N.C. 436, 215 S.E.2d 94 (1975); State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975); State v. King, 287 N.C. 645, 215 S.E.2d 540 (1975); State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975); State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975); State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975); State v. Miller, 288 N.C. 582, 220 S.E.2d 326 (1975); State v. Williams, 288 N.C. 680, 220 S.E.2d 558 (1975); State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976); State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); State v. Thompson, 290 N.C. 431, 226 S.E.2d 487 (1976); State v. Davis, 290 N.C. 511, 227 S.E.2d 97 (1976); State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976); State v. Cawthorne, 290 N.C. 639, 227 S.E.2d 528 (1976); State v. Harris, 290 N.C. 718, 228 S.E.2d 424 (1976); State v. Hicks, 290 N.C. 767, 228 S.E.2d 252 (1976); State v. Davis, 291 N.C. 1, 229 S.E.2d 285 (1976); State v. Monk, 291 N.C. 37, 229 S.E.2d 163 (1976); State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976); State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976); State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976); State v. Cousin, 291 N.C. 413, 230 S.E.2d 518 (1976); State v. Miley, 291 N.C. 431, 230 S.E.2d 537 (1976); Bridges v. Bridges, 29 N.C. App. 209, 223 S.E.2d 845 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Britt, 291 N.C. 528, 231 S.E.2d 644 (1977); State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977); State v. Locklear, 291 N.C. 598, 231 S.E.2d 256 (1977); State v. Jones, 291 N.C. 681, 231 S.E.2d 252 (1977); State v. Tilley, 292 N.C. 132, 232 S.E.2d 433 (1977); State v. Warren, 292 N.C. 235, 232 S.E.2d 419 (1977); State v. Stanfield, 292 N.C. 357, 233 S.E.2d 574 (1977); State v. Herndon, 292 N.C. 424, 233 S.E.2d 557 (1977); State v. Womble, 292 N.C. 455, 233 S.E.2d 534 (1977); State v. Jones, 292 N.C. 513, 234 S.E.2d 555 (1977); State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977); State v. Willard, 292 N.C. 567, 234 S.E.2d 587 (1977); State v. Beeson, 292 N.C. 602, 234 S.E.2d 595 (1977); State v. Poole, 298 N.C. 254, 258 S.E.2d 339 (1979); State v. Reynolds, 298 N.C. 380, 259 S.E.2d 843 (1979); Whalehead Properties v. Coastland Corp., 299 N.C. 270, 261 S.E.2d 899 (1980); State ex rel. Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (1980); State v. Ward, 300 N.C. 150, 266 S.E.2d 581 (1980); State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980); McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980); State v. Cox, 303 N.C. 75, 277 S.E.2d 376 (1981); Green v. Duke Power Co., 305 N.C. 603, 290 S.E.2d 593 (1982); State v. Corn, 307 N.C. 79, 296 S.E.2d 261 (1982); State v. Clark, 307 N.C. 120, 296 S.E.2d 296 (1982); State v. Sparks, 307 N.C. 71, 296 S.E.2d 451 (1982); State v. Woodruff, 307 N.C. 264, 297 S.E.2d 382 (1982); State v. Burns, 307 N.C. 224, 297 S.E.2d 384 (1982); State v. Reynolds, 307 N.C. 184, 297 S.E.2d 532 (1982); State v. Chamberlain, 307 N.C. 130, 297 S.E.2d 540 (1982); State v. Woods, 307 N.C. 213, 297 S.E.2d 574 (1982); State v. Taylor, 308 N.C. 185, 301 S.E.2d 358 (1983); State v. Ricks, 308 N.C. 522, 302 S.E.2d 770 (1983); State v. Webb, 309 N.C. 549, 308 S.E.2d

252 (1983); State v. Bates, 309 N.C. 528, 308 S.E.2d 258 (1983); State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983); State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983); Coastal Chem. Corp. v. Guardian Indus., Inc., 63 N.C. App. 176, 303 S.E.2d 642 (1983); In re Watson, 70 N.C. App. 120, 318 S.E.2d 544 (1984); State v. Moore, 311 N.C. 442, 319 S.E.2d 150 (1984); State v. Boyd, 311 N.C. 408, 319 S.E.2d 189 (1984); State v. Withers, 311 N.C. 699, 319 S.E.2d 211 (1984); State v. Joines, 312 N.C. 490, 322 S.E.2d 758 (1984); Johnson v. Brown, 71 N.C. App. 660, 323 S.E.2d 389 (1984); Abner Corp. v. City Roofing & Sheetmetal Co., 73 N.C. App. 470, 326 S.E.2d 632 (1985); State v. Price, 313 N.C. 297, 327 S.E.2d 863 (1985); State v. Ashe, 314 N.C. 28, 331 S.E.2d 652 (1985); State v. Grier, 314 N.C. 59, 331 S.E.2d 669 (1985); State v. Williams, 314 N.C. 337, 333 S.E.2d 708 (1985); State v. Spangler, 314 N.C. 374, 333 S.E.2d 722 (1985); State v. McNeely, 314 N.C. 451, 333 S.E.2d 738 (1985); State v. Freeman, 314 N.C. 432, 333 S.E.2d 743 (1985); LaFalce v. Wolcott, 76 N.C. App. 565, 334 S.E.2d 236 (1985); Rivenbark v. Southmark Corp., 77 N.C. App. 225, 334 S.E.2d 451 (1985); State v. Rowe, 81 N.C. App. 469, 344 S.E.2d 574 (1986); State v. Nations, 319 N.C. 318, 354 S.E.2d 510 (1987); State v. Nations, 319 N.C. 329, 354 S.E.2d 516 (1987); State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898 (1987); State v. Brown, 320 N.C. 179, 358 S.E.2d 1 (1987); Kirkman v. Wilson, 86 N.C. App. 561, 358 S.E.2d 550 (1987); Automotive Restyling Concepts, Inc. v. Central Serv. Lincoln Mercury, Inc., 87 N.C. App. 173, 360 S.E.2d 141 (1987); Tay v. Flaherty, 90 N.C. App. 346, 368 S.E.2d 403 (1988); Wilson Heights Church of God v. Autry, 94 N.C. App. 111, 379 S.E.2d 691 (1988); Hooper v. C.M. Steel, Inc., 94 N.C. App. 567, 380 S.E.2d 593 (1989); Howard v. Parker, 95 N.C. App. 361, 382 S.E.2d 808 (1989); Vinson v. Wallace, 96 N.C. 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Spruill, 338 N.C. 612, 452 S.E.2d 279 (1994), cert. denied, 516 U.S. 834, 116 S. Ct. 111, 133 L. Ed. 2d 63 (1995); State v. Alford, 339 N.C. 562, 453 S.E.2d 512 (1995); State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (1995); State v. Taylor, 340 N.C. 52, 455 S.E.2d 859 (1995); State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995); State v. Shoff, 118 N.C. App. 724, 456 S.E.2d 875 (1995), appeal dismissed, 340 N.C. 572, 460 S.E.2d 328 (1995), aff'd, 342 N.C. 638, 466 S.E.2d 277 (1996); State v. Worthy, 341 N.C. 707, 462 S.E.2d 482 (1995); State v. Butler, 341 N.C. 686, 462 S.E.2d 485 (1995); State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995); State v. Pleasant, 342 N.C. 366, 464 S.E.2d 284 (1995); State v. Buckner, 342 N.C. 198, 464 S.E.2d 414 (1995); State v. Marr, 342 N.C. 607, 467 S.E.2d 236 (1996); State v. Straing, 342 N.C. 623, 466 S.E.2d 278 (1996); Willoughby v. Board of Trustees, 121 N.C. App. 444, 466 S.E.2d 285 (1996); State v. Jones, 342 N.C. 628, 467 S.E.2d 233 (1996); State v. Williams, 342 N.C. 869, 467 S.E.2d 392 (1996); State v. Brewton, 342 N.C. 875, 467 S.E.2d 395 (1996); State v. Ransome, 342 N.C. 847, 467 S.E.2d 404 (1996); State v. Murphy, 342 N.C. 813, 467 S.E.2d 428 (1996); State v. Chandler, 342 N.C. 742, 467 S.E.2d 636 (1996); State v. DeCastro, 342 N.C. 667, 467 S.E.2d 653 (1996); State v. Lyons, 343 N.C. 1, 468 S.E.2d 204 (1996); State v. White, 343 N.C. 378, 471 S.E.2d 593 (1996); State v. Kilpatrick, 343 N.C. 466, 471 S.E.2d 624 (1996); State v. Burrus, 344 N.C. 79, 472 S.E.2d 867 (1996); State v. Fullwood, 343 N.C. 725, 472 S.E.2d 883 (1996), cert. denied, 520 U.S. 1122, 117 S. Ct. 1260, 137 L. Ed. 2d 339 (1997); State v. Singletary, 344 N.C. 95, 472 S.E.2d 895 (1996); State v. Sharpe, 344 N.C. 190, 473 S.E.2d 3 (1996); State v. Bates, 343 N.C. 564, 473 S.E.2d 269 (1996), cert. denied, 519 U.S. 1131, 117 S. Ct. 992, 136 L. Ed. 2d 873 (1997); State v. Heatwole, 344 N.C. 1, 473 S.E.2d 310 (1996), cert. denied, 520 U.S. 1122, 117 S. Ct. 1259, 137 L. Ed. 2d 339 (1997); State v. Boyd, 343 N.C. 699, 473 S.E.2d 327 (1996), cert. denied, 519 U.S. 1096, 117 S. Ct. 778, 136 L. Ed. 2d 722 (1997); State v. Taylor, 344 N.C. 31, 473 S.E.2d 596 (1996); State v. Cunningham, 344 N.C. 341, 474 S.E.2d 772 (1996); State v. Armstrong, 345 N.C. 161, 478 S.E.2d 194 (1996); State v. Thomas, 344 N.C. 639, 477 S.E.2d 450 (1996), cert. denied, 522 U.S. 824, 118 S. Ct. 84, 139 L. Ed. 2d 41 (1997); State v. Stroud, 345 N.C. 106, 478 S.E.2d 476 (1996), cert. denied, 522 U.S. 826, 118 S. Ct. 86, 139 L. Ed. 2d 43 (1997); State v. Perkins, 345 N.C. 254, 481 S.E.2d 25 (1997), cert. denied, 522 U.S. 837, 118 S. Ct. 111, 139 L. Ed. 2d 64 (1997); State v. Prevatte, 346 N.C. 162, 484 S.E.2d 377 (1997); State v. Anderson, 346 N.C. 158, 484 S.E.2d 543 (1997); State v. Evans, 346 N.C. 221, 485 S.E.2d 271 (1997), cert. denied, 522 U.S. 1057, 118 S. Ct. 712, 139

L. Ed. 2d 653 (1998); State v. McNeill, 346 N.C. 233, 485 S.E.2d 284 (1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 704, 139 L. Ed. 2d 647 (1998); State v. Bunning, 346 N.C. 253, 485 S.E.2d 290 (1997); Bellsouth Telecommunications, Inc. v. North Carolina Dep't of Revenue, 126 N.C. App. 409, 485 S.E.2d 333 (1997); United Servs. Auto. Ass'n v. Simpson, 126 N.C. App. 393, 485 S.E.2d 337 (1997); State v. Prevatte, 346 N.C. 162, 484 S.E.2d 377 (1997); State v. Lewis, 346 N.C. 141, 484 S.E.2d 379 (1997); State v. Barnard, 346 N.C. 95, 484 S.E.2d 382 (1997); Barrett v. Hyldburg, 127 N.C. App. 95, 487 S.E.2d 803 (1997); Biggers v. John Hancock Mut. Life Ins. Co., 127 N.C. App. 199, 487 S.E.2d 829 (1997); State v. Pickens, 346 N.C. 628, 488 S.E.2d 162 (1997); State v. Allen, 346 N.C. 731, 488 S.E.2d 188 (1997); State v. Pierce, 346 N.C. 471, 488 S.E.2d 576 (1997); Town Ctr. Assocs. v. Y & C Corp., 127 N.C. App. 381, 489 S.E.2d 434 (1997); State v. Peterson, 347 N.C. 253, 491 S.E.2d 223 (1997); State v. Sidden, 347 N.C. 218, 491 S.E.2d 225 (1997), cert. denied, 523 U.S. 1097, 118 S. Ct. 1583, 140 L. Ed. 2d 797 (1998); State v. Warren, 347 N.C. 309, 492 S.E.2d 609 (1997), cert. denied, 523 U.S. 1109, 118 S. Ct. 1681, 140 L. Ed. 2d 818 (1998); Skipper v. French, 130 F.3d 603 (4th Cir. 1997); Rousselo v. Starling, 128 N.C. App. 439, 495 S.E.2d 725 (1998), appeal dismissed, 348 N.C. 74, 505 S.E.2d 876 (1998), review denied, 348 N.C. 74, 505 S.E.2d 876 (1998); Reunion Land Co. v. Village of Marvin, 129 N.C. App. 249, 497 S.E.2d 446 (1998); State v. Zuniga, 348 N.C. 214, 498 S.E.2d 611 (1998); DKH Corp. v. Rankin-Patterson Oil Co., 348 N.C. 583, 500 S.E.2d 666 (1998); State v. Hoffman, 349 N.C. 167, 505 S.E.2d 80 (1998), cert. denied, 526 U.S. 1053, 119 S. Ct. 1362, 143 L. Ed. 2d 522 (1999); State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998), cert. denied, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999); State v. Guevara, 349 N.C. 243, 506 S.E.2d 711 (1998), cert. denied, 526 U.S. 1133, 119 S. Ct. 1809, 143 L. Ed. 2d 1013 (1999); State v. LaPlanche, 349 N.C. 279, 507 S.E.2d 34 (1998); State v. Trull, 349 N.C. 428, 509 S.E.2d 178, 1998 N.C. App. LEXIS 852 (1998), cert. denied, 528 U.S. 835, 120 S. Ct. 95, 145 L. Ed. 2d 80 (1999); State v. Bowman, 349 N.C. 459, 509 S.E.2d 428 (1998), cert. denied, 527 U.S. 1040, 119 S. Ct. 2403, 144 L. Ed. 2d 802 (1999); State v. Murillo, 349 N.C. 573, 509 S.E.2d 752, 1998 N.C. App. LEXIS 851 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 103, 145 L. Ed. 2d 87 (1999); State v. Williams, 350 N.C. 1, 510 S.E.2d 626, 1999 N.C. LEXIS 5 (1999), cert. denied 528 U.S. 880, 120 S. Ct. 193, 145 L. Ed. 2d 162 (1999); Hart v. F.N. Thompson Constr. Co., 132 N.C. App. 229, 511 S.E.2d 27 (1999); State v. Fleming, 350 N.C. 109, 512 S.E.2d 720, 1999 N.C. App. LEXIS 240 (1999), cert. denied, 528 U.S. 941, 120 S. Ct. 351, 145 L. Ed. 2d 274 (1999); State v. Brown, 350 N.C. 193, 513 S.E.2d 57 (1999); State v. Anderson, 350 N.C. 152, 513 S.E.2d 296, 1999 N.C. App. LEXIS 239 (1999), cert. denied, 528 U.S. 973, 120 S. Ct. 417, 145 L. Ed. 2d 326 (1999); Wilson v. Watson, 136 N.C. App. 500, 524 S.E.2d 812, 2000 N.C. App. LEXIS 51 (2000); Lee v. Mutual Cmty. Sav. Bank, 136 N.C. App. 808, 525 S.E.2d 854, 2000 N.C. App. LEXIS 156 (2000); State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799, 2000 N.C. LEXIS 528 (2000), cert. denied, 531 U.S. 1117, 121 S. Ct. 868, 148 L. Ed. 2d 780 (2001); State v. Steen, 352 N.C. 227, 536 S.E.2d 1, 2000 N.C. LEXIS 530 (2000), cert denied, 531 U.S. 1167, 121 S. Ct. 1131, 148 L. Ed. 2d 997 (2001); RPR & Assocs. v. State, 139 N.C. App. 525, 534 S.E.2d 247, 2000 N.C. App. LEXIS 977 (2000), aff'd, 353 N.C. 543, 543 S.E.2d 480 (2001); State v. Thibodeaux, 352 N.C. 570, 532 S.E.2d 797, 2000 N.C. LEXIS 615 (2000), cert denied, 531 U.S. 1155, 121 S. Ct. 1106, 148 L. Ed. 2d 976 (2001); State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 149 L. Ed. 2d 305 (2001), cert. denied, 532 U.S. 931, 121 S. Ct. 1380, 149 L. Ed. 2d 305 (2001); State v. Cummings, 352 N.C. 600, 536 S.E.2d 36, 2000 N.C. LEXIS 753 (2000), cert denied, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001); Desmond v. City of Charlotte, 142 N.C. App. 590, 544 S.E.2d 269, 2001 N.C. App. LEXIS 176 (2001); Summey v. Barker, 142 N.C. App. 688, 544 S.E.2d 262, 2001 N.C. App. LEXIS 180 (2001); Thompson v. Town of Dallas, 142 N.C. App. 651, 543 S.E.2d 901, 2001 N.C. App. LEXIS 191 (2001); Rug Doctor, L.P. v. Prate, 143 N.C. App. 343, 545 S.E.2d 766, 2001 N.C. App. LEXIS 263 (2001); Triangle Bank v. Eatmon, 143 N.C. App. 521, 547 S.E.2d 92, 2001 N.C. App. LEXIS 306 (2001); Darroch v. Lea, 150 N.C. App. 156, 563 S.E.2d 219, 2002 N.C. App. LEXIS 390 (2002); Carter v. Lee, 283 F.3d 240, 2002 U.S. App. LEXIS 3739 (4th. Cir. 2002), cert. denied, 537 U.S. 897, 123 S. Ct. 196, 154 L. Ed. 2d 166 (2002), cert. denied, 356 N.C. 617, 574 S.E.2d 468 (2002); State v. Leeper, 356 N.C. 55, 565 S.E.2d 1, 2002 N.C. LEXIS 551 (2002); Fairfield Mt. Prop. Owners Ass'n v. Doolittle, 149 N.C. App. 486, 560 S.E.2d 604, 2002 N.C. App. LEXIS 189 (2002); State v. Al-Bayyinah, 356 N.C. 150, 567 S.E.2d 120, 2002 N.C. LEXIS 678 (2002); Van Engen v. Que Scientific, Inc., 151 N.C. App. 683, 567 S.E.2d 179, 2002 N.C. App. LEXIS 871 (2002); State v. Murray, 154 N.C. App. 631, 572 S.E.2d 845, 2002 N.C. App. LEXIS 1532 (2002), cert. denied, 357 N.C. 467, 586 S.E.2d 778 (2003); Daniels v. Lee, 316 F.3d 477, 2003 U.S. App. LEXIS 333 (4th Cir. 2003), cert. denied, 540 U.S. 851, 124 S. Ct. 137, 157 L. Ed. 2d 93 (2003); Hunter-McDonald, Inc. v. Edison Foard, Inc., 157 N.C. App. 560, 579 S.E.2d 490, 2003 N.C. App. LEXIS 733 (2003), cert. denied, 357

N.C. 459, 585 S.E.2d 759 (2003); State v. Harless, 160 N.C. App. 78, 584 S.E.2d 339, 2003 N.C. App. LEXIS 1669 (2003); State v. Nobles, 357 N.C. 433, 584 S.E.2d 765, 2003 N.C. LEXIS 830 (2003); State v. Carter, 357 N.C. 345, 584 S.E.2d 792, 2003 N.C. LEXIS 832 (2003), cert. denied, 541 U.S. 943, 124 S. Ct. 1670, 158 L. Ed. 2d 368 (2004); State v. Squires, 357 N.C. 529, 591 S.E.2d 837, 2003 N.C. LEXIS 1265 (2003), cert. denied, 541 U.S. 1088, 124 S. Ct. 2818, 159 L. Ed. 2d 252 (2004); State v. Valentine, 357 N.C. 512, 591 S.E.2d 846, 2003 N.C. LEXIS 1266 (2003); State v. Miller, 357 N.C. 583, 588 S.E.2d 857, 2003 N.C. LEXIS 1410 (2003), cert. denied, — U.S. —, 124 S. Ct. 2914, 159 L. Ed. 2d 819 (2004); State v. Smith, 357 N.C. 604, 588 S.E.2d 453, 2003 N.C. LEXIS 1415 (2003), cert. denied, — U.S. —, 124 S. Ct. 2915, 159 L. Ed. 2d 819 (2004); State v. Maske, 358 N.C. 40, 591 S.E.2d 521, 2004 N.C. LEXIS 18 (2004); State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004); State v. Thompson, 359 N.C. 77, 604 S.E.2d 850, 2004 N.C. LEXIS 1197 (2004); State v. Edgerson, 164 N.C. App. 712, 596 S.E.2d 351, 2004 N.C. App. LEXIS 1013 (2004); State v. Boggess, 358 N.C. 676, 600 S.E.2d 453, 2004 N.C. LEXIS 912 (2004); State v. Chapman, 359 N.C. 328, 611 S.E.2d 794, 2005 N.C. LEXIS 361 (2005); State v. Brown, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005); State v. Campbell, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005); State v. Hurst, 360 N.C. 181, 624 S.E.2d 309, 2006 N.C. LEXIS 7 (2006); State v. Forte, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006); Bobbitt v. N.C. State Univ., — N.C. App. —, 635 S.E.2d 463, 2006 N.C. App. LEXIS 2164 (2006); Bowling v. Margaret R. Pardee Mem'l Hosp., — N.C. App. —, 635 S.E.2d 624, 2006 N.C. App. LEXIS 2115 (2006); State v. Polke, 361 N.C. 65, 638 S.E.2d 189, 2006 N.C. LEXIS 1297 (2006); Harris v. DaimlerChrysler Corp., — N.C. App. —, 638 S.E.2d 260, 2006 N.C. App. LEXIS 2500 (2006); State v. Badgett, 361 N.C. 234, 644 S.E.2d 206, 2007 N.C. LEXIS 416 (2007); Strates Shows, Inc. v. Amusements of Am., Inc., — N.C. App. —, 646 S.E.2d 418, 2007 N.C. App. LEXIS 1479 (2007).

II. SENTENCE OF DEATH OR LIFE IMPRISONMENT.

***Editor's Note.** — The notes below were decided under subsection (a) of this section prior to the amendment in 1995, which deleted reference to life imprisonment from the subsection.*

The term "imprisonment for life" as it is used in this section means only a determinate life sentence and does not include an indeterminate sentence merely because the stated maximum is a life term. State v. Ferrell, 300 N.C. 157, 265 S.E.2d 210 (1980).

Death Sentence Affirmed. — Defendant's murder conviction and death sentence were affirmed as (1) there was no abuse of discretion in the trial court's decision to deny defendant's ex parte motion that a doctor be appointed as an expert on substance induced mood disorder; (2) the trial court did not err in denying defendant's motion in limine seeking to exclude his prior conviction for malicious wounding; (3) there was no error in the trial court's refusal to peremptorily instruct the jury on the defendant's requested mitigating circumstances; (4) the evidence fully supported the aggravating circumstances found by the jury; (5) there was no indication the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (6) the sentence of death was neither disproportionate nor excessive. Therefore, the defendant received a fair trial and capital sentencing proceeding, free from prejudicial error. State v. Brown, 357 N.C. 382, 584 S.E.2d 278, 2003 N.C. LEXIS 834 (2003), cert. denied, 540 U.S. 1194, 124 S. Ct. 1447, 158 L. Ed. 2d 106 (2004).

Evidence supported the jury's findings that defendant acted with cruelty when he killed his wife with a shotgun while his stepson was sitting next to her, and then shot his stepson with the same shotgun shortly thereafter, and the state supreme court affirmed the trial court's judgments finding defendant guilty of two counts of first-degree murder and imposing the death penalty for each conviction. State v. Jones, 358 N.C. 330, 595 S.E.2d 124, 2004 N.C. LEXIS 341 (2004).

Petitions to Review Judgments in Habeas Corpus Proceedings. — By analogy, subsection (a) of this section, G.S. 15-180.2 (now repealed) and N.C.R.A.P., Rule 21(b) are logically applicable to petitions for certiorari to review judgments in habeas corpus proceedings involving the restraint of prisoners under sentences of death or life imprisonment. State v. Niccum, 293 N.C. 276, 238 S.E.2d 141 (1977).

Appeal to Supreme Court Under G.S. 15A-979 When Charge Is Death or Life Imprisonment. — G.S. 15A-979 does not specify whether an appeal lies to the Court of Appeals or to the Supreme Court. Subsection (a) of this section, however, stipulates that there is an appeal of right to the Supreme Court from a superior court judgment imposing a sentence of death or life imprisonment. When these two statutes are considered together, it is proper to appeal directly to the Supreme Court if the punishment for the charge(s) is either death or life imprisonment. State v. Silhan, 295 N.C. 636, 247 S.E.2d 902 (1978).

III. FINAL JUDGMENTS.

"Final Judgment" Defined. — A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. Atkins v. Beasley, 53 N.C. App. 33, 279 S.E.2d 866 (1981).

A party may properly appeal only from a final order, which disposes of all the issues as to all parties, or an interlocutory order affecting a substantial right of the appellant. Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984).

Denial of Application for Certiorari Is Not Final Judgment. — A "judgment" of the superior court denying defendant's application to that court for a writ of certiorari to review the proceedings of the district court in a criminal case was not a final judgment within the meaning of subsection (b) of this section, and defendant was not authorized to appeal therefrom to the Court of Appeals as a matter of right; defendant's only remedy was by petition for certiorari to the Court of Appeals. State v. Flynt, 8 N.C. App. 323, 174 S.E.2d 120 (1970).

Appeal from Order of Superior Court Affirming Annexation Ordinance. — By this section initial appellate jurisdiction of an appeal from an order of the superior court affirming an annexation ordinance is given to the Court of Appeals, subject, however, to the provisions of G.S. 7A-31. Adams-Millis Corp. v. Town of Kernersville, 281 N.C. 147, 187 S.E.2d 704 (1972).

Appeal from Decision of Board of Medical Examiners. — Court of Appeals is proper court to determine appeals taken from decisions of superior court in proceedings for judicial review of decisions of the Board of Medical Examiners under G.S. 7A-27(b); Court of Appeals erred in dismissing appeal under G.S. 90-14.11, since generally accepted rule is that where there is irreconcilable conflict between two statutes, later statute controls as the last expression of legislative intent, and therefore, later enacted statute, G.S. 7A-27(b), controlled in case. In re Guess, 324 N.C. 105, 376 S.E.2d 8 (1989), cert. denied, 498 U.S. 1047, 111 S. Ct. 754, 112 L. Ed. 2d 774 (1991).

The fact that plaintiff waived her right to appeal order granting summary judgment to one of three defendants in no way affected her statutory right to appeal from the final judgment, since although she could have appealed the entry of summary judgment as to that defendant, she was not required to do so. Ingle v. Allen, 71 N.C. App. 20, 321 S.E.2d 588 (1984), cert. denied, 313 N.C. 508, 329 S.E.2d 391 (1985).

Order Was Final Judgment Despite Reserving Issue for Jury. — Where the trial court in its "order and partial summary judgment" reserved for the jury the "issue as to whether defendant has waived any objection to, or is estopped to deny, the tenant's renewal of the lease," the order left no further action for the trial court to dispose of the case. Although the order reserved an issue for the jury, the trial court determined that it was irrelevant whether notice was received; therefore, there was no requirement for a trial on the issues of waiver or estoppel, and the order was effectively a final judgment and affected a substantial right. Janus Theatres of Burlington, Inc. v. Aragon, 104 N.C. App. 534, 410 S.E.2d 218 (1991).

Judgment Was Final Where Plaintiff Voluntarily Dismissed Remaining Claims. — Case was not dismissed because the employee's appeal was from a final judgment and was not interlocutory; the employee voluntarily dismissed the remaining claims as part of a settlement agreement. Tarrant v. Freeway Foods of Greensboro, Inc., 163 N.C. App. 504, 593 S.E.2d 808, 2004 N.C. App. LEXIS 409 (2004), cert. denied, 358 N.C. 739, 603 S.E.2d 126 (2004).

IV. INTERLOCUTORY ORDERS.

A. Generally.

"Interlocutory Order" Defined. — An order is interlocutory if it does not determine the issues but directs some further proceeding preliminary to final decree. Waters v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978); Blackwelder v. State Dep't of Human Resources, 60 N.C. App. 331, 299 S.E.2d 777 (1983); Heavner v. Heavner, 73 N.C. App. 331, 326 S.E.2d 78, cert. denied, 313 N.C. 601, 330 S.E.2d 610 (1985).

Appeals of Right from Interlocutory Orders. — G.S. 62-90(a) and (d) provide for appeals of final orders of the North Carolina Utilities Commission, G.S. 7A-29(a) and (b) provide for appeals of right from certain administrative agencies, and subsection (d) of this section provides for appeals of right from certain interlocutory orders of the superior or district courts. State ex rel. Utils. Comm'n v. Buck Island, Inc., 158 N.C. App. 536, 581 S.E.2d 122, 2003 N.C. App. LEXIS 1186 (2003).

Where only the issue of damages remained, no final judgment had been made and no substantial right had been affected, the appellate court found the trial court's certification ineffective and saw no impediment to the trial court's sorting out the various claims and affirmative defenses intertwined with the damages issue. CBP Resources, Inc. v. Mountaire Farms of N.C., Inc., 134 N.C. App. 169, 517 S.E.2d 151 (1999).

When Interlocutory Order Is Appealable Generally. — Ordinarily, an appeal lies only from a final judgment, but an interlocutory order which will work injury if not corrected before final judgment is appealable. Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977); Atkins v. Beasley, 53 N.C.

App. 33, 279 S.E.2d 866 (1981); Perry v. Aycock, 68 N.C. App. 705, 315 S.E.2d 791 (1984); Jenkins v. Wheeler, 69 N.C. App. 140, 316 S.E.2d 354, cert. denied, 311 N.C. 758, 321 S.E.2d 136 (1984); Stafford v. Stafford, 133 N.C. App. 163, 515 S.E.2d 43 (1999), aff'd, 351 N.C. 94, 520 S.E.2d 785 (1999).

Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment. Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977); Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979); Sims v. Ritter Constr., Inc., 62 N.C. App. 52, 302 S.E.2d 293 (1983); Adair v. Adair, 62 N.C. App. 493, 303 S.E.2d 190, cert. denied, 309 N.C. 319, 307 S.E.2d 162 (1983).

This section in effect provides that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment. Waters v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978); Citicorp Person-to-Person Fin. Center, Inc. v. Stallings, 49 N.C. App. 187, 270 S.E.2d 567 (1980); A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983); Heavner v. Heavner, 73 N.C. App. 331, 326 S.E.2d 78, cert. denied, 313 N.C. 601, 330 S.E.2d 610 (1985); Thompson v. Newman, 74 N.C. App. 597, 328 S.E.2d 597 (1985).

An appeal does not lie from an interlocutory order unless such order affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979); Ball v. Ball, 55 N.C. App. 98, 284 S.E.2d 555 (1981); Fraser v. Di Santi, 75 N.C. App. 654, 331 S.E.2d 217, cert. denied, 315 N.C. 183, 337 S.E.2d 856 (1985); Jenkins v. Maintenance, Inc., 76 N.C. App. 110, 332 S.E.2d 90 (1985); Brown v. Brown, 77 N.C. App. 206, 334 S.E.2d 506, cert. denied, 315 N.C. 389, 338 S.E.2d 878 (1985).

For a defendant to have a right of appeal from a mandatory preliminary injunction, substantial rights of the appellant must be adversely affected. Otherwise, an appeal from such an interlocutory order is subject to being dismissed. Dixon v. Dixon, 62 N.C. App. 744, 303 S.E.2d 606 (1983).

No appeal lies to an appellate court from an interlocutory order unless the order deprives the appellant of a substantial right which he would lose absent a review prior to final determination. Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment. Robins & Weill, Inc. v. Mason, 70 N.C. App. 537, 320 S.E.2d 693, cert. denied, 312 N.C. 495, 322 S.E.2d 559 (1984).

For an interlocutory order to be immediately appealable under North Carolina law, it must: (1) affect a substantial right, and (2) work injury if not corrected before final judgment. Goldston v. AMC, 326 N.C. 723, 392 S.E.2d 735 (1990).

Trial court's dismissal of plaintiffs' claims against aircraft manufacturer affected a substantial right to have determined in a single proceeding, i.e., whether plaintiffs were damaged by the actions of one, some or all defendants where their claims arise upon the same series of transactions, and the appeal from an interlocutory order was considered. Driver v. Burlington Aviation, Inc., 110 N.C. App. 519, 430 S.E.2d 476 (1993).

An interlocutory order not appealable under Rule 54(b) of the Rules of Civil Procedure may nevertheless be appealed pursuant to G.S. 1-277 and subsection (d) of this section which permit an appeal of an interlocutory order which (1) affects a substantial right, or (2) in effect determines the action and prevents a judgment from which appeal might be taken, or (3) discontinues the action, or (4) grants or refuses a new trial. Dalton Moran Shook, Inc. v. Pitt Dev. Co., 113 N.C. App. 707, 440 S.E.2d 585 (1994).

An appeal of an interlocutory order or judgment is permitted if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. North Carolina DOT v. Page, 119 N.C. App. 730, 460 S.E.2d 332 (1995).

There are two avenues by which an interlocutory judgment or order can be immediately appealed. First, if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal, and second, an interlocutory order can be immediately appealed under G.S. 1-277(a) and subdivision (d)(1) of this section if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. Bartlett v. Jacobs, 124 N.C. App. 521, 477 S.E.2d 693 (1996).

There are two avenues by which a party may immediately appeal an interlocutory order of judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to G.S. 1A-1-54(b) an immediate appeal may lie. Second, an appeal is permitted under subdivision (d)(1) of this section and G.S. 1-277 (a) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. Tinch v. Video Indus. Servs., Inc., 124 N.C. App.

391, 477 S.E.2d 193 (1996), rev'd on other grounds, 347 N.C. 380, 493 S.E.2d 426 (1997).

An interlocutory order can be immediately appealed under G.S. 1A-1-54(b) if the order is final as to some but not all of the claims, or an interlocutory order can be appealed under G.S. 1-277(a) and this subsection if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. First Atl. Mgt. Corp. v. Dunlea Realty Co., 131 N.C. App. 242, 507 S.E.2d 56 (1998).

Trial court's order granting a partial new trial and its judgment fixing the issue of liability were interlocutory and they were not appealable under the exceptions allowed by G.S. 1A-1, Rule 54(b), G.S. 1-277(a), or G.S. 7A-27(d), where the trial court did not certify either the order granting a partial new trial or the underlying judgment for immediate review, and where defendant failed to argue why the order and judgment appealed affected a substantial right. Loy v. Martin, 144 N.C. App. 414, 547 S.E.2d 843, 2001 N.C. App. LEXIS 424 (2001).

Where an interlocutory appeal affected a substantial right of one of the parties, such an appeal could be brought pursuant to G.S. 1-277 and 7A-27(d), and whether or not an appeal affected a substantial right had to be decided on a case by case basis. Ussery v. Taylor, 156 N.C. App. 684, 577 S.E.2d 159, 2003 N.C. App. LEXIS 326 (2003).

Arbitration Order in Particular. — An order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed. Miller v. Two State Constr. Co., 118 N.C. App. 412, 455 S.E.2d 678 (1995).

Particular Facts and Procedural History Must Be Considered. — In determining which interlocutory orders are appealable and which are not, the Supreme Court must consider the particular facts of each case and the procedural history of the order from which an appeal is sought. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 332 N.C. 288, 420 S.E.2d 426 (1992).

Under this section, whether a substantial right will be prejudiced by delaying an appeal must be determined on a case by case basis. Stafford v. Stafford, 133 N.C. App. 163, 515 S.E.2d 43 (1999), aff'd, 351 N.C. 94, 520 S.E.2d 785 (1999).

In deciding whether an appeal is interlocutory, G.S. 1-277 and this section require a two-part test: (1) does the trial court's order affect a substantial right; and (2) if so, will the loss of that right injure the party appealing if it is not corrected prior to final judgment. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 102 N.C. App. 659, 403 S.E.2d 593, aff'd, 332 N.C. 288, 420 S.E.2d 426 (1992).

Separation of Property in Divorce Cases. — Because a partial summary judgment giving a wife two parcels of land, before the divorcing parties' property was equitably divided, was an interlocutory order, a husband was not required to file an appeal from the interlocutory order; no substantial right of either party was involved, and the partial summary judgment was appealable when the husband filed his appeal from the equitable distribution judgment. Davis v. Davis, 360 N.C. 518, 631 S.E.2d 114, 2006 N.C. LEXIS 593 (2006).

The Appellate Division Rules on Interlocutory Nature of Appeals. — The trial court's determination that there is no just reason to delay an appeal, while accorded great deference, cannot bind the appellate courts because ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court. First Atl. Mgt. Corp. v. Dunlea Realty Co., 131 N.C. App. 242, 507 S.E.2d 56 (1998).

No Appeal from Interlocutory Order in Criminal Proceeding Absent Statutory Provision. — In light of the legislature's enactment of G.S. 15A-1444(d) and the decision in State v. Henry, 318 N.C. 408, 348 S.E.2d 593 (1986), G.S. 1-277, the statutory basis for the holding in State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965) (per curiam) and dictum in State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972) is no longer relevant to the appeal of interlocutory orders in criminal proceedings; accordingly, the court of appeals declines to follow State v. Jones, 67 N.C. App. 413, 313 S.E.2d 264 (1984); State v. Montalbano, 73 N.C. App. 259, 326 S.E.2d 634, disc. rev. denied, 313 N.C. 608, 332 S.E.2d 182 (1985); and State v. Major, 84 N.C. App. 421, 352 S.E.2d 862 (1987) insofar as they might allow interlocutory appeals in criminal proceedings based on Childs, Bryant, or G.S. 1-277. State v. Joseph, 92 N.C. App. 303, 374 S.E.2d 132 (1988), cert. denied, 324 N.C. 115, 377 S.E.2d 241 (1989).

For discussion of apparent doctrinal inconsistency concerning the requirements for appealing interlocutory orders, which may produce irreconcilable results in cases which include counterclaims, see J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

Fragmentary Appeals from Interlocutory Orders Not Permitted. — The appeal from a preliminary injunction restraining defendant bank from disposing of shares of corporate stock it held as executor under the will of a stockholder who died owning 88% of the capital stock of a North Carolina corporation was unauthorized and was dismissed since it was fragmentary; piecemeal appeals from interlocutory orders are not usually permitted in this State and the preliminary injunction appealed from in this case was such an order, as its effect was temporary rather than permanent. Shuping v. NCNB Nat'l Bank, 93 N.C. App. 338, 377 S.E.2d 802 (1989).

Standing to Appeal. — In an action brought by payee against makers to enforce acceleration clause in note, where third-party defendant bank not only had an opportunity to participate, but in fact did fully participate in the determination of third-party plaintiff's liability and was bound by the judgment in favor of plaintiff entered against defendants as third-party plaintiffs, bank qualified as an aggrieved party within the meaning of G.S. 1-271 and the bank had standing to appeal entry of summary judgment in favor of payee. Barker v. Agee, 326 N.C. 470, 389 S.E.2d 803 (1990).

The General Assembly did not restrict the right of appeal provided by G.S. 1-277 and subsection (d) of this section by engrafting G.S. 1A-1, Rule 54(b) requirements upon them. Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

G.S. 1-277 and this section prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to be done with a case fully and finally before it is presented to the appellate division. Blackwelder v. State Dep't of Human Resources, 60 N.C. App. 331, 299 S.E.2d 777 (1983).

The reason for the rules embodied in G.S. 1-277(a) and subdivision (d)(1) of this section is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division. Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment. McKinney v. Royal Globe Ins. Co., 64 N.C. App. 370, 307 S.E.2d 390 (1983).

Appellate court refused to review the neighbors' interlocutory appeal of the trial court's grant of partial summary judgment, where the neighbors failed to comply with N.C. R. App. P. 28(b)(4) by failing to state in their brief the substantial right that would have been lost if the appeal was not heard, as was required under G.S. 1-277(a), 7A-27(d)(1). Munden v. Courser, 155 N.C. App. 217, 574 S.E.2d 110, 2002 N.C. App. LEXIS 1582 (2002).

If appellant's rights would be fully and adequately protected by an exception to an interlocutory order that could then be assigned as error on appeal after final judgment, there is no right to an immediate appeal. Horne v. Nobility Homes, Inc., 88 N.C. App. 476, 363 S.E.2d 642 (1988); Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988).

No Appeal from Interlocutory Order Where Substantial Right Not Affected. — An interlocutory order which does not affect a "substantial right" of one of the parties under G.S. 1-277 and subsection (d) of this section is not appealable, and the avoidance of a rehearing or trial is not considered to be such a "substantial right." Davis v. Mitchell, 46 N.C. App. 272, 265 S.E.2d 248 (1980).

No appeal lies from an interlocutory order unless it affects a substantial right and will result in injury if not reviewed before final judgment. Horne v. Nobility Homes, Inc., 88 N.C. App. 476, 363 S.E.2d 642 (1988); Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988). But see, State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132 (1988), cert. denied, 324 N.C. 115, 377 S.E.2d 241 (1989), annotated above.

Court of appeals held that where a trial court dismissed a company's contract claims, but stayed the tort claims: (1) this was an interlocutory order; (2) there was no certification; and (3) the company failed to show a substantial right at stake on appeal. Mitsubishi Elec. & Elecs. USA, Inc. v. Duke Power Co., 155 N.C. App. 555, 573 S.E.2d 742, 2002 N.C. App. LEXIS 1602 (2002).

But Interlocutory Order May Be Appealed If It Affects a Substantial Right. — Orders which are technically interlocutory may properly be appealed, regardless of lack of certification under G.S. 1A-1, Rule 54(b) if they affect a substantial right. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Although it is the general rule that no appeal lies from an interlocutory order, G.S. 1-277 and subsection (d) of this section permit an immediate appeal from an interlocutory order which affects a substantial right. Fox v. Wilson, 85 N.C. App. 292, 354 S.E.2d 737 (1987).

Interlocutory order affects a substantial right so that it is appealable under G.S. 1-277(a) and subdivision (d)(1) of this section if the right affected is substantial and the right will be lost, prejudiced, or less than adequately protected if order is not reviewed before final judgment. T'ai Co. v. Market Square Ltd. Partnership, 92 N.C. App. 234, 373 S.E.2d 885 (1988).

Appeal Is Permitted Where a Substantial Right Would Be Affected. — Where a trial court granted plaintiff summary judgment as to liability on a criminal conversation claim, and granted defendant summary judgment as to an alienation of affections claim, though no final judgment was entered as to the issue of damages for the criminal conversation claim, nor was certification granted under G.S. 1A-1, N.C. R. Civ. P. 54(b) as to the alienation of affections claim, the appeal affected a substantial right that would be lost absent immediate review, because the elements of damages were so closely related that they did not support separate awards for each tort. McCutchen v.

McCutchen, 170 N.C. App. 1, 612 S.E.2d 162, 2005 N.C. App. LEXIS 904 (2005).

Because a physician's assertions of statutory privilege related directly to the matters to be disclosed under a trial court's interlocutory discovery order, the challenged discovery order affected a substantial right and the physician's interlocutory appeal was properly before the appellate court under G.S. 1-277(a) and G.S. 7A-27(d)(1). Armstrong v. Barnes, 171 N.C. App. 287, 614 S.E.2d 371, 2005 N.C. App. LEXIS 1262 (2005), cert. denied, 360 N.C. 60, 621 S.E.2d 173 (2005).

North Carolina Court of Appeals accepted the appeal brought by third-party defendants, the North Carolina Division of Forest Resources and North Carolina Department of Environment and Natural Resources, in a wrongful death suit, asserting negligence on the third-party defendants with regard to a forest fire obscuring the vision of travelers on a highway, which led to a multiple vehicle accident, killing a passenger, because the trial court's denial of the third-party defendants' motions to dismiss raised the issues of sovereign immunity and the public duty doctrine, which affected a substantial right sufficient to warrant immediate appellate review. Myers v. McGrady, 170 N.C. App. 501, 613 S.E.2d 334, 2005 N.C. App. LEXIS 1087 (2005), , rev'd and remanded, review improvidently allowed, 350 N.C. 460, 628 S.E.2d 761 (2006).

A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment. In other words, the right to immediate appeal is reserved for those cases in which the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed. Blackwelder v. State Dep't of Human Resources, 60 N.C. App. 331, 299 S.E.2d 777 (1983).

The "substantial right" test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered. Blackwelder v. State Dep't of Human Resources, 60 N.C. App. 331, 299 S.E.2d 777 (1983).

No hard and fast rules exist for determining which appeals affect a substantial right. Rather, such decisions usually require consideration of the facts of the particular case. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Whether a substantial right is affected usually depends on the facts and circumstances of each case and the procedural context of the orders appealed from. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

There has evolved a two-part test of the appealability of interlocutory orders under the "substantial right" exception provided in G.S. 1-277(a) and subdivision (d)(1) of this section. First, the right itself must be "substantial," and second, the enforcement of the substantial right must be lost, prejudiced or less than adequately protected by exception to entry of the interlocutory order. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

The appealability of interlocutory orders pursuant to the "substantial right" exception is determined by a two-step test. The right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment. Miller v. Swann Plantation Dev. Co., 101 N.C. App. 394, 399 S.E.2d 137 (1991).

Awards Pendente Lite. — Awards pendente lite are interlocutory decrees which necessarily do not affect a substantial right from which lies an immediate appeal pursuant to this section. Browne v. Browne, 101 N.C. App. 617, 400 S.E.2d 736 (1991).

Facts and circumstances of each case and the procedural context of the orders appealed from are the determinative factors in deciding whether a "substantial right" is affected. Schneider v. Brunk, 72 N.C. App. 560, 324 S.E.2d 922 (1985).

Avoidance of a rehearing or trial is not a "substantial right" entitling a party to an immediate appeal. Blackwelder v. State Dep't of Human Resources, 60 N.C. App. 331, 299 S.E.2d 777 (1983).

Denial of a motion to dismiss is interlocutory because it simply allows an action to proceed and will not seriously impair any right of defendants that cannot be corrected upon appeal from final judgment, and the avoidance of a trial is not a "substantial right" that would make such an interlocutory order appealable under G.S. 1-277 or subsection (d) of this section. Howard v. Ocean Trail Convalescent Ctr., 68 N.C. App. 494, 315 S.E.2d 97 (1984).

Avoidance of a trial is not a substantial right entitling plaintiff to an immediate appeal. Horne v. Nobility Homes, Inc., 88 N.C. App. 476, 363 S.E.2d 642 (1988).

Court found that the only possible "injury" defendant would suffer if not permitted immediate appellate review was the necessity of proceeding to trial before the matter was reviewed by the appellate court, not the deprivation of a substantial right under this section. Anderson v. Atlantic Cas. Ins. Co., 134 N.C. App. 724, 518 S.E.2d 786 (1999).

The necessity of a second trial, standing alone, does not affect a substantial right. However, in certain cases the appellate courts have held that a plaintiff's right to have all his claims heard before the same jury affects a substantial right. Estrada v. Jaques, 70 N.C.

App. 627, 321 S.E.2d 240 (1984).

A party has a "substantial right" to avoid separate trials of the same legal issues. Whitehurst v. Corey, 88 N.C. App. 746, 364 S.E.2d 728 (1988).

Right to avoid possibility of two trials on same issues can be a substantial right. Davidson v. Knauff Ins. Agency, Inc., 93 N.C. App. 20, 376 S.E.2d 488, cert. denied, 324 N.C. 577, 381 S.E.2d 772 (1989).

In a suit for malicious prosecution, in which defendant counterclaimed requesting a constructive trust, a factual issue of whether plaintiff forged defendant's name on a check was central to both actions; denial of appeal from summary judgment against defendant could have resulted in two juries in separate trials reaching different resolutions of this same issue if subsequent trial on the merits and appeal were successful. Consequently, the order dismissing defendant's counterclaim affected a substantial right and appeal was granted. Lamb v. Lamb, 92 N.C. App. 680, 375 S.E.2d 685 (1989).

The right to avoid the possibility of two trials on the same issues can be a substantial right that permits an appeal of an interlocutory order when there are issues of fact common to the claim appealed and remaining claims. Allen v. Sea Gate Ass'n, 119 N.C. App. 761, 460 S.E.2d 197 (1995).

Under circumstances in which a patient's suit alleged multiple, overlapping acts of medical malpractice resulting in harm, it was best that one jury hear the case to avoid inconsistent verdicts; accordingly, a summary judgment in favor of a radiologist affected a substantial right and the appeal from the summary judgment was considered, despite the fact that the summary judgment was granted as to one but not all of the defendants and the trial court did not certify that there was "no just reason for delay." Burgess v. Campbell, — N.C. App. —, 642 S.E.2d 478, 2007 N.C. App. LEXIS 692 (2007).

But Avoiding Separate Trials of Different Issues Is Not a Substantial Right. — Simply having all claims determined in one proceeding is not a substantial right. A party has instead the substantial right to avoid two separate trials of the same "issues," but avoiding separate trials of different issues is not a substantial right. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

Appellate Court as Dispatcher of Appeals. — To the extent that judgments as to one or more but fewer than all parties are determined by the appellate courts of this State to affect a "substantial right" of one of the litigants under G.S. 1-277 and subsection (d) of this section, the procedure for trial court certification of such judgments as appealable established in G.S. 1A-1, Rule 54(b) is bypassed and the appellate court is substituted as the true dispatcher of appeals. Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980).

Rule Against Allowing Appeal from Interlocutory Orders Strictly Construed. — Strict construction of the rule against allowing appeal from an interlocutory order of the trial court serves the purpose of eliminating the unnecessary delay and expense of fragmented appeals and of presenting the whole case for determination in a single appeal from a final judgment. Funderburk v. Justice, 25 N.C. App. 655, 214 S.E.2d 310 (1975).

Effect of Procedures for Staying Execution of Judgment. — The existence of procedures under G.S. 1-269, 1-289 and 1A-1, Rule 62, for staying execution on judgment does not prevent the entry of the judgment from affecting a substantial right of the judgment debtor. Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

No Appeal as Matter of Right from Interlocutory Orders in Criminal Cases. — This section makes no provision for an appeal as a matter of right from interlocutory orders in criminal cases. State v. Lance, 1 N.C. App. 620, 162 S.E.2d 154 (1968); State v. Smith, 4 N.C. App. 491, 4 N.C. App. 591, 166 S.E.2d 870, 166 S.E.2d 870 (1969); State v. Bryant, 12 N.C. App. 530, 183 S.E.2d 824 (1971), rev'd on other grounds, 280 N.C. 407, 185 S.E.2d 854 (1972).

In a criminal case there is no provision in the statute for an appeal to the Court of Appeals as a matter of right from an interlocutory order entered therein. State v. Black, 7 N.C. App. 324, 172 S.E.2d 217 (1970); State v. Thompson, 56 N.C. App. 439, 289 S.E.2d 132 (1982).

Dismissal of Interlocutory Appeals. — The appellate division possesses sufficient authority to dispose of interlocutory appeals which do not affect a substantial right by dismissal. It has express authority to do so on motion of the parties if the appeal is frivolous or is taken solely for purposes of delay. Or it may exercise its general authority in response to motions filed under the general motions provision. Or the appellate division may dismiss upon its own motion as part of its general duty to apply the laws governing the right to appeal. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

In a workers' compensation proceeding, an appeal by an employer and its insurance carrier was dismissed as interlocutory where the North Carolina Industrial Commission specifically reserved the issue of the amount of the compensation award for the employee. Watts v. Hemlock Homes of the Highlands, Inc., 160 N.C. App. 81, 584 S.E.2d 97, 2003 N.C. App. LEXIS 1666 (2003).

Because the trial court did not rule on the merits of an employee's claim for unemployment benefits, but found that the Employment Security Commission's order did not address all of the relevant issues raised by the record, and the findings were incomplete and failed to set out the sequence of events regarding the timing and notification of the employee's discharge, the order was clearly interlocutory; hence, without evidence that the employee's substantial rights were affected, or that any criteria for an immediate appeal was required, the employee's appeal was dismissed. Reeves v. Yellow Transp., Inc., 170 N.C. App. 610, 613 S.E.2d 350, 2005 N.C. App. LEXIS 1076 (2005), review denied, — N.C. —, 619 S.E.2d 511 (2005).

Filing of Motion to Dismiss. — Ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court. Since this often requires consideration of the merits, motions to dismiss appeals on grounds of being interlocutory should properly be filed after the record on appeal is filed in the appellate court. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Possibility of Two Trials. — The right to avoid the possibility of two trials on the same issues can be a substantial right so as to warrant an immediate appeal under G.S. 1-277 and subsection (d) of this section. Dalton Moran Shook, Inc. v. Pitt Dev. Co., 113 N.C. App. 707, 440 S.E.2d 585 (1994).

Where dismissal of appeal as interlocutory could result in two different trials on the same issues, creating the possibility of inconsistent verdicts, a substantial right was prejudiced; therefore, defendant's motion for summary judgment which was granted by the trial court was immediately appealable by plaintiff. Hartman v. Walkertown Shopping Ctr., Inc., 113 N.C. App. 632, 439 S.E.2d 787, cert. denied, 336 N.C. 780, 447 S.E.2d 422 (1994).

Where denial of Rule 60(b) motion was in the nature of an interlocutory order because plaintiff's voluntary dismissal resulted in there being no action pending, and defendants would not suffer the loss of a substantial right absent an appeal, in the court's discretion pursuant to Rules 2 and 21 the appeal was treated as a writ of certiorari. Troy v. Tucker, 126 N.C. App. 213, 484 S.E.2d 98 (1997).

B. Particular Orders.

Order Impacting Sovereign Immunity. — Denial of a city's summary judgment motion in a wrongful death action, an interlocutory order, was immediately appealable pursuant to G.S. 7A-27(d)(1) because the appeal raised an issue of sovereign immunity. Williams v. Scotland County, 167 N.C. App. 105, 604 S.E.2d 334, 2004 N.C. App. LEXIS 2076 (2004), cert. denied, 359 N.C. 327, 611 S.E.2d 168 (2005).

Denial of an officer's and department's motion for summary judgment grounded on the defense of governmental immunity affected a substantial right and was immediately appealable; with respect to the balance of their arguments, however, the officer and the department showed no substantial right that would have been lost or irreparably prejudiced if the order was not reviewed before final judgment and those arguments were premature. Showalter v. N.C. Dep't of Crime Control & Pub. Safety, — N.C. App. —, 643 S.E.2d 649, 2007 N.C. App. LEXIS 836 (2007).

Although a trial court's denial of a county board of education's summary judgment motion was an interlocutory order that was generally not appealable at that point in the litigation, as the board was claiming sovereign immunity as a complete defense to an action by a student's mother after the student was denied placement at a school, the order was immediately appealable under G.S. 7A-27(d)(1). Craig v. New Hanover County Bd. of Educ., — N.C. App. —, 648 S.E.2d 923, 2007 N.C. App. LEXIS 1941 (2007).

Order granting a motion for a change of venue is interlocutory and not immediately appealable. Kennon v. Kennon, 72 N.C. App. 161, 323 S.E.2d 741 (1984).

Order Denying Motion for Change of Venue. — Defendant's purported appeal from an interlocutory order denying defendant's motion for a change of venue pursuant to G.S. 1-83(2) for the convenience of the witnesses and the ends of justice was dismissed as premature. Furches v. Moore, 48 N.C. App. 430, 269 S.E.2d 635 (1980).

In cases where a trial court's decision deprives an appellant of a substantial right which would be lost absent immediate review, an appellate court was allowed to review the appeal; motions for change of venue because the county designated was not proper affected a substantial right and were immediately appealable. Hawley v. Hobgood, 174 N.C. App. 606, 622 S.E.2d 117, 2005 N.C. App. LEXIS 2478 (2005).

Appeal of the denial of a subcontractor's motions to consolidate actions and to change venue was proper because the right to venue established by statute is a substantial right, the denial of which is immediately appealable; further, a substantial right was affected when the same factual issues would be present in both trials and the possibility of inconsistent verdicts on those issues existed. Barrier Geotechnical Contractors, Inc. v. Radford Quarries of Boone, Inc., — N.C. App. —, 646 S.E.2d 840, 2007 N.C. App. LEXIS 1599 (2007).

Order Regarding Interrogatories. — Trial court's order sustaining objections to, and granting a motion to strike, certain interrogatories, denying defendants' motion to compel answers to those interrogatories, and also denying defendants' motion to permit them to respond to plaintiff's request for admissions was interlocutory, and defendants' appeal was fragmentary and premature. First Union Nat'l Bank v. Olive, 42 N.C. App. 574, 257 S.E.2d 100 (1979).

In a wrongful death action, the defendant declined to answer certain interrogatories on the grounds of self-incrimination, but was ordered to do so by the court, and he appealed. Although this appeal was from an interlocutory order, it was nevertheless authorized, because if some of the interrogatories were incriminating and the defendant was compelled to answer them, his constitutional rights could have been lost beyond recall, and his appeal at the end of the trial would have been of no value. Shaw v. Williamson, 75 N.C. App. 604, 331 S.E.2d 203, cert. denied, 314 N.C. 669, 335 S.E.2d 496 (1985).

Refusal to grant permissive intervention is an interlocutory order. Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988).

Underinsured Motorist Carrier's Right to Appear as Unnamed Defendant. — An underinsured motorist carrier could appeal from an order denying its motion to appear unnamed in the liability phase of a trial against its insured, since the right of an underinsured motorist carrier to defend unnamed is substantial. Church v. Allstate Ins. Co., 143 N.C. App. 527, 547 S.E.2d 458, 2001 N.C. App. LEXIS 315 (2001).

Order Granting Motion to Amend. — An order of the trial court allowing a motion to amend a complaint is interlocutory and is not immediately appealable. Barber v. Woodmen of World Life Ins. Soc'y, 88 N.C. App. 666, 364 S.E.2d 715 (1988).

Class Action. — Because no substantial right was involved in a trial court's determination that the case met the prerequisites to utilizing a class action, the general rule disallowing interlocutory appeals of such orders applied. Frost v. Mazda Motor of Am., 353 N.C. 188, 540 S.E.2d 324, 2000 N.C. LEXIS 903 (2000).

Order Granting Intervention. — Although the rule is not absolute, ordinarily no appeal will lie from an order permitting intervention of parties unless the order adversely affects a substantial right which the appellant may lose if not granted an appeal before final judgment. The rule applies with equal vigor without regard to whether the trial court grants a motion to intervene as a matter of right pursuant to G.S. 1A-1, Rule 24(a) or as permissive intervention pursuant to G.S. 1A-1, Rule 24(b). Wood v. City of Fayetteville, 35 N.C. App. 738, 242 S.E.2d 640, cert. denied, 295 N.C. 264, 245 S.E.2d 781 (1978).

Order Denying Intervention. — An interlocutory order was immediately appealable, where substantial rights were affected by the trial court's denial of a motion by a physician and his employer to intervene in a declaratory judgment action brought by an infant patient's estate to determine which potential heirs would share in the proceeds, if any, of the underlying wrongful death action. Alford v. Davis, 131 N.C. App. 214, 505 S.E.2d 917 (1998).

Denial of Motion to Dismiss. — Ordinarily, there is no right of appeal from the refusal of a motion to dismiss. The refusal to dismiss the action generally will not seriously impair any right of defendant that cannot be corrected upon appeal from final judgment. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

An order denying defendant's motion to dismiss plaintiff's claim for punitive damages is not immediately appealable. Williams v. East Coast Sales, Inc., 50 N.C. App. 565, 274 S.E.2d 276 (1981).

Where defendant was ordered by the trial court through an interlocutory order to pay plaintiff's legal fees, and where defendant did not perfect his appeal from such judgment, defendant did not lose his right to attack the judgment, since the record indicated that the appeal was not taken because of an agreement between the parties' counsel to vacate the order in question. Stroupe v. Stroupe, 301 N.C. 656, 273 S.E.2d 434 (1981).

The order entered by the trial court denying the defendants' motion to dismiss and motion for summary judgment was not a final determination of the defendants' rights, even though the trial court stated that "there is no just reason to delay the appeal," and did not affect the defendants' substantial rights. The appeal of the order, therefore, could not lie as of right. Fraser v. Di Santi, 75 N.C. App. 654, 331 S.E.2d 217, cert. denied, 315 N.C. 183, 337 S.E.2d 856 (1985).

The trial court's denial of defendant's motion to dismiss clearly represented an interlocutory order, which was not properly before the Court of Appeals. Southern Uniform Rentals, Inc. v. Iowa Nat'l Mut. Ins. Co., 90 N.C. App. 738, 370 S.E.2d 76 (1988).

Where the trial court denied employer's motion to dismiss employee's breach of contract suit on the ground of a forum selection clause, finding that the clause was a product of unequal bargaining power, the motion to dismiss was immediately appealable. Cox v. Dine-A-Mate, Inc., 129 N.C. App. 773, 501 S.E.2d 353 (1998), cert. denied, 349 N.C. 355 (1998).

Same — Failure to State Claim. — The trial court's refusal to allow defendant's motion to dismiss for failure to state a claim upon which relief could be granted pursuant to G.S. 1A-1, Rule 12 (b)(6) did not put an end to the action or seriously impair any substantial right of defendant that could not be corrected upon appeal from final judgment. Godley Auction Co.

v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

Same — Failure to Join Necessary Party. — No substantial right of the defendant was impaired by the trial court's denial of the motion to dismiss for failure to join a necessary party pursuant to G.S. 1A-1, Rule 12(b)(7). The trial court did not rule that other parties were not necessary to be joined. It ruled that the action should not be dismissed for that purpose. Defendant still had adequate opportunity in the trial court for a determination on the question of joinder of parties. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

Same — Expiration of Statute of Limitations. — The denial of plaintiff's motion to dismiss the defendant railroad's counterclaim for being filed beyond the three-year statute of limitations did not affect a substantial right and therefore was not appealable. Thompson v. Norfolk S. Ry., 140 N.C. App. 115, 535 S.E.2d 397, 2000 N.C. App. LEXIS 1100 (2000).

Immunity as Basis for Summary Adjudication. — Denial of a motion to dismiss or for summary judgment is interlocutory and not immediately appealable. However, recent case law clearly establishes that if immunity is raised as a basis in the motion for summary adjudication, a substantial right is affected and the denial is immediately appealable. EEE-ZZZ Lay Drain Co. v. North Carolina Dep't of Human Resources, 108 N.C. App. 24, 422 S.E.2d 338 (1992), overruled on other grounds, Meyer v. Walls, 347 N.C. 97, 489 S.E.2d 880 (1997).

Denial of defendant's motion to dismiss on the basis of res judicata did not affect a substantial right entitling defendant to immediate appeal, where no possibility of inconsistent verdicts existed and no manifest injustice would result absent immediate appeal. Country Club of Johnston County, Inc. v. United States Fid. & Guar. Co., 135 N.C. App. 159, 519 S.E.2d 540 (1999).

Same — Collateral Estoppel. — The denial of a motion for summary judgment based on the defense of collateral estoppel may affect a substantial right. McCallum v. North Carolina Coop. Extension Serv., 142 N.C. App. 48, 542 S.E.2d 227, 2001 N.C. App. LEXIS 51 (2001), cert. denied, 353 N.C. 452, 548 S.E.2d 527 (2001).

Summary Judgment Based on Governmental Immunity. — Generally, denial of a motion for summary judgment is interlocutory and not immediately appealable; however, if the defense of governmental immunity is asserted as grounds for the summary judgment motion, the denial of the motion has been held to affect a substantial right, and the order is immediately appealable pursuant to G.S. 1-277(a) and subsection (d). Hallman v. Charlotte-Mecklenburg Bd. of Educ., 124 N.C. App. 435, 477 S.E.2d 179 (1996).

Order denying a motion to amend a complaint is interlocutory, for it does not determine the entire controversy and requires further action by the trial court. Mauney v. Morris, 73 N.C. App. 589, 327 S.E.2d 248, rev'd on other grounds, 316 N.C. 67, 340 S.E.2d 397 (1986).

Order Granting Motion to Amend and Denying Motion for Judgment on the Pleadings. — An order granting a motion to amend and denying a motion for judgment on the pleadings is obviously not a final judgment but is interlocutory. Consequently, no appeal lies of right. Funderburk v. Justice, 25 N.C. App. 655, 214 S.E.2d 310 (1975).

Order Regarding Counterclaims. — The trial court's order for partial summary judgment in favor of the plaintiff employee suing for payment of a commission as to the defendant employer's four counterclaims—wrongful attachment, negligence, breach of contract, and breach of fiduciary duty—was interlocutory; no overlapping factual issues existed between the plaintiff's complaint and the defendant's counterclaims, and the order appealed from did not deprive the defendant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits. Murphy v. Coastal Physician Group, 139 N.C. App. 290, 533 S.E.2d 817, 2000 N.C. App. LEXIS 893 (2000).

Order Dismissing Counterclaims Except as Set-Offs. — In an action arising out of a contract between the parties whereby defendants agreed to construct a house on a piece of property owned by them and to convey the completed house and property to plaintiffs, the trial court's order dismissing defendants' counterclaims for overages, interest expenses, liquidated damages, attorneys' fees and trespass but allowing defendants to assert these counterclaims as set-offs to plaintiff's claim was not a final judgment; however, the judgment in question affected a substantial right of defendants, their right to recover on their claims based on the contract, and the absence of an immediate appeal would work an injury to them, the possibility of being forced to undergo two full trials on the merits and to incur the expense of litigating twice, if not corrected before an appeal from a final judgment. Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

Denial of motion to amend answer to allege compulsory counterclaim affects a substantial right and is immediately appealable. Hudspeth v. Bunzey, 35 N.C. App. 231, 241 S.E.2d 119, appeal dismissed, 294 N.C. 736, 244 S.E.2d 154 (1978).

Order allowing estates to amend their complaint in a medical malpractice suit was not immediately appealable where the issues of a hospital's claim that, without immediate review, it lost the right to avoid trial altogether by (1) raising the statute of limitations, (2) raising "estoppel by laches" as an affirmative defense, or (3) having the amended complaint dismissed for failure to comply with G.S. 1A-1, N.C. R. Civ. P. 9(j), were not brought before the trial court, and no substantial right was lost by the failure to allow immediate review; the estates were also entitled to sanctions against the hospital. Estate of Spell v. Ghanem, 175 N.C. App. 191, 622 S.E.2d 725, 2005 N.C. App. LEXIS 2717 (2005).

Order Denying Motion to Permit Contact with Treating Physician. — A discovery order which prohibited the defendant hospital from contact with the defendant doctor other than through "the statutorily recognized methods of discovery enumerated in" G.S. 1A-1, Rule 26 was not immediately appealable because the order in no way precluded the hospital from "meeting with and discussing the case with" the doctor in the context of the multi-varied discovery methods detailed in G.S. 1A-1, Rule 26 and, therefore, did not affect a substantial right. Norris v. Sattler, 139 N.C. App. 409, 533 S.E.2d 483, 2000 N.C. App. LEXIS 894 (2000).

Contempt Order. — See Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

Possibility of Inconsistent Verdicts. — Plaintiffs' appeal is reviewable under the substantial right exception where a dismissal would raise the possibility of inconsistent verdicts in later proceedings. Hoots v. Pryor, 106 N.C. App. 397, 417 S.E.2d 269, cert. denied, 332 N.C. 344, 421 S.E.2d 148 (1992).

When a patient sued a pharmacy for negligence, breach of implied warranties, liability under G.S. 99B-6, and to pierce the pharmacy's corporate veil and hold its president liable, and the warranty claim and claim to pierce the corporate veil were dismissed, the patient did not show, in an interlocutory appeal of that dismissal, that she would lose a substantial right if she could not immediately appeal the dismissal. Rauch v. Urgent Care Pharm., Inc., 178 N.C. App. 510, 632 S.E.2d 211, 2006 N.C. App. LEXIS 1566 (2006).

Order Granting Summary Judgment. — An order granting summary judgment denied plaintiff a jury trial on the issue of its claim against the bank and, in effect, determined the claim in favor of the bank. Thus the order affected a substantial right and was appealable under G.S. 1-277 and this section. Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976).

In an action seeking to quiet title to property which plaintiffs, the original owners, alleged was secured by two of the three defendants by fraud or by mutual mistake and conveyed by general warranty deed to the other defendant, the current owner, summary judgment in favor of the current owner precluded plaintiffs from obtaining reformation of the deed and reconveyance of the property, thereby affecting a substantial right, and therefore the interlocutory order was appealable. Jenkins v. Maintenance, Inc., 76 N.C. App. 110, 332 S.E.2d 90 (1985).

In an action by a discharged employee seeking to recover accumulated vacation leave, a "substantial right" of the plaintiff was affected by the granting of summary judgment for the defendant, so that the order granting the motion for summary judgment was appealable, despite the defendant's pending counterclaim for wrongful conversion of company funds, and despite the absence of a determination by the trial judge under N.C.R.C.P., Rule 54(b), that "there was no just reason for delay." Narron v. Hardee's Food Sys., 75 N.C. App. 579, 331 S.E.2d 205, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

Where summary judgment is allowed for fewer than all the defendants and the judgment does not contain a certification pursuant to G.S. 1A-1, Rule 54(b), that there is "no just reason for delay," an appeal is premature unless the order allowing summary judgment affects a substantial right. Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982).

Where the possibility of an inconsistent verdict in defendants' counterclaim trial could irreparably prejudice any subsequent trial of plaintiff's negligence and contract claims, the trial court's summary judgment dismissing plaintiff's claims affected a substantial right such that it was immediately appealable under subdivision (d)(1) of this section and G.S. 1-277(a). J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

Where defendants' defense to plaintiff's promissory note claim, as well as their counterclaims, were both founded on proving plaintiff's breach of a fiduciary relationship with defendants, defendants' substantial right to avoid separate trials of the same issue would be prejudiced absent immediate review of the trial court's grant of summary judgment on plaintiff's claim. Whitehurst v. Corey, 88 N.C. App. 746, 364 S.E.2d 728 (1988).

Summary judgment on complaint was not appealable before counterclaim for attorneys' fees had been adjudicated by the trial court. There was no possibility of inconsistent results in complaint and counterclaim because an award for counterclaim could only have been granted if defendants were prevailing parties in the plaintiff's action; therefore, as parties did not address any other substantial right which could have been affected, no substantial right was involved which would have been "lost, prejudiced, or less than adequately protected" if court did not review appeal before final judgment. T'ai Co. v. Market Square Ltd. Partnership, 92 N.C. App. 234, 373 S.E.2d 885 (1988).

Appeal from the grant of summary judgment for a psychiatric hospital in a medical malpractice action against the hospital and independent contractor physicians was premature, where the remaining defendants had separate and distinct contracts and each owed a different duty to the patient. Myers v. Barringer, 101 N.C. App. 168, 398 S.E.2d 615 (1990).

Since plaintiff's claim for negligent infliction of emotional distress, on which defendant was granted summary judgment, involved the issue of defendant's negligence as well as the separate factual issues of the existence of severe emotional distress and foreseeability of injury, if at trial a jury determined defendant's conduct to have been negligent, then plaintiff would only have to prove severe emotional distress and foreseeability of injury at a second trial in the event of a proper successful appeal of the summary judgment. Since a second trial would not require plaintiff to retry the negligence issue, there were no overlapping issues to justify an immediate appeal of the interlocutory order. Jarrell v. Coastal Emergency Servs. of Carolinas, Inc., 121 N.C. App. 198, 464 S.E.2d 720 (1995).

While an order granting summary judgment was interlocutory, it was appealable because the cause of action for criminal conversation, which was still before the trial court, was so connected with the claim for alienation of affections that only one issue of damages should be submitted to the jury, and thus, a substantial right was at stake to have the same jury hear the wife's two claims. McCutchen v. McCutchen, 360 N.C. 280, 624 S.E.2d 620, 2006 N.C. LEXIS 2 (2006).

When, in a personal injury case, a trial court granted summary judgment in favor of some of the parties sued, the judgment was appealable, under G.S. 1-277(a) and G.S. 7A-27(d)(1), because it was alleged that the parties as to whom summary judgment was granted were joint tortfeasors with the remaining parties, so many of the same factual issues would apply to the claims against the parties awarded summary judgment and to the remaining parties, and separate trials could result in inconsistent judgments, so the alleged injured parties who brought suit asserted a substantial right to immediate review, and their appeals were properly before the appellate court. Walden v. Morgan, — N.C. App. —, 635 S.E.2d 616, 2006 N.C. App. LEXIS 2169 (2006).

Appeal of Order of Summary Judgment. — Where dismissal of an appeal of a summary judgment could result in two different trials on the same issues, thereby creating the possibility of inconsistent verdicts, a substantial right is prejudiced and the summary judgment is immediately appealable. Taylor v. Brinkman, 108 N.C. App. 767, 425 S.E.2d 429, cert. denied, 333 N.C. 795, 431 S.E.2d 30 (1993).

The court denied the plaintiff—the administrator of the estates of his wife and two children, and guardian ad litem of a surviving injured child, who sued defendants/railroad company and engineering firm—the right to an immediate interlocutory appeal of a summary judgment on his contract claim where his tort claim survived the summary judgment and the trial court reserved the right to rule on matters of evidence which that judge considered competent, relevant and admissible on the remaining issues; the plaintiff failed to show that the court's separate treatment of the two claims would injure a substantial right where the evidence and the issues differed. Turner v. Norfolk S. Corp., 137 N.C. App. 138, 526 S.E.2d 666, 2000 N.C. App. LEXIS 256 (2000).

Under G.S. 1-277(a) and subsection (d) of this section, although an interlocutory order is ordinarily not immediately appealable, an interlocutory order may be immediately appealed if it affects a substantial right; the subcontractors' interlocutory appeal was supported by their assertion of a substantial right to have the case heard in a particular county and to have the liability of all of the defendants determined in one proceeding, which would have been lost without appellate review. Cencomp, Inc. v. Webcon, Inc., 157 N.C. App. 501, 579 S.E.2d 482, 2003 N.C. App. LEXIS 731 (2003).

Denial of a motion for summary judgment based on the defense of res judicata may affect a substantial right, making the order immediately appealable. Bockweg v. Anderson, 333 N.C. 486, 428 S.E.2d 157 (1993).

Interlocutory appeal of the denial of defendants' motion for summary judgment in a constructive trust action was allowed; the basis of the motion for summary judgment was that res judicata barred the constructive trust action and in such a case, the failure to allow an appeal might affect a substantial right in that the possibility existed that without an immediate appeal, they would be required to twice defend against the same claim by plaintiffs. Tiber Holding Corp. v. DiLoreto, 170 N.C. App. 662, 613 S.E.2d 346, 2005 N.C. App. LEXIS 1081 (2005), cert. denied, — N.C. —, 623 S.E.2d 263 (2005).

Summary Judgment on Issue of Liability. — Ordinarily, an order granting summary judgment on the issue of liability and reserving for trial the issue of damages is not immediately appealable. Smith v. Watson, 71 N.C. App. 351, 322 S.E.2d 588 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

Order Granting Partial Summary Judgment. — The trial court's entry of summary judgment for a monetary sum against one of two defendants affected a "substantial right" of that defendant, and such judgment was therefore immediately appealable under G.S. 1-277 and this section, notwithstanding the absence of an express determination by the trial judge that there was "no just reason for delay" as required by G.S. 1A-1, Rule 54(b). Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980).

Order allowing summary judgment as to fewer than all defendants held to affect a substantial right. Federal Land Bank v. Lieben, 86 N.C. App. 342, 357 S.E.2d 700 (1987).

An order of partial summary judgment dismissing a punitive damages claim was appealable, though interlocutory, since claims for compensatory and punitive damages depended upon the same evidence and plaintiff's right to try them before the same jury and avoid the possible travesty of different juries rendering conflicting verdicts was a substantial one. Nance v. Robertson, 91 N.C. App. 121, 370 S.E.2d 283, cert. denied, 323 N.C. 477, 373 S.E.2d 865 (1988).

Where trial court's summary judgment determined fewer than all claims between parties, plaintiff could maintain interlocutory appeals from court's judgment, since trial court's dismissal of plaintiff's negligence, fraud and unfair trade practice claims against defendant insurance company and unfair trade claim against defendant insurance agency affected substantial right since there were factual issues common to claims dismissed by trial court and negligence claim which it did not dismiss. Davidson v. Knauff Ins. Agency, Inc., 93 N.C. App. 20, 376 S.E.2d 488, cert. denied, 324 N.C. 577, 381 S.E.2d 772 (1989).

Where plaintiff claimed that defendants, husband and wife, were negligent, and where summary judgment was granted in favor of wife, and where a possibility existed that inconsistent verdicts would be rendered in separate trials on the issue of husband and wife's joint and concurrent negligence if plaintiff's appeal ultimately was successful, judgment was appealable because it affected a substantial right of plaintiff to have determined, in a single action, the question of whether plaintiff was injured by the acts of one, both, or neither of the defendants, especially since the claims against them arose from the same series of events. DeHaven v. Hoskins, 95 N.C. App. 397, 382 S.E.2d 856 (1989), cert. denied, 325 N.C. 705, 388 S.E.2d 452 (1989), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998).

The appellate court eliminated specifically the application of the doctrine of substantial rights to cases wherein partial summary judgment has been granted denying a claim for punitive damages. Moose v. Nissan of Statesville, Inc., 115 N.C. App. 423, 444 S.E.2d 694 (1994).

There were no factual issues common to the claims determined by summary judgments or the claims remaining, so that no substantial right was affected and plaintiff was not entitled to interlocutory appeal of summary judgments, since plaintiff did not present identical factual issues creating the possibility of two trials on the same issue. Jarrell v. Coastal Emergency Servs. of Carolinas, Inc., 121 N.C. App. 198, 464 S.E.2d 720 (1995).

The trial court's partial grant of summary judgment on the issue of breach of contract was interlocutory with no immediate right of appeal because it did not affect substantial rights. Alexander Hamilton Life Ins. Co. of Am. v. J&H Marsh & McClennan, Inc., 142 N.C. App. 699, 543 S.E.2d 898, 2001 N.C. App. LEXIS 186 (2001).

Same — Where Injunction Is Part of Order. — While ordinarily, the allowance of a motion for summary judgment on the issue of liability, reserving for trial the issue of damages, will not be appealable, where a mandatory injunction was part of the order for partial summary judgment, it clearly affected a "substantial right" of the defendant and the allowance of the motion for partial summary judgment was appealable. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, 319 N.C. 274, 354 S.E.2d 459 (1987).

Where defendants would immediately suffer the consequences of complying with mandatory injunction ordering that they remove anchors and boat slips constructed on plaintiff's submerged lands, this affected a substantial right of defendants, giving them the right to appeal from the interlocutory order granting summary judgment for plaintiffs except on the issue of damages. Steel Creek Dev. Corp. v. Smith, 300 N.C. 631, 268 S.E.2d 205 (1980).

Appeal of Order Denying Partial Summary Judgment. — Defendant's appeal of an order denying its motion for partial summary judgment on the issue of punitive damages was interlocutory. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 102 N.C. App. 659, 403 S.E.2d 593, aff'd, 332 N.C. 288, 420 S.E.2d 426 (1992).

When a landowner sued a developer and a land grader for, inter alia, negligence and trespass for conducting activities on a lot adjacent to the landowner's lot that allegedly caused flooding on the landowner's lot, a trial court's denial of the landowner's partial summary judgment motion on the issue of liability was not immediately appealable because the landowner did not show any substantial right that would be lost by a delay of his appeal from this denial. Williams v. Allen, — N.C. App. —, 641 S.E.2d 391, 2007 N.C. App. LEXIS 483 (2007).

Order Requiring Jury Trial. — If an order denying a jury trial is appealable, an order requiring a jury trial should be appealable. If denial of a jury trial affects a substantial right, which would be lost absent review prior to final determination, the requirement that a case will be tried by a jury should have the same effect. Faircloth v. Beard, 320 N.C. 505, 358 S.E.2d 512 (1987), overruled in part, Jacobs v. City of Asheville, 137 N.C. App. 441, 528 S.E.2d 905 (2000).

Generally, the right to avoid a trial is not a substantial right; however, while avoidance of two trials on the same issues may be. This would require that a party show that the same factual issues would be present in both trials and that the possibility of inconsistent verdicts on those issues exists. Stafford v. Stafford, 133 N.C. App. 163, 515 S.E.2d 43 (1999), aff'd, 351 N.C. 94, 520 S.E.2d 785 (1999).

Partial summary judgment holding that third-party defendant must indemnify defendant for any judgment on plaintiff's claim is interlocutory and not appealable under G.S. 1-277 or subsection (d) of this section, since the judgment will not work injury to third-party defendant if not corrected before appeal from a final judgment. Cook v. Export Leaf Tobacco Co., 47 N.C. App. 187, 266 S.E.2d 754 (1980).

Partial Summary Judgment in Favor of Defendant Who Is Only Secondarily Liable. — Plaintiffs had no right to an immediate appeal from summary judgment granted to defendant attorney where plaintiffs sought to recover against defendant attorney only if they were unable to recover against the other defendants on their primary claims. Blue Ridge Sportcycle Co. v. Schroader, 53 N.C. App. 354, 280 S.E.2d 799 (1981).

Interlocutory summary judgments in favor of third-party and fourth-party defendants in a negligence action were appealable as to the question of negligence, which presented common factual issues with the remaining claim of plaintiff against defendant, but not as to the issue of indemnity, which did not. Britt v. American Hoist & Derrick Co., 97 N.C. App. 442, 388 S.E.2d 613 (1990).

Arbitration Order. — An order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed. Prime S. Homes, Inc. v. Byrd, 102 N.C. App. 255, 401 S.E.2d 822 (1991); Hackett v. Bonta, 113 N.C. App. 89, 437 S.E.2d 687 (1993).

Where evidence showed that plaintiff knew that the terms of a dispute resolution agreement would apply to her should she continue her employment, and she did continue, sufficient consideration existed to support the agreement, plaintiff relinquished the right to pursue disputes in court, and the trial court's refusal to compel arbitration deprived defendants of a substantial right entitling them to immediate appeal. Howard v. Oakwood Homes Corp., 134 N.C. App. 116, 516 S.E.2d 879, 1999 N.C. App. LEXIS 671 (1999), cert. denied, 350 N.C. 832, 539 S.E.2d 288 (1999), cert. denied, 528 U.S. 1155, 120 S. Ct. 1161, 145 L. Ed. 2d 1072 (2000).

Trial court's order denying a home inspector's motion to compel arbitration pursuant to a written agreement was immediately appealable, under G.S. 1-277 and G.S. 7A-27(d)(l), because it affected a substantial right of the home inspector. Edwards v. Taylor, — N.C. App. —, 643 S.E.2d 51, 2007 N.C. App. LEXIS 805 (2007).

Arbitration. — There is no immediate right of appeal from an order compelling arbitration. Bluffs, Inc. v. Wysocki, 68 N.C. App. 284, 314 S.E.2d 291 (1984).

Order compelling arbitration was interlocutory and did not affect a substantial right. North Carolina Elec. Membership Corp. v. Duke Power Co., 95 N.C. App. 123, 381 S.E.2d 896, cert. denied, 325 N.C. 709, 388 S.E.2d 461 (1989).

An order compelling arbitration is interlocutory, does not affect a substantial right, and is not immediately appealable. Laws v. Horizon Hous., Inc., 137 N.C. App. 770, 529 S.E.2d 695, 2000 N.C. App. LEXIS 534 (2000).

Order Allowing Reinstatement of Lawsuits. — Defendant's appeal of an order granting plaintiffs' motions for reinstatement of their lawsuits for payment of materials provided on a county improvement project was interlocutory and not appealable, although a denial of review might force them "to continue the defense of th[e] action." Interior Distribs., Inc. v. Autry, 140 N.C. App. 541, 536 S.E.2d 853, 2000 N.C. App. LEXIS 1217 (2000), cert denied, 353 N.C. 375, 547 S.E.2d 411 (2001).

Order Appointing Guardian Ad Litem. — For plaintiff to have been entitled to appeal of right from order granting defendant's motions for the appointment of a guardian ad litem, plaintiff was required to establish that it either (1) affected a substantial right, or (2) in effect determined the action and prevented a judgment from which appeal might be taken, or (3) discontinued the action, or (4) granted or refused a new trial. Culton v. Culton, 327 N.C. 624, 398 S.E.2d 323 (1990).

Order of partial summary judgment which included a mandatory injunction directing the defendant to remove a roadway affected a substantial right of the defendant and was thus immediately appealable pursuant to G.S. 1-277 and this section. Smith v. Watson, 71 N.C. App. 351, 322 S.E.2d 588 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

The denial of summary judgment is interlocutory in nature and not appealable under G.S. 1-277 and this section, unless a substantial right of one of the parties would be affected if the appeal were not heard prior to final judgment. Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980).

An order setting aside without preju-

dice a summary judgment on the grounds of procedural irregularity, is interlocutory and not immediately appealable. Waters v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978).

Order Limiting Scope of Lis Pendens in Action to Quiet Title. — In an action to quiet title to property which defendants have incorporated into a residential subdivision, an order limiting the scope of lis pendens filed by plaintiffs only to the area of the subdivision which they claim was interlocutory and not immediately appealable. Whyburn v. Norwood, 37 N.C. App. 610, 246 S.E.2d 540 (1978).

Order Allowing Surveyor to Enter upon Land. — An interlocutory order by which defendants are simply ordered to allow a neutral third party, a surveyor, to enter upon their land for the purpose of completing an accurate survey of the property is not appealable. Ball v. Ball, 55 N.C. App. 98, 284 S.E.2d 555 (1981).

An order denying a motion to cancel a notice of lis pendens is not immediately appealable where the property owner fails to show that a substantial right of his has been impaired. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

An order requiring defendant husband to vacate premises which had been occupied by him and his wife as their home affected a substantial right and was appealable to the Court of Appeals, where the order was made after a hearing and before the case was tried. Musten v. Musten, 36 N.C. App. 618, 244 S.E.2d 699 (1978).

Orders Regarding Condemnation Proceedings. — The trial court's denial of defendants' constitutional challenge and its conclusion that the defendants' four tracts formed a physically unified parcel affected by condemnation proceedings were interlocutory and did not affect any substantial rights, so the defendants were not required to appeal the trial court's orders immediately. DOT v. Rowe, 351 N.C. 172, 521 S.E.2d 707 (1999).

Orders and awards pendente lite are interlocutory decrees which necessarily do not affect a substantial right from which an immediate appeal lies pursuant to subsection (d) of this section. Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970) and other prior decisions recognizing a right of immediate appeal from orders and awards pendente lite are overruled. Thus, where husband in a divorce action appealed an order by the trial court for alimony pendente lite, child support pendente lite, and attorneys' fees pendente lite, the appeal was premature and therefore was dismissed. See Stephenson v. Stephenson, 55 N.C. App. 250, 285 S.E.2d 281 (1981).

[A]wards pendente lite are interlocutory decrees which necessarily do not affect a substantial right from which lies an immediate appeal pursuant to this section. Browne v. Browne, 101 N.C. App. 617, 400 S.E.2d 736 (1991).

Order which clearly affected the right of plaintiff to receive support on behalf of minor children from defendant on a monthly basis as needed and in the amount which had been found reasonably necessary for the support and maintenance of the children involved a substantial right, and therefore the order in question was immediately appealable. Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986).

Denial of Attorneys' Motion for Admission Pro Hac Vice. — Order denying plaintiff's motion to reconsider order denying attorneys' motion for admission pro hac vice was an interlocutory order and was not immediately appealable; it did not come within the statutory appeals in G.S. 1-277(a) or subsection (d) of this section. Leonard v. Johns-Manville Sales Corp., 57 N.C. App. 553, 291 S.E.2d 828, cert. denied, 306 N.C. 558, 294 S.E.2d 371 (1982).

Preliminary Injunction Against Operation of Business. — Defendant could appeal trial court's issuance of a preliminary injunction enjoining defendant from operating a used car lot in violation of plaintiff town's zoning ordinance, where although defendant's appeal was from an interlocutory order, defendant would have been deprived of a substantial right, the right to operate his business, absent a review prior to determination on the merits. Town of Knightdale v. Vaughn, 95 N.C. App. 649, 383 S.E.2d 460 (1989).

Denial of Preliminary Injunction. — Court of appeals found that deciding if operating video games in arcade was a substantial right was not necessary where a trial court's denial of a preliminary injunction did not strip the operators of a substantial right and the operators' appeal was interlocutory. Bessemer City Express, Inc. v. City of Kings Mt., 155 N.C. App. 637, 573 S.E.2d 712, 2002 N.C. App. LEXIS 1605 (2002), cert. denied, 357 N.C. 61, 579 S.E.2d 384 (2003).

Trial court's order granting a preliminary injunction restraining the sale of real property was immediately appealable; the merits of the underlying special proceeding between an executor and a widow in which the executor's right to partition property and to sell the widow's interest therein were decided by the entry of the widow's default nearly 10 years before, and there could have been no final order confirming a sale of the widow's allotted portion of the farm until a sale, which the trial court's order enjoined, was accomplished. Revelle v. Chamblee, 168 N.C. App. 227, 606 S.E.2d 712, 2005 N.C. App. LEXIS 158 (2005).

Preliminary Injunction Pursuant to Covenant Not to Compete. — Preliminary injunction entered by the trial court against defendant, pursuant to a covenant not to compete, was appealable prior to final determination on the merits, as it deprived defendant of a substantial right which he would lose absent review prior to a final determination. Masterclean of N.C., Inc. v. Guy, 82 N.C. App. 45, 345 S.E.2d 692 (1986).

In an action for injunctive relief and damages based on alleged breach of a covenant not to compete, defendant's appeal of trial court's preliminary injunction barring him from participating in any employment that competed with plaintiff's business in certain geographic locations would be dismissed as interlocutory, where there was no evidence in the record to show that defendant was presently working in any of those areas, as the injunction did not deprive defendant of any substantial right which he would lose absent a review prior to final determination. Automated Data Sys. v. Myers, 96 N.C. App. 624, 386 S.E.2d 432 (1989).

Where a former employer sued a former employee for violating a covenant not to compete, the employee was entitled to interlocutory review of the trial court's decision to issue a preliminary injunction which, inter alia, prohibited the employee from working for the employer's competitors in North Carolina or South Carolina, as the injunction adversely affected the employee's substantial right to earn a living and to practice the employee's livelihood. Precision Walls, Inc. v. Servie, 152 N.C. App. 630, 568 S.E.2d 267, 2002 N.C. App. LEXIS 980 (2002).

When a party asserts a statutory privilege, such as that set out by G.S. 90-21.22(e) (right to non-disclosure of confidential information), which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion is not otherwise frivolous or insubstantial, the challenged order affects a substantial right under G.S. 1-277(a) and subdivision (d)(1) of this section and is immediately reviewable; to the extent that cases like Kaplan v. Prolife Action League of Greensboro, 123 N.C.App. 677, 474 S.E.2d 408 (1996) differ, they are overruled. Sharpe v. Worland, 351 N.C. 159, 522 S.E.2d 577 (1999).

Attorney-Client Privilege. — The trial court's orders requiring that the defendants-insurers produce material protected by the attorney-client privilege affected a substantial right and entitled them to a hearing on appeal. Evans v. United Servs. Auto. Ass'n, 142 N.C. App. 18, 541 S.E.2d 782, 2001 N.C. App. LEXIS 48 (2001), cert. denied, 353 N.C. 371, 547 S.E.2d 810 (2001).

An order that denied a motion to invalidate appellee's request for a jury trial was interlocutory, and no appeal lay to an appellate court therefrom, as such order did not deprive the appellants of a substantial right. Faircloth v. Beard, 83 N.C. App. 235, 349 S.E.2d 609 (1986).

Where superior court's refusal to invalidate plaintiffs' demand for a jury trial in a stockholder's derivative action amounted to a ruling that plaintiffs were entitled to a jury trial, denial of defendants' motion to invalidate the demand was appealable. Faircloth v. Beard, 320 N.C. 505, 358 S.E.2d 512 (1987), overruled in part, Jacobs v. City of Asheville, 137 N.C. App. 441, 528 S.E.2d 905 (2000).

Dismissal of Claim Against One Defendant. — Dismissal of Count II of plaintiff's amended complaint, resulting in dismissal of plaintiff's claim against defendant professional corporation, affected her substantial right to have determined in a single proceeding the issues of whether she had been damaged by the actions of one, some or all of the defendants, especially since her claims against all of them arose upon the same series of transactions. Therefore, her appeal therefrom was not premature. Fox v. Wilson, 85 N.C. App. 292, 354 S.E.2d 737 (1987).

Injured party's appeal from the trial court's judgment dismissing the injured party's claims against a church and a landowner was interlocutory because the trial court did not dismiss the injured party's claims against the landowner's son; however, the judgment was appealable under G.S. 1-277 and subsection (d) of this section because the injured party had a substantial right in having the case against all defendants tried by the same jury. Clontz v. St. Mark's Evangelical Lutheran Church, 157 N.C. App. 325, 578 S.E.2d 654, 2003 N.C. App. LEXIS 537 (2003), cert. denied, 357 N.C. 249, 582 S.E.2d 29 (2003).

The trial court's dismissal of all claims against defendant/insurer and some but not all claims against defendant-landlords affected a substantial right where plaintiff sought relief against them based on negligence, violation of the statutory duty of a landlord to repair premises, unfair and deceptive trade practices, and wrongful death, all arising from the single occurrence of a fire in a rental home and where she had the right to have all her claims adjudicated in a single proceeding. Prince v. Wright, 141 N.C. App. 262, 541 S.E.2d 191, 2000 N.C. App. LEXIS 1389 (2000).

Discovery Orders. — Order from which defendant first appealed, which contained no enforcement sanctions, and only ordered defendant to answer questions by a certain date, was not properly appealable, and its attempted appeal was a nullity, notwithstanding the fact that the judge signed the appeal entries. Accordingly, such appeal did not divest the trial court of jurisdiction to subsequently enter sanctions against defendant. Benfield v. Benfield, 89 N.C. App. 415, 366 S.E.2d 500 (1988).

Denial of the caveators' motion to compel the decedent's former attorney to answer deposition questions was an interlocutory order that was not appealable, because the order did not affect a substantial right pursuant to G.S. 1-277(a) and subdivision (d)(1) of this section; the caveators failed to demonstrate that the attorney, who was discharged prior to the drafting of the will at issue in the case, possessed relevant information concerning the decedent's health or relationship with the propounder of the will at the time the will was drafted. In re Will of Johnston, 157 N.C. App. 258, 578 S.E.2d 635, 2003 N.C. App. LEXIS 642 (2003).

When defendants contended that nursing home incident reports were protected by the peer review privilege, the trial court's interlocutory order compelling production of the reports affected a substantial right and thus was immediately appealable. Hayes v. Premier Living, Inc., — N.C. App. —, 641 S.E.2d 316, 2007 N.C. App. LEXIS 370 (2007).

Sanctions for Noncompliance with Discovery Order. — Where a party is adjudged to be in contempt for noncompliance with a discovery order or has been assessed with certain other sanctions, the order is immediately appealable, since it affects a substantial right under G.S. 1-277 and subdivision (d)(1) of this section. Benfield v. Benfield, 89 N.C. App. 415, 366 S.E.2d 500 (1988).

Order holding defendant in contempt of court for his failure to comply with discovery order was appealable and tested the validity both of the original discovery order and the contempt order. Benfield v. Benfield, 89 N.C. App. 415, 366 S.E.2d 500 (1988).

Order Setting Aside Judgment. — The avoidance of having to affirmatively prove claim was not a "substantial" right, where plaintiff was affected by inability to immediately appeal order setting aside judgment only to the extent that it would have to establish defendants' liability and the amount thereof by proper evidence, rather than by relying upon a purported confession of judgment. First Am. Sav. & Loan Ass'n v. Satterfield, 87 N.C. App. 160, 359 S.E.2d 812 (1987).

Order setting aside a default judgment is interlocutory, as it does not finally dispose of the case and requires further action by the trial court. Horne v. Nobility Homes, Inc., 88 N.C. App. 476, 363 S.E.2d 642 (1988).

Order Denying Motion for Stay. — The denial of defendant's motion for stay did not dispose of any of the claims or parties, the trial court did not certify the case for immediate appeal under G.S. 1A-1, Rule 54(b), and defendants did not show that the trial court's decision deprived them of a substantial right which would be lost absent immediate review. Howerton v. Grace Hosp., 124 N.C. App. 199, 476 S.E.2d 440 (1996).

Order Requiring Posting of Bond. — Where brothers were equal shareholders in company, and company could no longer be conducted to the advantage of both of the shareholders, and where judge ordered the brothers to post a secured bond to ensure compliance with any judgment rendered, the appeal of the order by one of the brothers was interlocutory and would be dismissed; no substantial right of his was affected, since the amount of the bond reasonably approximated the value of the assets in his possession, and the bond would be cancelled if the opposing brother was unsuccessful in obtaining judgment in his favor. Stancil v. Stancil, 94 N.C. App. 760, 381 S.E.2d 720 (1989).

Order Increasing Attachment Bond Where No Findings Were Made. — Because the trial court was not required to make findings of fact in order to modify the plaintiffs' attachment bond on the motion of the defendant pursuant to G.S. 1-440.40(a), and where the plaintiffs failed to request such findings, they could not assert that the order had affected their substantial rights and they were not entitled to review. Collins v. Talley, 135 N.C. App. 758, 522 S.E.2d 794, 1999 N.C. App. LEXIS 1228 (1999).

Order Removing Attorney. — Plaintiff had a substantial right to have attorney of her choice, properly admitted pro hac vice under G.S. 84-4.1, represent her in her lawsuit, and order removing him as counsel affected a substantial right of the plaintiff and was immediately appealable. Goldston v. AMC, 326 N.C. 723, 392 S.E.2d 735 (1990).

Denial of Motion to Disqualify Counsel. — An order granting disqualification of counsel seriously disrupts the progress of litigation while new counsel is obtained, but one refusing such relief merely allows the action to proceed and has no permanent effect of any kind. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 332 N.C. 288, 420 S.E.2d 426 (1992).

Ruling striking attorney's charging lien was not a final order, since a charging lien is not available until there is a final judgment or decree to which the lien can attach, and no final judgment had yet been entered in the underlying divorce action. Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988).

Where trial court's entry of summary judgment against plaintiff included an award of attorneys' fees, it affected a substantial right; consequently, the order was immediately appealable pursuant to G.S. 1-277(a) and subsection (d) of this section. K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan Ass'n, 96 N.C. App. 474, 386 S.E.2d 226 (1989).

Denial of attorneys' fees under G.S. 50-16.4 was not a final order of the trial court, where at the time appellant's motion was filed there had been no determination that his client, defendant, was entitled to alimony pendente lite under G.S. 50-16.3, so that appellant was not yet entitled to attorneys' fees under

G.S. 50-16.4, and as appellant could appeal the denial of his motion after final judgment, or could bring a separate lawsuit to collect fees, no substantial right of appellant was affected by the Court of Appeals' failure to entertain an interlocutory appeal on this issue. Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988).

Orders awarding child support, alimony, and attorneys' fees pendente lite are interlocutory decrees which necessarily do not affect a substantial right from which lies an immediate appeal pursuant to G.S. 7A-27(d). Berry v. Berry, 87 N.C. App. 624, 361 S.E.2d 771 (1987).

Child support order which was not expressly designated pendente lite by the court, but which was nevertheless a temporary one, entered provisionally pending a final determination to be made at a later date, was not subject to review by appeal. Berry v. Berry, 87 N.C. App. 624, 361 S.E.2d 771 (1987).

Termination of Temporary Alimony. — Appeal of an order terminating dependent spouse's right to receive temporary alimony was not premature, as the question of plaintiff's continued entitlement to the previously ordered alimony pendente lite until such time as her prayer for permanent alimony could be heard affected a "substantial right" of the dependent spouse. Brown v. Brown, 85 N.C. App. 602, 355 S.E.2d 525, cert. denied, 320 N.C. 511, 358 S.E.2d 516 (1987).

Equitable Distribution Order. — Permitting an immediate appeal from an interim equitable distribution order would be contrary to the policy of this state discouraging fragmentary appeals. Hunter v. Hunter, 126 N.C. App. 705, 486 S.E.2d 244 (1997).

Order Barring Defendant from Equitable Distribution. — Trial court's order denying defendant's motion to amend his answer in divorce action, which he filed following grant of absolute divorce to plaintiff, had the effect of forever barring defendant from asserting a claim for equitable distribution, and thus affected a substantial right; it was therefore appealable as a matter of right. Goodwin v. Zeydel, 96 N.C. App. 670, 387 S.E.2d 57 (1990).

Order Dismissing Equitable Distribution Claim. — Given the factual issues overlapping husband's company's contract claim retained by the court and wife's equitable distribution counterclaim which it dismissed, wife could appeal the dismissal of the equitable distribution counterclaim as a matter of right, since a substantial right would otherwise be affected. Small v. Small, 93 N.C. App. 614, 379 S.E.2d 273, cert. denied, 325 N.C. 273, 384 S.E.2d 519 (1989).

Order Granting Absolute Divorce While Reserving Equitable Distribution Issues. — While the trial court's determination of the parties' date of separation might have an effect on the unresolved issue of equitable distribution, the same factual issues would not be involved and no threat of inconsistent verdicts was involved, and thus, no substantial right of the husband was affected so as to entitle him to appeal the trial court's grant of an absolute divorce to the wife while reserving equitable distribution issues for a later hearing. Stafford v. Stafford, 133 N.C. App. 163, 515 S.E.2d 43 (1999), aff'd, 351 N.C. 94, 520 S.E.2d 785 (1999).

Ruling Disposing of a Plea in Bar. — Court's ruling on a separation/property settlement agreement did not dispose of plaintiff's claims for equitable distribution and alimony but only disposed of defendant's plea in bar to those claims: The court's ruling was thus interlocutory, and although the court's order stated that its ruling affected a substantial right and was a proper subject of immediate appeal, the court's order could not be certified as a final appealable order under G.S. 1A-1, Rule 54(b). Garris v. Garris, 92 N.C. App. 467, 374 S.E.2d 638 (1988).

Appeal of Order Denying Motion to Disqualify Opponent's Counsel. — Where defendant maintained that because law firm representing plaintiff represented defendant in previous matters of a similar nature (but not involving plaintiff), that firm could not represent plaintiff in the present matter, it did have a substantial right to prevent prior counsel from using confidential information gleaned from a prior representation and utilizing it against the client in subsequent litigation, however, it cannot be found that the deprivation of this right would injure defendant if not corrected before a final judgment, and defendant's appeal of the trial court's order denying its motion to disqualify law firm was interlocutory. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 102 N.C. App. 659, 403 S.E.2d 593, aff'd, 332 N.C. 288, 420 S.E.2d 426 (1992).

Appeal Regarding Waiver of Parental Consent. — No appeal of right lies to the Court of Appeals from an order of the superior court entered pursuant to G.S. 90-21.8(h); the exclusive appeal remedy is the appeal from the district court to the superior court. In re Doe, 126 N.C. App. 401, 485 S.E.2d 354 (1997).

Appeal of Order Denying Release of Escrow Funds. — The effect of an order denying the release of the funds held in escrow under G.S. 58-36-25 was temporary and not permanent where the Commissioner's order only determined that the funds are not to be released now, and did not purport to determine who is entitled to the money; for these reasons, an appeal of the order was interlocutory and was not immediately appealable under either G.S. 1A-1, Rule 54(b) or G.S. 1-277 or this section. State ex rel. Comm'r of Ins. v. North Carolina

Rate Bureau, 102 N.C. App. 809, 403 S.E.2d 597 (1991).

Judgment That Leaves Issue of Damages Unresolved. — A judgment that determines only that there has in fact been a breach by defendant and leaves unresolved the issue of plaintiffs' damage is clearly an interlocutory order; an order determining only the issue of liability and leaving unresolved other issues such as that of damages cannot be held to affect a substantial right. Johnston v. Royal Indem. Co., 107 N.C. App. 624, 421 S.E.2d 170 (1992).

Order of North Carolina Industrial Commission Modifying Deputy Commissioner's Order. — Appeal from the North Carolina Industrial Commission's order that a deputy commissioner's dismissal of a workers' compensation claim was to be deemed to be without prejudice was dismissed; the Commission's order was an interlocutory order, from which there was no general right to immediate review, and the denial of immediate review would not affect the employers' substantial rights. Ward v. Wake Co. Bd. of Educ., 166 N.C. App. 726, 603 S.E.2d 896, 2004 N.C. App. LEXIS 2031 (2004), cert. denied, 359 N.C. 326, 611 S.E.2d 853 (2005).

Interlocutory Appeal Allowed Where Order Affected Potential Inheritance. — Interlocutory order denying siblings' motion to intervene in a G.S. 49-14 paternity action was permitted to be considered under G.S. 1-277 and G.S. 7A-27(a) (as the order adversely affected a substantial right which they could lose — part of their inheritance from their deceased father's estate), but denial of the motion was affirmed. Stockton v. Estate of Thompson, 165 N.C. App. 899, 600 S.E.2d 13, 2004 N.C. App. LEXIS 1515 (2004).

Interlocutory Appeal From Denial of Appointment of Receiver. — Shareholders were entitled to an interlocutory appeal of the trial court's denial of their motion for the appointment of a receiver because they established a substantial right to the preservation of what they alleged were their corporation's assets and opportunities under G.S. 1-277(a) and G.S. 7A-27(d)(1), which right was substantially affected by the trial court's denial of the appointment of a receiver. Barnes v. Kochhar, 178 N.C. App. 489, 633 S.E.2d 474, 2006 N.C. App. LEXIS 1574 (2006).

Trial court's denial of a motion to enforce a settlement did not resolve the underlying personal injury claim, and the order of denial was therefore interlocutory; since the trial court did not certify that there was no just reason to delay the appeal, and the denial did not affect a substantial right, there was no right to an immediate appeal since an appeal of the denial was still allowed once there was a final judgment. Milton v. Thompson, 170 N.C. App. 176, 611 S.E.2d 474, 2005 N.C. App. LEXIS 903 (2005).

§ 7A-28. Decisions of Court of Appeals on post-trial motions for appropriate relief final or valuation of exempt property.

(a) Decisions of the Court of Appeals upon review of motions for appropriate relief listed in G.S. 15A-1415(b) are final and not subject to further review in the Supreme Court by appeal, motion, certification, writ, or otherwise.

(b) Decisions of the Court of Appeals upon review of valuation of exempt property under G.S. 1C are final and not subject to further review in the Supreme Court by appeal, motion, certification, writ, or otherwise. (1981, c. 470, s. 1; 1981 (Reg. Sess., 1982), c. 1224, s. 16.)

Editor's Note. — The original G.S. 7A-28, which was substantially similar to this section, was enacted by Session Laws 1967, c. 108, s. 1, and repealed by Session Laws 1977, c. 711, s. 33.

CASE NOTES

New Trial Based upon Newly Discovered Evidence. — The State has the right to immediately appeal a superior court order granting a criminal defendant a new trial pursuant to G.S. 15A-1415(b)(6), on the ground of newly discovered evidence. State v. Monroe, 330 N.C. 433, 410 S.E.2d 913 (1991).

Exhaustion Requirement in Federal Habeas Corpus. — The fact that the respondent in an appeal from the order of a United States magistrate dismissing a claim for habeas corpus relief incorrectly pleaded that the appellant had exhausted his state court remedies and was entitled to adjudication on the merits was neither conclusive nor a waiver of the exhaustion requirement by the State. Strader v. Allsbrook, 656 F.2d 67 (4th Cir. 1981).

Jurisdiction of North Carolina Supreme

Court. — Statute could not have restricted the Supreme Court of North Carolina's constitutional authority under N.C. Const., Art. IV, § 12(1) to exercise jurisdiction to review upon appeal any decision of the courts below, and as such, the Supreme Court of North Carolina did not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice, and did so to consider questions that were not properly presented according to its rules; this exercise of supervisory authority was particularly appropriate when prompt and definitive resolution of an issue was necessary to ensure the uniform administration of North Carolina's criminal statutes. State v. Ellis, 361 N.C. 200, 639 S.E.2d 425, 2007 N.C. LEXIS 38 (2007).

Cited in McLendon v. Woodard, 719 F. Supp. 441 (W.D.N.C. 1989).

§ 7A-29. Appeals of right from certain administrative agencies.

(a) From any final order or decision of the North Carolina Utilities Commission not governed by subsection (b) of this section, the Department of Health and Human Services under G.S. 131E-188(b), the North Carolina Industrial Commission, the North Carolina State Bar under G.S. 84-28, the Property Tax Commission under G.S. 105-290 and G.S. 105-342, the Commissioner of Insurance under G.S. 58-2-80, the State Board of Elections under G.S. 163-127.6, or the Secretary of Environment and Natural Resources under G.S. 104E-6.2 or G.S. 130A-293, appeal as of right lies directly to the Court of Appeals.

(b) From any final order or decision of the Utilities Commission in a general rate case, appeal as of right lies directly to the Supreme Court. (1967, c. 108, s. 1; 1971, c. 703, s. 5; 1975, c. 582, s. 12; 1979, c. 584, s. 1; 1981, c. 704, s. 28; 1983, c. 526, s. 1; c. 761, s. 188; 1983 (Reg. Sess., 1984), c. 1000, s. 2; c. 1087, s. 2; c. 1113, s. 2; 1985, c. 462, s. 3; 1987, c. 850, s. 2; 1991, c. 546, s. 2; c. 679, s. 2; 1993, c. 501, s. 2; 1995, c. 115, s. 1; c. 504, s. 2; c. 509, s. 2; 1997-443, ss. 11A.118(a), 11A.119(a); 2003-63, s. 1; 2006-155, s. 1.1.)

Cross References. — As to jurisdiction of the Supreme Court to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission, see N.C. Const., Art. IV, § 12(1). As to scope of judicial review of orders of the Property Tax Commission, see G.S. 105-345 through 105-346.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1087, s. 7, made ss. 1 through 5 of the act, s. 2 of which amended this section, effective on the earlier of: (1) The date on which registration becomes effective in one of the states listed in G.S. 54B-48.2(16) which authorizes regional acquisitions of savings and loan associations and savings and loan holding companies on a reciprocal basis and which applies to savings and loan associations and savings and loan holding companies in North Carolina; or (2) July 1, 1986. Sections 1 through 5 of the act became effective July 1, 1985, when the legislation became effective in Virginia.

Session Laws 1995, c. 509, s. 2, amended this section in the coded bill drafting format prescribed by G.S. 120-20.1. Subsection (a) has been set out in the form above as directed by the Revisor of Statutes.

Session Laws 2006-155, s. 6, provides: "The North Carolina Supreme Court is respectfully requested to adopt rules necessary to implement the provisions as to appeal in G.S. 163-127.6."

Session Laws 2006-155, s. 7, is a severability clause.

Effect of Amendments. — Session Laws 2006-155, s. 1.1, effective January 1, 2007, and applicable to actions filed on or after that date, inserted "the State Board of Elections under G.S. 163-127.6" near the end of subsection (a).

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

For survey of 1982 law on administrative law, see 61 N.C.L. Rev. 961 (1983).

CASE NOTES

Appeals of Right from Certain Administrative Agencies. — G.S. 62-90(a) and (d) provide for appeals of final orders of the North Carolina Utilities Commission; subsections (a) and (b) of this section provide for appeals of right from certain administrative agencies, and G.S. 7A-27(d) provides for appeals of right from certain interlocutory orders of the superior or district courts. State ex rel. Utils. Comm'n v. Buck Island, Inc., 158 N.C. App. 536, 581 S.E.2d 122, 2003 N.C. App. LEXIS 1186 (2003).

North Carolina DHHS, Division of Facility Services, Certificate of Need Section's issuance of a No Review letter to a hospice that sought to open a branch office in another service area was the issuance of an exemption for purposes of G.S. 131E-188(a); accordingly, G.S. 131E-188(b) conferred jurisdiction on the Court of Appeals of North Carolina to hear an appeal from a challenge to the letter. Hospice at Greensboro, Inc. v. N.C. HHS Div. of Facility Servs., — N.C. App. —, 647 S.E.2d 651, 2007 N.C. App. LEXIS 1714 (2007).

Right of Appeal Expressly Granted. — The right of appeal from any final order or decision of the Utilities Commission is expressly granted by this section. Morgan v. Duke Power Co., 22 N.C. App. 497, 206 S.E.2d 507, appeal dismissed, 285 N.C. 759, 209 S.E.2d 282 (1974).

No appeal lies from an interlocutory order of the Industrial Commission. There is a right of appeal only from a final order. Vaughn v. North Carolina Dep't of Human Resources, 37 N.C. App. 86, 245 S.E.2d 892, aff'd, 296 N.C. 683, 252 S.E.2d 792 (1978); Lynch v. M.B. Kahn Constr. Co., 41 N.C. App. 127, 254 S.E.2d 236, cert. denied, 298 N.C. 298, 259 S.E.2d 914 (1979).

Only from a final order or decision of the Industrial Commission is there an appeal of right to the Court of Appeals. Ledford v. Asheville Hous. Auth., 125 N.C. App. 597, 482 S.E.2d 544 (1997).

Appeal of Decisions Under G.S. 143-166.4. — The Court of Appeals has no jurisdiction to review an appeal of a decision by the North Carolina Industrial Commission made pursuant to G.S. 143-166.4. In re Vandiford, 56 N.C. App. 224, 287 S.E.2d 912 (1982).

Appeal By State Bar of North Carolina. — Court of Appeals of North Carolina lacked jurisdiction to hear the State Bar of North Carolina's appeal of a grant of summary judgment to an attorney in a disciplinary proceeding because G.S. 84-28(h) provided no appeal from a final order that did not impose discipline and in the instant case no discipline had been imposed. N.C. State Bar v. Rudisill, 159 N.C. App. 704, 583 S.E.2d 413, 2003 N.C. App. LEXIS 1527 (2003).

An order of the hearing commission of the State Bar denying defendant's motion to dismiss on the ground of lack of jurisdiction is interlocutory; therefore, defendant cannot appeal therefrom as a matter of right. North Carolina State Bar v. DuMont, 298 N.C. 564, 259 S.E.2d 280 (1979).

Interlocutory Appeal Dismissed. — Water and sewer processing facilities part-owner's appeal of interlocutory orders of the North Carolina Utilities Commission holding that the part-owner was a public utility under G.S. 62-3(23)a.2 and was subject to the Commission's jurisdiction was dismissed as the absence of any exceptions to G.S. 62-90 or this section, allowing review of interlocutory orders of the Commission, required the appellate court to conclude that it had no jurisdiction to consider appeals of interlocutory orders of the Commission; further, the appellate court did not have authority under G.S. 7A-32(c) to review the part-owner's issues as there was no final order of the Commission. State ex rel. Utils. Comm'n v. Buck Island, Inc., 158 N.C. App. 536, 581 S.E.2d 122, 2003 N.C. App. LEXIS 1186 (2003).

Applied in Morgan v. VEPCO, 22 N.C. App. 300, 206 S.E.2d 338 (1974); Fisher v. E.I. Du Pont De Nemours, 54 N.C. App. 176, 282 S.E.2d 543 (1981); Perkins v. Broughton Hosp., 71 N.C. App. 275, 321 S.E.2d 495 (1984); State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 313 N.C. 215, 328 S.E.2d 264 (1985); State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985); Hardin v. Venture Constr. Co., 107 N.C. App. 758, 421 S.E.2d 601 (1992); Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993).

Cited in State ex rel. Utils. Comm'n v. General Tel. Co., 17 N.C. App. 727, 195 S.E.2d 311 (1973); State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982); Citicorp v. Currie, 75 N.C. App. 312, 330 S.E.2d 635 (1985); State ex rel. Utils. Comm'n v. Thornburg, 317 N.C. 26, 342 S.E.2d 28 (1986); In re Wake Kidney Clinic, 85 N.C. App. 639, 355 S.E.2d 788 (1987); State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989); State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 484, 385 S.E.2d 463 (1989); State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994); Martin v. Piedmont Asphalt & Paving, 337 N.C. 785, 448 S.E.2d 380 (1994).

§ 7A-30. Appeals of right from certain decisions of the Court of Appeals.

Except as provided in G.S. 7A-28, an appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case:

(1) Which directly involves a substantial question arising under the Constitution of the United States or of this State, or
(2) In which there is a dissent. (1967, c. 108, s. 1; 1983, c. 526, s. 2.)

Cross References. — As to jurisdiction of the Supreme Court to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utils. Commission, see N.C. Const., Art. IV, § 12(1).

Legal Periodicals. — For statistical analysis of all of the opinions of the North Carolina Supreme Court for the year 1977, see 15 Wake Forest L. Rev. 39 (1979).

For article, "The Discipline and Removal of Judges in North Carolina," see 4 Campbell L. Rev. 1 (1981).

For 1984 survey of appellate procedure, "Appellate Rule 16(b) and New Requirements for Appeals of Right," see 63 N.C.L. Rev. 1074 (1985).

For comment, "The Burial of an Impartial Judicial System: The Lifting of Restrictions on Judicial Candidate Speech in North Carolina," see 33 Wake Forest L. Rev. 413 (1998).

For a brief discussion of the scope of review under this section, see 22 Campbell L. Rev. 253 (2000).

For recent development: "'Deference Does Not by Definition Preclude Relief': The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals," see 84 N.C. L. Rev. 1328 (2006).

CASE NOTES

I. In General.
II. Constitutional Questions.
III. Dissent.

I. IN GENERAL.

Legislative Intent. — In establishing the North Carolina Court of Appeals, defining its jurisdiction, and providing a system of appeals, the General Assembly followed the basic principle that there should be only one trial on the merits and one appeal on the law, as of right, in every case. Consequently, double appeals as of right — first to the Court of Appeals and then to the Supreme Court — are authorized only in the instances specified by this section. State v. Cumber, 280 N.C. 127, 185 S.E.2d 141 (1971).

Had the General Assembly intended to limit double appeals in criminal cases to the defendant only, it would have said so. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972).

Scope of Review. — When the Supreme Court, after a decision of a cause by the Court of Appeals and pursuant to the petition of a party thereto as authorized by G.S. 7A-31, grants certiorari to review the decision of the Court of Appeals, only the decision of the Court of Appeals is before the Supreme Court for review. The Supreme Court inquires into proceedings in the trial court solely to determine the correctness of the decision of the Court of Appeals. Its inquiry is restricted to rulings of the Court of Appeals which are assigned as error in the petition for certiorari and which are preserved by arguments or the citation of authorities with reference thereto in the brief filed by the petitioner in the Supreme Court, except in those instances in which the Supreme Court elects to exercise its general power of supervision of courts inferior to the Supreme Court. Supreme Court review of a decision by the Court of Appeals upon an appeal from it to the Supreme Court as a matter of right, pursuant to this section, is similarly limited. State v. Williams, 274 N.C. 328, 163 S.E.2d 353 (1968).

Right to Counsel. — G.S. 7A-450 et seq. has generally been construed to limit the right to appointed counsel in criminal cases to direct appeals taken as of right. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

Applied in State v. Cavallaro, 274 N.C. 480, 164 S.E.2d 168 (1968); Southern Ry. v. City of Winston-Salem, 275 N.C. 465, 168 S.E.2d 396 (1969); State v. Horton, 275 N.C. 651, 170 S.E.2d 466 (1969); State v. Bumper, 275 N.C. 670, 170 S.E.2d 457 (1969); State v. Strickland, 276 N.C. 253, 173 S.E.2d 129 (1970); State v. Barrow, 276 N.C. 381, 172 S.E.2d 512 (1970); State v. McCloud, 276 N.C. 518, 173 S.E.2d 753 (1970); North Carolina State Hwy. Comm'n v. Asheville School, Inc., 276 N.C. 556, 173 S.E.2d 909 (1970); Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970); State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970); Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970); State v. Gaiten, 277 N.C. 236, 176 S.E.2d 778 (1970); State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970); Marrone v. Long, 277 N.C. 246, 176 S.E.2d 762 (1970); State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970); State v. Jordan, 277 N.C. 341, 177 S.E.2d 289 (1970); State v. Hatcher, 277 N.C. 380, 177 S.E.2d 892 (1970); Williamson v. McNeill, 277 N.C. 447, 177 S.E.2d 859 (1970); Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1971); In re Johnson, 277 N.C. 688, 178 S.E.2d 470 (1971); Southern Ry. v. City of Raleigh, 277 N.C. 709, 178 S.E.2d 422 (1971); Keiger v. Winston-Salem Bd. of Adjustment, 278 N.C. 17, 178 S.E.2d 616 (1971); Blackwell v. Butts, 278 N.C. 615, 180 S.E.2d 835 (1971); State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971); Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971); Nationwide Mut. Ins. Co. v. Fireman's Fund Ins. Co., 279 N.C. 240, 182 S.E.2d 571 (1971); Brewer v. Harris, 279 N.C. 288, 182 S.E.2d 345 (1971); State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Hunter, 279 N.C. 498, 183 S.E.2d 665 (1971); First-Citizens Bank & Trust Co. v. Carr, 279 N.C. 539, 184 S.E.2d 268 (1971); Pleasant v. Motors Ins. Co., 280 N.C. 100, 185 S.E.2d 164 (1971); State v. Jackson, 280 N.C. 122, 185 S.E.2d 202 (1971); State v. Speights, 280 N.C. 137, 185 S.E.2d 152 (1971); State v. McCluney, 280 N.C. 404, 185 S.E.2d 870 (1972); State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972); In re Tew, 280 N.C. 612, 187 S.E.2d 13 (1972); State v. Greenwood, 280 N.C. 651, 187 S.E.2d 8 (1972); Willis v. J.M. Davis Indus., Inc., 280 N.C. 709, 186 S.E.2d 913 (1972); State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972); Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972); State v. Ford, 281 N.C. 62, 187 S.E.2d 741 (1972); State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108, 187 S.E.2d 747 (1972); State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972); EAC Credit Corp. v. Wilson, 281 N.C. 140, 187 S.E.2d 752 (1972); Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972); Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972); Investment Properties of Asheville, Inc. v. Norburn, 281 N.C. 191, 188 S.E.2d 342 (1972); Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972); State v. Accor, 281 N.C. 287, 188 S.E.2d 332 (1972); Stevenson v. City of Durham, 281 N.C. 300, 188 S.E.2d 281 (1972); Calloway v. Ford Motor Co., 281 N.C. 496, 189 S.E.2d 484 (1972); Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972); State v. Brown, 282 N.C. 117, 191 S.E.2d 659 (1972); State v. Killian, 282 N.C. 138, 191 S.E.2d 699 (1972); State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972); Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972); State v. Russell, 282 N.C. 240, 192 S.E.2d 294 (1972); Variety Theatres, Inc. v. Cleveland County, 282 N.C. 272, 192 S.E.2d 290 (1972); Braswell v. Purser, 282 N.C. 388, 193 S.E.2d 90 (1972); State ex rel. Utils. Comm'n v. City of Durham, 16 N.C. App. 69, 190 S.E.2d 851 (1972); Hoots v. Calaway, 282 N.C. 477, 193 S.E.2d 709 (1973); State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973); Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973); State ex rel. Utils. Comm'n v. J.D. McCotter, Inc., 283 N.C. 104, 194 S.E.2d 859 (1973); State v. Cameron, 283 N.C. 191, 195 S.E.2d 481 (1973); State v. Streeter, 283 N.C. 203, 195 S.E.2d 502 (1973); State v. Fredell, 283 N.C. 242, 195 S.E.2d 300 (1973); Investment Properties of Asheville, Inc. v. Allen, 283 N.C. 277, 196 S.E.2d 262 (1973); Tennessee Carolina Transp., Inc. v. Strick Corp., 283 N.C. 423, 196 S.E.2d 711 (1973); Anderson v. Butler, 284 N.C. 723, 202 S.E.2d 585 (1974); State v. Horn, 285 N.C. 82, 203 S.E.2d 36 (1974); State v. Heard, 285 N.C. 167, 203 S.E.2d 826 (1974); Sanders v. Wilkerson, 285 N.C. 215, 204 S.E.2d 17 (1974); State v. Castor, 285 N.C. 286, 204 S.E.2d 848 (1974); State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974); State v. Austin, 285 N.C. 364, 204 S.E.2d 675 (1974); Smith v. Keator, 285 N.C. 530, 206 S.E.2d 203 (1974); Robertson v. Stanley, 285 N.C. 561, 206 S.E.2d 190 (1974); State v. Luther, 285 N.C. 570, 206 S.E.2d 238 (1974); Spartan Leasing, Inc. v. Brown, 285 N.C. 689, 208 S.E.2d 649 (1974); Estate of Loftin v. Loftin, 285 N.C. 717, 208 S.E.2d 670 (1974); Little v. Rose, 285 N.C. 724, 208 S.E.2d 666 (1974); Zimmerman v. Hogg & Allen, 286 N.C. 24, 209 S.E.2d 795 (1974); Rhodes v. Hogg & Allen, 286 N.C. 40, 209 S.E.2d 794 (1974); State v. Crews, 286 N.C. 41, 209 S.E.2d 462 (1974); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); State v. Edwards, 286 N.C. 162, 209 S.E.2d 758 (1974); State v. Black, 286 N.C. 191, 209 S.E.2d 458 (1974); Heath v. Mosley, 286 N.C. 197, 209 S.E.2d 740 (1974); State v. Lindley, 286 N.C. 255, 210 S.E.2d 207 (1974); Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975); State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Admin. Office, 287 N.C. 192, 214 S.E.2d 98 (1975); State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975); Hinson v. Jefferson, 287 N.C. 422, 215 S.E.2d 102 (1975); State v. Jackson, 287 N.C. 470, 215 S.E.2d 123 (1975); State v. Pope, 287 N.C. 505, 215 S.E.2d 139 (1975); State v. Brown, 287 N.C. 523, 215 S.E.2d 150 (1975); Rape v. Lyerly, 287 N.C. 601, 215 S.E.2d 737 (1975); Tucker v. Tucker, 288 N.C. 81, 216 S.E.2d 1 (1975); Thompson v. Thompson, 288 N.C. 120, 215 S.E.2d 606 (1975); Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975); State v. McCotter, 288 N.C. 227, 217 S.E.2d 525 (1975); Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975); Canady v. Creech, 288 N.C. 354, 218 S.E.2d 383 (1975); Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975); Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975); Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975); Adder v. Holman & Moody, Inc., 288 N.C. 484, 219 S.E.2d 190 (1975); State v. Scott, 289 N.C. 712, 224 S.E.2d 185 (1976); State v. Rhodes, 290 N.C. 16, 224 S.E.2d 631 (1976); Cogdill v. Scates, 290 N.C. 31, 224 S.E.2d 604 (1976); State v. Wright, 290 N.C. 45, 224 S.E.2d 624 (1976); State v. Atwood, 290 N.C. 266, 225 S.E.2d 543 (1976); Watkins v. City of Wilmington, 290 N.C. 276, 225 S.E.2d 577 (1976); Rickenbaker v. Rickenbaker, 290 N.C. 373, 226 S.E.2d 347 (1976); Nantz v. Employment Sec. Comm'n, 290 N.C. 473, 226 S.E.2d 340 (1976); Crumpton v. Crumpton, 290 N.C. 651, 227 S.E.2d 587 (1976); Brock v. North Carolina Property Tax Comm'n, 290 N.C. 731, 228 S.E.2d 254 (1976); State v. Finney, 290 N.C. 755, 228 S.E.2d 433 (1976); State v. Asbury, 291 N.C. 164, 229 S.E.2d 175 (1976); State v. Sauls, 291 N.C. 253, 230 S.E.2d 390 (1976); State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976); State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 361, 230 S.E.2d 671 (1976); State v. Castor, 28 N.C. App. 336, 220 S.E.2d 819 (1976); Manganello v. Permastone, Inc., 291 N.C. 666, 231 S.E.2d 678 (1977); State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Admin. Office, 292 N.C. 1, 231 S.E.2d 867 (1977); State v. McKenzie, 292 N.C. 170, 232 S.E.2d 424 (1977); Foremost Ins. Co. v. Ingram, 292 N.C. 244, 232 S.E.2d 414 (1977); State v. Thomas, 292 N.C. 251, 232 S.E.2d 411 (1977); State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977); State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977); Gallimore v. Marilyn's Shoes, 292 N.C. 399, 233 S.E.2d 529 (1977); Thompson v. Wake County Bd. of Educ., 292 N.C. 406, 233 S.E.2d 538 (1977); Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977); Farmer v. Chaney, 292 N.C. 451, 233 S.E.2d 582 (1977); State v. Gainey, 292 N.C. 627, 234 S.E.2d 610 (1977); Etheridge v. Peters, 301 N.C. 76, 269 S.E.2d 133 (1980); Morrison v. Burlington Indus., 301 N.C. 226, 271 S.E.2d 364 (1980); State v. Maher, 305 N.C. 544, 290 S.E.2d 694 (1982); State v. 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North Carolina Dep't of Agric., 349 N.C. 656, 509 S.E.2d 165 (1998); State v. Malette, 350 N.C. 52, 509 S.E.2d 776 (1999); Marcus Bros. Textiles v. Price Waterhouse, 350 N.C. 214, 513 S.E.2d 320 (1999); Beechridge Dev. Co. v. Dahners, 350 N.C. 583, 516 S.E.2d 592 (1999); State v. Mackey, 352 N.C. 650, 535 S.E.2d 555, 2000 N.C. LEXIS 751 (2000); Martishius v. Carolco Studios, Inc., 355 N.C. 465, 562 S.E.2d 887, 2002 N.C. LEXIS 428 (2002); State v. Hearst, 356 N.C. 132, 567 S.E.2d 124, 2002 N.C. LEXIS 679 (2002); Augur v. Augur, 356 N.C. 582, 573 S.E.2d 125, 2002 N.C. LEXIS 1262 (2002); Owenby v. Young, 357 N.C. 142, 579 S.E.2d 264, 2003 N.C. LEXIS 427 (2003); Dockery v. Hocutt, 357 N.C. 210, 581 S.E.2d 431, 2003 N.C. LEXIS 596 (2003); Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41, 2003 N.C. LEXIS 605 (2003), cert. denied, 540 U.S. 1177, 124 S. Ct. 1407, 158 L. Ed. 2d 78 (2004); Holley v. ACTS, Inc., 357 N.C. 228, 581 S.E.2d 750, 2003 N.C. LEXIS 606 (2003); Shipman v. Shipman, 357 N.C. 471, 586 S.E.2d 250, 2003 N.C. LEXIS 1103 (2003); Summey v. Barker, 357 N.C. 492, 586 S.E.2d 247, 2003 N.C. LEXIS 1105 (2003); Brewer v. Cabarrus Plastics, Inc., 160 N.C. App. 688, 586 S.E.2d 819, 2003 N.C. App. LEXIS 1924 (2003); In re Stumbo, 357 N.C. 279, 582 S.E.2d 255, 2003 N.C. LEXIS 747 (2003); In re May, 357 N.C. 423, 584 S.E.2d 271, 2003 N.C. LEXIS 833 (2003); Lange v. Lange, 357 N.C. 645, 588 S.E.2d 877, 2003 N.C. LEXIS 1419 (2003); State v. Hooper, 358 N.C. 122, 591 S.E.2d 514, 2004 N.C. LEXIS 12 (2004); Locust v. Pitt County Mem'l Hosp., Inc., 358 N.C. 113, 591 S.E.2d 543, 2004 N.C. LEXIS 20 (2004); Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004); Watkins v. N.C. State Bd. of Dental Exam'rs, 358 N.C. 190, 593 S.E.2d 764 (2004); Holcomb v. Colonial Assocs., L.L.C., 358 N.C. 501, 597 S.E.2d 710, 2004 N.C. LEXIS 670 (2004); State v. Weaver, 359 N.C. 246, 607 S.E.2d 599, 2005 N.C. LEXIS 30 (2005); In re Estate of Lunsford, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005); In re T.E.F., 359 N.C. 570, 614 S.E.2d 296, 2005 N.C. LEXIS 642 (2005); State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 359 N.C. 516, 614 S.E.2d 281, 2005 N.C. LEXIS 648 (2005); State v. Harris, 360 N.C. 145, 622 S.E.2d 615, 2005 N.C. LEXIS 1320 (2005); Newberne v. Dep't of Crime Control & Pub. Safety, 359 N.C. 782, 618 S.E.2d 201, 2005 N.C. LEXIS 835 (2005); McCutchen v. McCutchen, 360 N.C. 280, 624 S.E.2d 620, 2006 N.C. LEXIS 2 (2006); State v. Lawrence, 360 N.C. 368, 627 S.E.2d 609, 2006 N.C. LEXIS 30 (2006); In re T.R.P., 360 N.C. 588, 636 S.E.2d 787, 2006 N.C. LEXIS 1193 (2006); Patronelli v. Patronelli, 360 N.C. 628, 636 S.E.2d 559, 2006 N.C. LEXIS 1194 (2006); Chambers v. Transit Mgmt., 360 N.C. 609, 636 S.E.2d 553, 2006 N.C. LEXIS 1195 (2006); Misenheimer v. Burris, 360 N.C.

620, 637 S.E.2d 173, 2006 N.C. LEXIS 1196 (2006); State v. Hammett, 361 N.C. 92, 637 S.E.2d 518, 2006 N.C. LEXIS 1296 (2006); Frost v. Salter Path Fire & Rescue, 361 N.C. 181, 639 S.E.2d 429, 2007 N.C. LEXIS 35 (2007); Robins v. Town of Hillsborough, 361 N.C. 193, 639 S.E.2d 421, 2007 N.C. LEXIS 37 (2007); Bio-Medical Applications of N.C., Inc. v. N.C. HHS, 361 N.C. 229, 641 S.E.2d 303, 2007 N.C. LEXIS 218 (2007); Multiple Claimants v. N.C. HHS, Div. of Facility Servs., 361 N.C. 372, 646 S.E.2d 356, 2007 N.C. LEXIS 599 (2007).

II. CONSTITUTIONAL QUESTIONS.

The constitutional question must be real and substantial rather than superficial and frivolous. It must be a constitutional question which has not already been the subject of conclusive judicial determination. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968), cert. denied, 393 U.S. 1087, 89 S. Ct. 876, 21 L. Ed. 2d 780 (1969); Bundy v. Ayscue, 276 N.C. 81, 171 S.E.2d 1 (1969).

Dismissal Where Involvement of Substantial Constitutional Question Is Not Shown. — An appellant seeking a second review by the Supreme Court as a matter of right on the ground that a substantial constitutional question is involved must allege and show the involvement of such question or suffer dismissal. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968), cert. denied, 393 U.S. 1087, 89 S. Ct. 876, 21 L. Ed. 2d 780 (1969); Bundy v. Ayscue, 276 N.C. 81, 171 S.E.2d 1 (1969).

This section requires that an appellant must either allege and show the existence of a real and substantial constitutional question which has not already been the subject of conclusive judicial determination or suffer dismissal. Thompson v. Thompson, 288 N.C. 120, 215 S.E.2d 606 (1975).

Respondent's appeal based solely on the assertion that the district court's allowance of an amendment to a juvenile petition deprived him of a constitutional right was dismissed by the Supreme Court, ex mero motu, because it did not directly involve a substantial constitutional question within the meaning of this section. In re Jones, 279 N.C. 616, 184 S.E.2d 267 (1971).

Mouthing of Constitutional Phrases Will Not Avoid Dismissal. — Mere mouthing of constitutional phrases like "due process of law" and "equal protection of the law" will not avoid dismissal. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968), cert. denied, 393 U.S. 1087, 89 S. Ct. 876, 21 L. Ed. 2d 780 (1969); Bundy v. Ayscue, 276 N.C. 81, 171 S.E.2d 1 (1969).

Question Should Be Raised and Passed on in Trial Court. — Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. State v. Mitchell, 276 N.C. 404, 172 S.E.2d 527 (1970); State v. Cumber, 280 N.C. 127, 185 S.E.2d 141 (1971).

And Preserved by Appropriate Objection, Assignment of Error and Argument in Brief. — The Supreme Court will not pass upon the merits of a litigant's contention that his constitutional right has been violated by a ruling or order of a lower court, unless, at the time the alleged violation of such right occurred or was threatened by a proposed procedure, ruling or offer of evidence, or at the earliest opportunity thereafter, the litigant made an appropriate objection, exception or motion and thereafter preserved the constitutional question at each level of appellate review by an appropriate assignment of error and by argument in his brief. State v. Mitchell, 276 N.C. 404, 172 S.E.2d 527 (1970).

Consideration of Other Matters. — Once involvement of a substantial constitutional question is established, the Supreme Court will retain the case and may, in its discretion, pass upon any or all assignments of error, constitutional or otherwise, allegedly committed by the Court of Appeals and properly presented for review. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968), cert. denied, 393 U.S. 1087, 89 S. Ct. 876, 21 L. Ed. 2d 780 (1969); Bundy v. Ayscue, 276 N.C. 81, 171 S.E.2d 1 (1969).

III. DISSENT.

Legislative Intent. — The General Assembly intended to insure a review by the Supreme Court of questions on which there was a division in the intermediate appellate court; no such review was intended for claims joined or consolidated in the lower appellate court and on which that court rendered unanimous decision. Hendrix v. Alsop, 278 N.C. 549, 180 S.E.2d 802 (1971); State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972); State v. Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982); State v. Hooper, 318 N.C. 680, 351 S.E.2d 286 (1987).

Dissent Allows Appeal as a Matter of Right. — The aggrieved party, whether the State or the defendant, may appeal to the Supreme Court as of right from any decision of the Court of Appeals in which there is a dissent. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972).

Supreme Court of North Carolina found that it could hear an appeal from a decision of the Court of Appeals of North Carolina that a defendant be resentenced because G.S. 7A-30(2) provided the state with an appeal of right as there was a dissent in the Court of Appeals. State v. Norris, 360 N.C. 507, 630 S.E.2d 915, 2006 N.C. LEXIS 592 (2006).

Concurring Opinions Labelled as Dissents. — Plaintiff had no right of appeal pursuant to subdivision (2) of this section, although two concurring opinions were labelled as dissents, where all three judges of the Court of Appeals agreed that the plaintiff's complaint and summonses should be dismissed, though for different reasons. Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

Issues on Appeal Under Subdivision (2). — When an appeal is taken pursuant to subdivision (2) of this section, the only issues properly before the court are those on which the dissenting judge in the Court of Appeals based his dissent. Clifford v. River Bend Plantation, Inc., 312 N.C. 460, 323 S.E.2d 23 (1984); State v. Hooper, 318 N.C. 680, 351 S.E.2d 286 (1987); Steingress v. Steingress, 350 N.C. 64, 511 S.E.2d 298 (1999).

On appeal to the Supreme Court pursuant to subdivision (2) of this section by defendant from a decision of the Court of Appeals, one judge dissenting, in which a majority of the panel found no error in defendant's convictions, where the dissenting judge disagreed only with the majority's treatment of the second question presented to that court, and where defendant did not petition the Supreme Court for discretionary review of the other questions, only the second question was properly before the Supreme Court for review, notwithstanding defendant's attempt to bring forward other questions in his brief. State v. Reilly, 313 N.C. 499, 329 S.E.2d 381 (1985), considering, however, the additional question of the sufficiency of the evidence in order to prevent manifest injustice.

Under subdivision (2) of this section, only the issue raised in the dissent is properly before the Supreme Court for review. N.C.R.A.P., Rule 16 defines the permissible scope of review in such cases. Blumenthal v. Lynch, 315 N.C. 571, 340 S.E.2d 358 (1986), addressing, nevertheless, additional issues which arise frequently in the administration of estates, and must often be determined by the Department of Revenue under the Court's residual power or authority under N.C.R.A.P., Rule 2.

Waiver of Failure to Serve Notice of Appeal. — Failure to serve the notice of appeal is a defect in the record analogous to failure to serve process. Therefore, a party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal, and the Court of Appeals thus had jurisdiction and could consider the case on its merits. Hale v. Afro-American Arts Int'l, Inc., 335 N.C. 231, 436 S.E.2d 588 (1993).

§ 7A-31. Discretionary review by the Supreme Court.

(a) In any cause in which appeal is taken to the Court of Appeals, except a cause appealed from the North Carolina Industrial Commission, the North Carolina State Bar pursuant to G.S. 84-28, the Property Tax Commission pursuant to G.S. 105-345, the Board of State Contract Appeals pursuant to G.S. 143-135.9, or the Commissioner of Insurance pursuant to G.S. 58-2-80, or a motion for appropriate relief or valuation of exempt property pursuant to G.S. 7A-28, the Supreme Court may, in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals. A cause appealed to the Court of Appeals from any of the administrative bodies listed in the preceding sentence may be certified in similar fashion, but only after determination of the cause in the Court of Appeals. The effect of such certification is to transfer the cause from the Court of Appeals to the Supreme Court for review by the Supreme Court. If the cause is certified for transfer to the Supreme Court before its determination in the Court of Appeals, review is not had in the Court of Appeals but the cause is forthwith transferred for review in the first instance by the Supreme Court. If the cause is certified for transfer to the Supreme Court after its determination by the Court of Appeals, the Supreme Court reviews the decision of the Court of Appeals.

Except in motions within the purview of G.S. 7A-28, the State may move for certification for review of any criminal cause, but only after determination of the cause by the Court of Appeals.

(b) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court before determination of the cause by the Court of Appeals when in the opinion of the Supreme Court:

(1) The subject matter of the appeal has significant public interest, or

(2) The cause involves legal principles of major significance to the jurisprudence of the State, or

(3) Delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm, or

(4) The work load of the courts of the appellate division is such that the expeditious administration of justice requires certification.

(c) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court after determination of the cause by the Court of Appeals when in the opinion of the Supreme Court:

(1) The subject matter of the appeal has significant public interest, or

(2) The cause involves legal principles of major significance to the jurisprudence of the State, or

(3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

Interlocutory determinations by the Court of Appeals, including orders remanding the cause for a new trial or for other proceedings, shall be certified for review by the Supreme Court only upon a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm.

(d) The procedure for certification by the Supreme Court on its own motion, or upon petition of a party, shall be prescribed by rule of the Supreme Court. (1967, c. 108, s. 1; 1969, c. 1044; 1975, c. 555; 1977, c. 711, s. 5; 1981, c. 470, s. 2; 1981 (Reg. Sess., 1982), c. 1224, s. 17; c. 1253, s. 1; 1983, c. 526, s. 3; c. 761, s. 189.)

Cross References. — As to jurisdiction of the Supreme Court to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission, see N.C. Const., Art. IV, § 12(1).

Editor's Note. — The reference to G.S. 143-135.9 in subsection (a) of this section appears to be in error. G.S. 143-135.10 et seq., which were repealed by Session Laws 1987, c. 847, s. 5, related to the former Board of State Contract Appeals.

Legal Periodicals. — For note discussing the right to counsel on discretionary appeal, see 53 N.C.L. Rev. 560 (1974).

For 1984 survey of appellate procedure, "Appellate Rule 16(b) and New Requirements for Appeals of Rights," see 63 N.C.L. Rev. 1074 (1985).

For recent development: "'Deference Does Not by Definition Preclude Relief': The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals," see 84 N.C. L. Rev. 1328 (2006).

CASE NOTES

Scope of Review. — When the Supreme Court, after a decision of a cause by the Court of Appeals and pursuant to the petition of a party thereto as authorized by this section, grants certiorari to review the decision of the Court of Appeals, only the decision of the Court of Appeals is before the Supreme Court for review. The Supreme Court inquires into proceedings in the trial court solely to determine the correctness of the decision of the Court of Appeals. Its inquiry is restricted to rulings of the Court of Appeals which are assigned as error in the petition for certiorari and which are preserved by arguments or the citation of authorities with reference thereto in the brief filed by the petitioner in the Supreme Court, except in those instances in which the Supreme Court elects to exercise its general power of supervision of courts inferior to the Supreme Court. Supreme Court review of a decision by the Court of Appeals upon an appeal from it to the Supreme Court as a matter of right, pursuant to G.S. 7A-30, is similarly limited. State v. Williams, 274 N.C. 328, 163 S.E.2d 353 (1968); Peaseley v. Virginia Iron, Coal & Coke Co., 282 N.C. 585, 194 S.E.2d 133 (1973); State v. Miller, 282 N.C. 633, 194 S.E.2d 353 (1973).

The Supreme Court reviews the decision of the Court of Appeals for errors of law allegedly committed by it and properly brought forward for review. State v. Parrish, 275 N.C. 69, 165 S.E.2d 230 (1969); State v. Miller, 282 N.C. 633, 194 S.E.2d 353 (1973).

The Supreme Court may review the entire proceedings and consider any errors which have occurred during the course of the litigation, provided that the parties have taken the proper steps to preserve the questions for appellate review. Spartan Leasing, Inc. v. Brown, 285 N.C. 689, 208 S.E.2d 649 (1974).

When the Supreme Court grants certiorari pursuant to this section, review is ordinarily restricted to the rulings of the Court of Appeals which are assigned as error in the petition for

certiorari and brought forward in petitioner's brief. State v. Muse, 280 N.C. 31, 185 S.E.2d 214 (1971), cert. denied, 406 U.S. 974, 92 S. Ct. 2409, 32 L. Ed. 2d 674, rehearing denied, 409 U.S. 898, 93 S. Ct. 99, 34 L. Ed. 2d 157 (1972); Peaseley v. Virginia Iron, Coal & Coke Co., 282 N.C. 585, 194 S.E.2d 133 (1973).

Jurisdiction Proper. — Statute could not have restricted the Supreme Court of North Carolina's constitutional authority under N.C. Const., Art. IV, § 12(1) to exercise jurisdiction to review upon appeal any decision of the courts below, and as such, the Supreme Court of North Carolina did not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice, and did so to consider questions that were not properly presented according to its rules; this exercise of supervisory authority was particularly appropriate when prompt and definitive resolution of an issue was necessary to ensure the uniform administration of North Carolina's criminal statutes. State v. Ellis, 361 N.C. 200, 639 S.E.2d 425, 2007 N.C. LEXIS 38 (2007).

Departure from General Rule. — In a criminal case in which the State petitioned for certiorari and the Court of Appeals ruled on only one of defendant's assignments of error in granting a new trial, the Supreme Court elected to depart from the general rule that review under this section is ordinarily restricted to the rulings of the Court of Appeals which are assigned as error, and to consider the remaining assignments of error not considered by the Court of Appeals. State v. Muse, 280 N.C. 31, 185 S.E.2d 214 (1971), cert. denied, 406 U.S. 974, 92 S. Ct. 2409, 32 L. Ed. 2d 674, rehearing denied, 409 U.S. 898, 93 S. Ct. 99, 34 L. Ed. 2d 157 (1972).

Improvidently Allowed. — Discretionary review, pursuant to G.S. 7A-31, of three protective orders was improvidently allowed; under N.C. R. App. P. 15(b), a husband's petition for review of those orders was not timely filed. Davis v. Davis, 360 N.C. 518, 631 S.E.2d 114, 2006 N.C. LEXIS 593 (2006).

Under this section the Supreme Court is to review only those cases of substantial general or legal importance or in which review is necessary to preserve the integrity of precedent established by the Supreme Court. Peaseley v. Virginia Iron, Coal & Coke Co., 282 N.C. 585, 194 S.E.2d 133 (1973).

Constitutional Questions. — The Supreme Court will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was timely raised and passed upon in the trial court if it could have been, or in the Court of Appeals if the question arose after trial. State v. Parrish, 275 N.C. 69, 165 S.E.2d 230 (1969).

The failure of plaintiff to petition for a writ of certiorari to review the interlocutory decree of the Court of Appeals does not preclude the Supreme Court from granting certiorari after final judgment and thereupon considering and rectifying any errors which occurred at any stage of the proceedings. Spartan Leasing, Inc. v. Brown, 285 N.C. 689, 208 S.E.2d 649 (1974).

The denial of a writ of certiorari imports no expression of opinion upon the merits of the case and such denial does not mean that the Supreme Court has determined that the decision of the Court of Appeals is correct. Denial may simply mean that in the opinion of the Supreme Court the case does not require further review under the provisions of this section. Peaseley v. Virginia Iron, Coal & Coke Co., 282 N.C. 585, 194 S.E.2d 133 (1973).

G.S. 7A-451 Does Not Give Indigent Right to Counsel. — An indigent is entitled to have a lawyer at his trial, and for direct review of that trial, but G.S. 7A-451 is not intended to cover the discretionary power of the North Carolina Supreme Court to grant a writ of certiorari under this section. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

And Equal Protection Clause Does Not Require Free Counsel for Discretionary Appeals. — The equal protection clause does not require North Carolina to provide free counsel for indigent defendants seeking to take discretionary appeals to the North Carolina Supreme Court or to file petitions for certiorari to that court. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

The duty of the State is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

A defendant is not denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking discretionary review in that court. At that stage he will have a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and often an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make pro se, would appear to provide the Supreme Court with an adequate basis on which to base its decision to grant or deny review. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

Equally Divided Court. — Where one member of the Supreme Court does not participate in the consideration or decision of a case, and the remaining six justices are equally divided as to whether the decision of the Court of Appeals should be affirmed or reversed, the decision of the Court of Appeals is affirmed without becoming a precedent. Greenhill v. Crabtree, 301 N.C. 520, 271 S.E.2d 908 (1980); Wayfaring Home, Inc. v. Ward, 301 N.C. 518, 272 S.E.2d 121 (1980).

Exhaustion Requirement in Federal Habeas Corpus. — The fact that the respondent in an appeal from the order of a United States magistrate dismissing a claim for habeas corpus relief incorrectly pleaded that the appellant had exhausted his state court remedies and was entitled to adjudication on the merits was neither conclusive nor a waiver of the exhaustion requirement by the State. Strader v. Allsbrook, 656 F.2d 67 (4th Cir. 1981).

Substantially Similar Rules and Procedures. — The rules and procedures of the North Carolina Supreme Court regarding writs of certiorari are substantially similar to those of the United States Supreme Court. Felton v. Barnett, 912 F.2d 92 (4th Cir. 1990), cert. denied, 498 U.S. 1032, 111 S. Ct. 693, 112 L. Ed. 2d 683, 502 U.S. 1007, 112 S. Ct. 644, 116 L. Ed. 2d 661 (1991).

Discretionary Review Granted. — Supreme Court took discretionary review of three issues in a criminal appeal of a rape conviction that was affirmed by the Court of Appeals; finding error in two of those issues regarding admission of hearsay evidence that affected whether the defendant committed first or second degree rape, the court reversed the conviction and remanded for a new trial. State v. Finney, 358 N.C. 79, 591 S.E.2d 863, 2004 N.C. LEXIS 10 (2004).

Applied in State v. Horton, 275 N.C. 651, 170 S.E.2d 466 (1969); State v. McBane, 276 N.C. 60, 170 S.E.2d 913 (1969); State v. Jennings, 276 N.C. 157, 171 S.E.2d 447 (1970); Whitley v. Redden, 276 N.C. 263, 171 S.E.2d 894 (1970); Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1 (1970); King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970); Smith v. Mercer, 276 N.C. 329, 172 S.E.2d 489 (1970); State v. Riera, 276 N.C. 361, 172 S.E.2d 535 (1970); Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970); State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970); Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970); Home Sec. Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970); Whitney Stores, Inc. v. Clark, 277 N.C. 322, 177 S.E.2d 418 (1970); Mansour v. Rabil, 277 N.C. 364, 177 S.E.2d 849 (1970); State v. McVay, 277 N.C. 410, 177 S.E.2d 874 (1970); In re Ellis, 277 N.C. 419, 178 S.E.2d 77 (1970); State v. Harris, 277 N.C. 435, 177 S.E.2d 865 (1970); State Keg, Inc. v. State Bd. of Alcoholic Control, 277 N.C. 450, 177 S.E.2d 861 (1970); Styers v. Phillips, 277 N.C. 460, 178 S.E.2d 583 (1971); State v. Crump, 277 N.C. 573, 178 S.E.2d 366 (1971); Stegall v. Housing Auth., 278 N.C. 95, 178 S.E.2d 824 (1971); State v. Brooks, 279 N.C. 45, 181 S.E.2d 553 (1971); Strickland v. Powell, 279 N.C. 183, 181 S.E.2d 464 (1971); Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971); Wachovia Bank & Trust Co. v. Morgan, 279 N.C. 265, 182 S.E.2d 356 (1971); Mutual Sav. & Loan Ass'n v. Lanier, 279 N.C. 299, 182 S.E.2d 368 (1971); Cogdill v. North Carolina State Hwy. Comm'n, 279 N.C. 313, 182 S.E.2d 373 (1971); Dr. T.C. Smith Co. v. North Carolina State Hwy. Comm'n, 279 N.C. 328, 182 S.E.2d 383 (1971); State v. Allred, 279 N.C. 398, 183 S.E.2d 553 (1971); State v. Moore, 279 N.C. 455, 183 S.E.2d 546 (1971); State v. Fields, 279 N.C. 460, 183 S.E.2d 666 (1971); State v. Battle, 279 N.C. 484, 183 S.E.2d 641 (1971); State v. Allen, 279 N.C. 492, 183 S.E.2d 659 (1971); State v. Roberts, 279 N.C. 500, 183 S.E.2d 647 (1971); State v. Smith, 279 N.C. 505, 183 S.E.2d 649 (1971); State v. Collins, 279 N.C. 508, 183 S.E.2d 549 (1971); State v. Carnes, 279 N.C. 549, 184 S.E.2d 235 (1971); State v. Gladden, 279 N.C. 566, 184 S.E.2d 249 (1971); Steelman v. City of New Bern, 279 N.C. 589, 184 S.E.2d 239 (1971); State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971); State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971); State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971); State v. Rummage, 280 N.C. 51, 185 S.E.2d 221 (1971); State v. Jones, 280 N.C. 60, 184 S.E.2d 862 (1971); State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971); Sutton v. Figgatt, 280 N.C. 89, 185 S.E.2d 97 (1971); Wiggins v. Bunch, 280 N.C. 106, 184 S.E.2d 879 (1971); State v. Burleson, 280 N.C. 112, 184 S.E.2d 869 (1971); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971); State v. Williams, 280 N.C. 132, 184 S.E.2d 875 (1971); State v. Tart, 280 N.C. 172, 184 S.E.2d 842 (1971); State v. Allison, 280 N.C. 175, 184 S.E.2d 857 (1971); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Jones, 280 N.C. 322, 185 S.E.2d 858 (1972); State v. Gainey, 280 N.C. 366, 185 S.E.2d 874 (1972); State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972); State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972); Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972); State v. Jackson, 280 N.C. 563, 187 S.E.2d 27 (1972); Hall v. Wake County Bd. of Elections, 280 N.C. 600, 187 S.E.2d 52 (1972); Adams-Millis Corp. v. Town of Kernersville, 281 N.C. 147, 187 S.E.2d 704 (1972); City of Kings Mountain v. Cline, 281 N.C. 269, 188 S.E.2d 284 (1972); In re Strong Tire Serv., Inc., 281 N.C. 293, 188 S.E.2d 306 (1972); State v. McIntyre, 281 N.C. 304, 188 S.E.2d 304 (1972); Allgood v. Town of Tarboro, 281 N.C. 430, 189 S.E.2d 255 (1972); North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272

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Hope, 314 N.C. 112, 331 S.E.2d 122 (1985); In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985); State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986); State v. Miller, 315 N.C. 773, 340 S.E.2d 290 (1986); Leonard v. Johns-Manville Sales Corp., 316 N.C. 84, 340 S.E.2d 338 (1986); City of Winston-Salem v. Cooper, 315 N.C. 702, 340 S.E.2d 366 (1986); State v. Moore, 315 N.C. 738, 340 S.E.2d 401 (1986); State v. Riddick, 316 N.C. 127, 340 S.E.2d 422 (1986); Henry v. Edmisten, 315 N.C. 474, 340 S.E.2d 720 (1986); Beasley v. National Sav. Life Ins. Co., 316 N.C. 372, 341 S.E.2d 338 (1986); State v. Parker, 316 N.C. 295, 341 S.E.2d 555 (1986); Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986); Servomation Corp. v. Hickory Constr. Co., 316 N.C. 543, 342 S.E.2d 853 (1986); Marks v. Marks, 316 N.C. 447, 342 S.E.2d 859 (1986); Maffei v. Alert Cable TV of N.C., Inc., 316 N.C. 615, 342 S.E.2d 867 (1986); Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 348 S.E.2d 782 (1986); Daniels v. Montgomery Mut. Ins. Co., 320 N.C. 669, 360 S.E.2d 772 (1987); Lawson v. Lawson, 321 N.C. 274, 362 S.E.2d 269 (1987); Abernathy v. Consolidated Freightways, Corp., 321 N.C. 236, 362 S.E.2d 559 (1987); Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988); Josey v. Employment Sec. Comm'n, 322 N.C. 295, 367 S.E.2d 675 (1988); State ex rel. Rohrer v. Credle, 322 N.C. 522, 369 S.E.2d 825 (1988); Chrismon v. Guilford County, 322 N.C. 611, 370 S.E.2d 579 (1988); State v. Hayes, 323 N.C. 306, 372 S.E.2d 704 (1988); State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988); State v. Alston, 323 N.C. 614, 374 S.E.2d 247 (1988); Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 374 S.E.2d 385 (1988); Turlington v. McLeod, 323 N.C. 591, 374 S.E.2d 394 (1988); Lea Co. v. North Carolina Bd. of Transp., 323 N.C. 697, 374 S.E.2d 866 (1989); State ex rel. Rhodes v. Simpson, 325 N.C. 514, 385 S.E.2d 329 (1989); State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989); Kiser v. Kiser, 325 N.C. 502, 385 S.E.2d 487 (1989); North Carolina State Bar v. Randolph, 325 N.C. 699, 386 S.E.2d 185 (1989); Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 388 S.E.2d 134 (1990); State v. Wise, 326 N.C. 476, 390 S.E.2d 142 (1990); McNeill v. Harnett County, 327 N.C. 552, 398 S.E.2d 475 (1990); State v. Nobles, 329 N.C. 239, 404 S.E.2d 668 (1991); State v. Rainey, 331 N.C. 259, 415 S.E.2d 337 (1992); Holloway v. Wachovia Bank & Trust Co., 333 N.C. 94, 423 S.E.2d 752 (1992); Wireways, Inc. v. Mitek Indus., Inc., 333 N.C. 253, 424 S.E.2d 384 (1993); Brantley v. Starling, 336 N.C. 567, 444 S.E.2d 170 (1994); State v. Farris, 336 N.C. 552, 444 S.E.2d 182 (1994); Forsyth Mem. Hosp. v. Armstrong World Indus., Inc., 336 N.C. 438, 444 S.E.2d 423 (1994); DOT v. Overton, 336 N.C. 598, 444 S.E.2d 448 (1994); State v. McCarroll, 336 N.C. 559, 445 S.E.2d 18 (1994); Hales v. North Carolina Ins. Guar. Ass'n, 337 N.C. 329, 445 S.E.2d 590 (1994); Nissan Div. of Nissan Motor Corp. in United States v. Fred Anderson Nissan, 337 N.C. 424, 445 S.E.2d 600 (1994); In re Ward, 337 N.C. 443, 446 S.E.2d 40 (1994); State v. Horn, 337 N.C. 449, 446 S.E.2d 52 (1994); Hickman ex rel. Womble v. McKoin, 337 N.C. 460, 446 S.E.2d 80 (1994); Moss v. J.C. Bradford & Co., 337 N.C. 315, 446 S.E.2d 799 (1994); Ragan v. Hill, 337 N.C. 667, 447 S.E.2d 371 (1994); Brown v. O'Toole, 337 N.C. 686, 447 S.E.2d 381 (1994); Hargett v. Holland, 337 N.C. 651, 447 S.E.2d 784 (1994); Bowden v. Latta, 337 N.C. 794, 448 S.E.2d 503 (1994); Best v. Duke Univ., 337 N.C. 742, 448 S.E.2d 506 (1994); State v. Hauser, 342 N.C. 382, 464 S.E.2d 443 (1995); State v. Marr, 342 N.C. 607, 467 S.E.2d 236 (1996); Associated Mechanical Contractors v. Payne, 342 N.C. 825, 467 S.E.2d 398 (1996); Maready v. City of Winston-Salem, 342 N.C. 708, 467 S.E.2d 615 (1996); Crowell Constructors, Inc. v. State, 342 N.C. 838, 467 S.E.2d 675 (1996); State v. Dellinger, 343 N.C. 93, 468 S.E.2d 218 (1996); Edward Valves, Inc. v. Wake County, 343 N.C. 426, 471 S.E.2d 342 (1996), cert. denied, 519 U.S. 1112, 117 S. Ct. 952, 136 L. Ed. 2d 839 (1997); Collins v. North Carolina Parole Comm'n, 344 N.C. 179, 473 S.E.2d 1 (1996); State v. Barnes, 345 N.C. 146, 478 S.E.2d 188 (1996); Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997); Tise v. Yates Constr. Co., 345 N.C. 456, 480 S.E.2d 677 (1997); State v. Rogers, 346 N.C. 262, 485 S.E.2d 619 (1997); State v. Smith, 346 N.C. 794, 488 S.E.2d 210 (1997); Leahy v. North Carolina Bd. of Nursing, 346 N.C. 775, 488 S.E.2d 245 (1997); Krauss v. Wayne County Dep't of Social Servs., 347 N.C. 371, 493 S.E.2d 428 (1997); Whitfield v. Gilchrist, 348 N.C. 39, 497 S.E.2d 412 (1998); State v. Pearson, 348 N.C. 272, 498 S.E.2d 599 (1998); Poole v. Copland, Inc., 348 N.C. 260, 498 S.E.2d 602 (1998); City of Charlotte v. Cook, 348 N.C. 222, 498 S.E.2d 605 (1998); Elliott v. North Carolina Psychology Bd., 348 N.C. 230, 498 S.E.2d 616 (1998); Farmah v. Farmah, 348 N.C. 586, 500 S.E.2d 662 (1998); Briley v. Farabow, 348 N.C. 537, 501 S.E.2d 649 (1998); Bethania Town Lot Comm. v. City of Winston-Salem, 348 N.C. 664, 502 S.E.2d 360 (1998); State v. Helms, 348 N.C. 578, 504 S.E.2d 293 (1998); State v. Ruff, 349 N.C. 213, 505 S.E.2d 579 (1998); State v. Malette, 350 N.C. 52, 509 S.E.2d 776 (1999); Frye Regional Medical Ctr., Inc. v. Hunt, 350 N.C. 39, 510 S.E.2d 159 (1999); State v. Hayes, 350 N.C. 79, 511 S.E.2d 302 (1999); Parish v. Hill, 350 N.C. 231, 513 S.E.2d 547 (1999); Bailey v. North Carolina Dep't of Revenue, 353 N.C. 142, 540 S.E.2d 313, 2000 N.C. LEXIS 896 (2000); Craig v. County of Chatham, 356 N.C. 40, 565 S.E.2d 172, 2002 N.C. LEXIS 539 (2002); Morris Communs. Corp. v. City of Asheville, 356 N.C. 103, 565 S.E.2d 70, 2002 N.C. LEXIS 546 (2002); State v. Hearst, 356 N.C. 132, 567 S.E.2d 124, 2002 N.C. LEXIS 679 (2002); Deadwood, Inc. v. N.C. Dep't of Revenue, 356 N.C. 407, 572 S.E.2d 103, 2002 N.C. LEXIS 1114 (2002); N.C. State Bar v. Talford, 356 N.C. 626, 576 S.E.2d 305, 2003 N.C. LEXIS 38 (2003); Owenby v. Young, 357 N.C. 142, 579 S.E.2d 264, 2003 N.C. LEXIS 427 (2003); Williams v. Blue Cross Blue Shield, 357 N.C. 170, 581 S.E.2d 415, 2003 N.C. LEXIS 595 (2003); Whitaker v. Town of Scotland Neck, 357 N.C. 552, 597 S.E.2d 665, 2003 N.C. LEXIS 1263 (2003); In re Investigation of the Death of Miller, 357 N.C. 316, 584 S.E.2d 772, 2003 N.C. LEXIS 831 (2003); Whitacre P'ship v. BioSignia, Inc., 358 N.C. 1, 591 S.E.2d 870, 2004 N.C. LEXIS 16 (2004); N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888, 2004 N.C. LEXIS 909 (2004); Register v. White, 358 N.C. 691, 599 S.E.2d 549, 2004 N.C. LEXIS 916 (2004); State v. Bryant, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005); State v. Philip Morris USA Inc., 359 N.C. 763, 618 S.E.2d 219, 2005 N.C. LEXIS 834 (2005); State v. Jones, 359 N.C. 832, 616 S.E.2d 496, 2005 N.C. LEXIS 845 (2005); State v. Blackwell, 359 N.C. 814, 618 S.E.2d 213, 2005 N.C. LEXIS 846 (2005); In re Anderson, 360 N.C. 271, 624 S.E.2d 626, 2006 N.C. LEXIS 5 (2006); Diaz v. Div. of Soc. Servs., 360 N.C. 384, 628 S.E.2d 1, 2006 N.C. LEXIS 31 (2006); In re J.S.L., 177 N.C. App. 151, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006); In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006); Armstrong v. Ledges Homeowners Ass'n, 360 N.C. 547, 633 S.E.2d 78, 2006 N.C. LEXIS 845 (2006); State v. McKinney, 361 N.C. 53, 637 S.E.2d 868, 2006 N.C. LEXIS 1298 (2006); DOT v. M.M. Fowler, Inc., 361 N.C. 1, 637 S.E.2d 885, 2006 N.C. LEXIS 1299 (2006); State v. Hinton, 361 N.C. 207, 639 S.E.2d 437, 2007 N.C. LEXIS 33 (2007); State v. Lasiter, 361 N.C. 299, 643 S.E.2d 909, 2007 N.C. LEXIS 408 (2007); State v. Agnew, 361 N.C. 333, 643 S.E.2d 581, 2007 N.C. LEXIS 409 (2007); State v. Oglesby, 361 N.C. 550, 648 S.E.2d 819, 2007 N.C. LEXIS 812 (2007).

§ 7A-32. Power of Supreme Court and Court of Appeals to issue remedial writs.

(a) The Supreme Court and the Court of Appeals have jurisdiction, exercisable by any one of the justices or judges of the respective courts, to issue the writ of habeas corpus upon the application of any person described in G.S. 17-3, according to the practice and procedure provided therefor in chapter 17 of the General Statutes, and to rule of the Supreme Court.

(b) The Supreme Court has jurisdiction, exercisable by one justice or by such number of justices as the court may by rule provide, to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction or in exercise of its general power to supervise and control the proceedings of any of the other courts of the General Court of Justice. The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law.

(c) The Court of Appeals has jurisdiction, exercisable by one judge or by such number of judges as the Supreme Court may by rule provide, to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice, and of the Utilities Commission and the Industrial Commission. The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law. (1967, c. 108, s. 1.)

Legal Periodicals. — For 1984 survey, "Double Jeopardy and Substantial Rights in North Carolina Appeals," see 63 N.C.L. Rev. 1061 (1985).

For 1984 survey of appellate procedure, "Appellate Rule 16(b) and New Requirements for Appeals of Right," see 63 N.C.L. Rev. 1074 (1985).

CASE NOTES

The Court of Appeals is authorized to treat an appeal as a petition for a writ of certiorari in order to clarify its position. Jerson v. Jerson, 68 N.C. App. 738, 315 S.E.2d 522 (1984).

Appellate court could exercise its discretion to treat pro se defendant's appeal as a petition for certiorari and grant the writ to address the merits of defendant's appeal for speeding and failure to produce a driver's license where defendant failed to include in the record on appeal a copy of the district court judgment establishing the derivative jurisdiction of the superior court. State v. Phillips, 149 N.C. App. 310, 560 S.E.2d 852, 2002 N.C. App. LEXIS 185 (2002), appeal dismissed, 355 N.C. 499, 564 S.E.2d 230 (2002).

Although the State cannot appeal from a verdict of not guilty, it may seek a writ of mandamus to compel a trial court to set aside action taken in excess of its authority. State v. Surles, 55 N.C. App. 179, 284 S.E.2d 738 (1981), cert. denied, 305 N.C. 307, 290 S.E.2d 707 (1982).

The State's attempted appeal of a district court's action in setting aside guilty verdicts in a misdemeanor case entered by it five months previously and entering verdicts of not guilty would be treated as a petition for a writ of mandamus pursuant to subsection (c) of this section and N.C.R.A.P., Rule 22. State v. Surles, 55 N.C. App. 179, 284 S.E.2d 738 (1981), cert. denied, 305 N.C. 307, 290 S.E.2d 707 (1982).

Appeal by Trustees of Charitable Trust. — Although an appeal by the trustees of a charitable trust was subject to dismissal on the ground that there were no parties aggrieved by the order of the superior court modifying the trust, the Court of Appeals nonetheless could consider the appeal, in the exercise of its supervisory power, where the order would affect the interests of a substantial number of public and private hospitals in the State, as well as thousands of persons who would be hospitalized as charity patients. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970).

Exercise of Discretionary Duties by Public Official. — Neither mandamus nor a mandatory injunction may be issued to control the manner of a public official's exercise of a discretionary duty. White v. Pate, 58 N.C. App. 402, 293 S.E.2d 601 (1982), modified, 308 N.C. 759, 304 S.E.2d 199 (1983).

Review of Judicial Disciplinary Proceedings. — Under N.C. Const., Art. IV, § 12 and this section, the courts of the appellate division have power to review judicial disciplinary proceedings whether the attorney or the State has prevailed in the trial court. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Review of Attorney Disciplinary Proceedings. — Court of Appeals of North Carolina lacked jurisdiction to hear the State Bar of North Carolina's appeal of a grant of summary judgment to an attorney in a disciplinary proceeding because G.S. 84-28(h) provided no appeal from a final order that did not impose discipline, and in the instant case no discipline had been imposed; further, certiorari was inappropriate because the case did not fall within the rubric of N.C. R. App. P. 21(a)(1) and the court declined to suspend the requirement of Rule 21(a)(1) using N.C. R. App. P. 2. N.C. State Bar v. Rudisill, 159 N.C. App. 704, 583 S.E.2d 413, 2003 N.C. App. LEXIS 1527 (2003).

State Must Seek Review of Disciplinary Proceedings by Writ of Certiorari. — The State may seek review by the appellate division of proceedings disciplining attorneys under the judicial method. However, the State may not appeal in such cases as a matter of right, but must seek appellate review by petition for writ of certiorari. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Relief Where Issue Not Presented in Brief. — Plaintiff's failure to present and argue in its brief to the Court of Appeals the propriety of the trial court's judgment as to attorneys' fees precluded plaintiff from obtaining relief on this point in the Court of Appeals as a matter of right; however, the Court of Appeals, in the exercise of its general supervisory powers under subsection (c) of this section or pursuant to N.C.R.A.P., Rule 2, could consider on its own initiative the question of the attorneys' fees award and give relief as a matter of appellate grace. Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

Or When Counsel Fails to Follow Statutory Procedures. — Even though counsel employed by defendant failed to follow the statutory procedure for appealing to the Court of Appeals, because of the important issues raised by the appeal, defendant's petition for writ of certiorari, pursuant to G.S. 7A-32(c), and pursuant to N.C.R.A.P., Rule 21, was allowed. State v. Hamrick, 110 N.C. App. 60, 428 S.E.2d 830, appeal dismissed, cert. denied, 334

N.C. 436, 433 S.E.2d 181 (1993).

The authority of a superior court to grant a writ of certiorari pursuant to Gen. Rules Prac., Rule 19 in appropriate cases is analogous to the Court of Appeals' power to issue a writ of certiorari pursuant to G.S. 7A-32(c). State v. Hamrick, 110 N.C. App. 60, 428 S.E.2d 830, appeal dismissed, cert. denied, 334 N.C. 436, 433 S.E.2d 181 (1993).

No Final Order to Review. — Where the only orders which had been were orders entered by a claims examiner and by a deputy commissioner, no final order or award had been entered by the Industrial Commission itself, and thus, the Commission had taken no action for the Court of Appeals to review, and the issuance of a writ of certiorari was improper. Martin v. Piedmont Asphalt & Paving, 337 N.C. 785, 448 S.E.2d 380 (1994).

Water and sewer processing facilities part-owner's appeal of interlocutory orders of the North Carolina Utilities Commission holding that the part-owner was a public utility under G.S. 62-3(23)a.2 and was subject to the Commission's jurisdiction was dismissed as the absence of any exceptions to G.S. 62-90 or G.S. 7A-29, allowing review of interlocutory orders of the Commission, required the appellate court to conclude that it had no jurisdiction to consider appeals of interlocutory orders of the Commission; further, the appellate court did not have authority under subsection (c) of this section to review the part-owner's issues as there was no final order of the Commission. State ex rel. Utils. Comm'n v. Buck Island, Inc., 158 N.C. App. 536, 581 S.E.2d 122, 2003 N.C. App. LEXIS 1186 (2003).

Applied in City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972); Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975); State v. Strickland, 290 N.C. 169, 225 S.E.2d 531 (1976); In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976); Crumpton v. Crumpton, 290 N.C. 651, 227 S.E.2d 587 (1976); Ziglar v. E.I. Du Pont De Nemours & Co., 53 N.C. App. 147, 280 S.E.2d 510 (1981); Department of Social Servs. v. Johnson, 70 N.C. App. 383, 320 S.E.2d 301 (1984); Coleman v. Interstate Cas. Ins. Co., 84 N.C. App. 268, 352 S.E.2d 249 (1987); State v. Dudley, 319 N.C. 656, 356 S.E.2d 361 (1987); State v. Freeman, 319 N.C. 609, 356 S.E.2d 765 (1987); Mack v. Moore, 91 N.C. App. 478, 372 S.E.2d 314 (1988); Garris v. Garris, 92 N.C. App. 467, 374 S.E.2d 638 (1988); Phelps v. Phelps, 337 N.C. 344, 446 S.E.2d 17, rehearing denied, 337 N.C. 807, 449 S.E.2d 750 (1994); In re Robinson, 120 N.C. App. 874, 464 S.E.2d 86 (1995); Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999); Frost v. Mazda Motor of Am., 353 N.C. 188, 540 S.E.2d 324, 2000 N.C. LEXIS 903 (2000); Smith v. State Farm Mut. Auto. Ins. Co., 157 N.C. App. 596, 580 S.E.2d 46, 2003 N.C. App. LEXIS 933 (2003), cert. denied, 357 N.C. 507, 587 S.E.2d 674 (2003).

Cited in State v. Flynt, 8 N.C. App. 323, 174 S.E.2d 120 (1970); North Carolina Fire Ins. Rating Bureau v. Ingram, 29 N.C. App. 338, 224 S.E.2d 229 (1976); Waters v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978); Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979); Bailey v. Gooding, 301 N.C. 205, 270 S.E.2d 431 (1980); Industrotech Constructors, Inc. v. Duke Univ., 67 N.C. App. 741, 314 S.E.2d 272 (1984); Elks v. Hannan, 68 N.C. App. 757, 315 S.E.2d 553 (1984); Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 423 S.E.2d 312 (1992); Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993); State v. Gary, 348 N.C. 510, 501 S.E.2d 57 (1998); State v. Lee, 348 N.C. 474, 501 S.E.2d 334 (1998); Stem v. Richardson, 350 N.C. 76, 511 S.E.2d 1 (1999); State v. Goode, 350 N.C. 247, 512 S.E.2d 414 (1999); Robinson, Bradshaw & Hinson, P.A. v. Smith, 139 N.C. App. 1, 532 S.E.2d 815, 2000 N.C. App. LEXIS 812 (2000); In re Voight, 138 N.C. App. 542, 530 S.E.2d 76, 2000 N.C. App. LEXIS 624 (2000); Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co., 141 N.C. App. 569, 541 S.E.2d 157, 2000 N.C. App. LEXIS 1298 (2000), cert. denied, 353 N.C. 370, 547 S.E.2d 433 (2001); Gibson v. Mena, 144 N.C. App. 125, 548 S.E.2d 745, 2001 N.C. App. LEXIS 332 (2001); State v. Featherson, 145 N.C. App. 134, 548 S.E.2d 828, 2001 N.C. App. LEXIS 569 (2001); In re Braithwaite, 150 N.C. App. 434, 562 S.E.2d 897, 2002 N.C. App. LEXIS 486 (2002), cert. denied, 356 N.C. 162, 568 S.E.2d 187 (2002); In re Will of McCauley, 356 N.C. 91, 565 S.E.2d 88, 2002 N.C. LEXIS 550 (2002); Staton v. Russell, 151 N.C. App. 1, 565 S.E.2d 103, 2002 N.C. App. LEXIS 688 (2002); State v. Wilson, 151 N.C. App. 219, 565 S.E.2d 223, 2002 N.C. App. LEXIS 714 (2002), cert. denied, 356 N.C. 313, 571 S.E.2d 215 (2002); Powell v. Bulluck, 155 N.C. App. 613, 573 S.E.2d 699, 2002 N.C. App. LEXIS 1628 (2002); State v. Hunt, 357 N.C. 257, 582 S.E.2d 593, 2003 N.C. LEXIS 746 (2003), cert. denied, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003); State v. Frogge, 359 N.C. 228, 607 S.E.2d 627, 2005 N.C. LEXIS 29 (2005); State v. Weaver, 359 N.C. 246, 607 S.E.2d 599, 2005 N.C. LEXIS 30 (2005).

§ 7A-33. Supreme Court to prescribe appellate division rules of practice and procedure.

The Supreme Court shall prescribe rules of practice and procedure designed to procure the expeditious and inexpensive disposition of all litigation in the appellate division. (1967, c. 108, s. 1.)

Cross References. — For the North Carolina Rules of Appellate Procedure, see the Annotated Rules of North Carolina.

Legal Periodicals. — For recent development, "The Supreme Court of North Carolina's Rulemaking Authority and the Struggle for Power: State v. Tutt," see 84 N.C. L. Rev. 2100 (2006).

CASE NOTES

Adoption of Procedural Rule Did Not Affect Action Already Pending. — Given the unique constitutional and statutory responsibilities of the Supreme Court of North Carolina to promulgate rules of appellate procedure, as well as rules and standards of conduct for the judiciary, the Supreme Court of North Carolina did not exceed its authority in adopting N.C. Code Jud. Conduct, Limitation of Proceedings; however, where a judicial disciplinary action was already pending when N.C. Code Jud. Conduct, Limitation of Proceedings came into effect, the action was not barred. In re Inquiry Concerning a Judge (Brown), 358 N.C. 711, 599 S.E.2d 502, 2004 N.C. LEXIS 910 (2004).

Applied in State v. Bennett, 59 N.C. App. 418, 297 S.E.2d 138 (1982).

Cited in State v. Garnett, 4 N.C. App. 367, 167 S.E.2d 63 (1969); State v. Monroe, 330 N.C. 433, 410 S.E.2d 913 (1991).

§ 7A-34. Rules of practice and procedure in trial courts.

The Supreme Court is hereby authorized to prescribe rules of practice and procedure for the superior and district courts supplementary to, and not inconsistent with, acts of the General Assembly. (1967, c. 108, s. 1.)

Legal Periodicals. — For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

For article, "Rummaging Through a Wilderness of Verbiage: The Charge Conference, Jury Argument and Instructions," see 8 Campbell L. Rev. 269 (1986).

CASE NOTES

Provision of Rule of Practice Must Give Way to Statute. — Subsection (b) of G.S. 15A-1231 clearly contemplates that a defendant be required to request an instruction conference as a prerequisite for assigning error to the trial court's failure to conduct one. Under this section, the provision of Gen. Rules Prac., Rule 21 which requires the trial judge to conduct a jury instruction conference conflicts with subsection (b) of G.S. 15A-1231 and must give way to the provisions of the statute. State v. Morris, 60 N.C. App. 750, 300 S.E.2d 46 (1983).

Applied in Hamm v. Texaco, Inc., 17 N.C. App. 451, 194 S.E.2d 560 (1973); State v. Bennett, 308 N.C. 530, 302 S.E.2d 786 (1983); Young v. Young, 133 N.C. App. 332, 515 S.E.2d 478 (1999); In re J.S., — N.C. App. —, 641 S.E.2d 395, 2007 N.C. App. LEXIS 494 (2007).

Cited in Lee v. Rowland, 11 N.C. App. 27, 180 S.E.2d 445 (1971); Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971); Duke v. Meisky, 12 N.C. App. 329, 183 S.E.2d 292 (1971); State v. Andrews, 12 N.C. App. 421, 184 S.E.2d 69 (1971); Lattimore v. Powell, 15 N.C. App. 522, 190 S.E.2d 288 (1972); Finley v. Finley, 15 N.C. App. 681, 190 S.E.2d 660 (1972); Neff v. Queen City Coach Co., 16 N.C. App. 466, 192 S.E.2d 587 (1972); Williams v. Hartis, 18 N.C. App. 89, 195 S.E.2d 806 (1973); State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978); Wood v. Wood, 297 N.C. 1, 252 S.E.2d 799 (1979); Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980); State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331 (1980); Hensgen v. Hensgen, 53 N.C. App. 331, 280 S.E.2d 766 (1981); Lee v. Jenkins, 57 N.C. App. 522, 291 S.E.2d 797 (1982); Four Seasons Homeowners Ass'n v. Sellers, 62 N.C. App. 205, 302 S.E.2d 848 (1983); Butler Serv. Co. v. Butler Serv. Group, Inc., 66 N.C. App. 132, 310 S.E.2d 406 (1984); Simmons v. Tuttle, 70 N.C. App. 101, 318 S.E.2d 847 (1984); Daniels v. Montgomery

Mut. Ins. Co., 320 N.C. 669, 360 S.E.2d 772 (1987); Provident Fin. Co. v. Locklear, 89 N.C. App. 535, 366 S.E.2d 599 (1988); State v. Coffey, 326 N.C. 268, 389 S.E.2d 48, 1990 N.C. LEXIS 119 (1990); State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992); State v. Rorie, 348 N.C. 266, 500 S.E.2d 77 (1998); Smith v. Young Moving & Storage, Inc., 141 N.C. App. 469, 540 S.E.2d 383, 2000 N.C. App. LEXIS 1297 (2000), aff'd, 353 N.C. 521, 546 S.E.2d 87 (2001).

§ 7A-34.1. Unnecessary cover sheets.

A cover sheet summarizing the critical elements of the filing in a format prescribed by the Administrative Office of the Courts shall not be required for papers filed in civil actions subsequent to the initial filing if such subsequent filing contains:

(1) A caption including the file number, on the first page thereof.

(2) The name, address, and telephone number of the attorney filing the papers or, if the party filing the papers is not represented by an attorney, the name, address, and telephone number of the party filing the papers.

(3) A designation of the party represented by the attorney filing the papers, if an attorney is filing the papers.

(4) The name and designation of "plaintiff", "defendant", "petitioner", "respondent", or other relationship to the action of each other party to the action.

(5) The code or codes, set forth on the first page next to the title thereof, corresponding to the codes located on the cover sheet forms promulgated by the Administrative Office of the Courts which apply to the filing.

(6) The signature of the attorney or party filing the paper and the date signed. (2001-388, s. 2.)

§ 7A-35: Repealed by Session Laws 1971, c. 377, s. 32.

§ 7A-36: Repealed by Session Laws 1969, c. 1190, s. 57.

§ 7A-37: Repealed by Session Laws 1993, c. 553.

§ 7A-37.1. Statewide court-ordered, nonbinding arbitration in certain civil actions.

(a) The General Assembly finds that court-ordered, nonbinding arbitration may be a more economical, efficient and satisfactory procedure to resolve certain civil actions than by traditional civil litigation and therefore authorizes court-ordered nonbinding arbitration as an alternative civil procedure, subject to these provisions.

(b) The Supreme Court of North Carolina may adopt rules governing this procedure and may supervise its implementation and operation through the Administrative Office of the Courts. These rules shall ensure that no party is deprived of the right to jury trial and that any party dissatisfied with an arbitration award may have trial de novo.

(c) This procedure may be employed in civil actions where claims do not exceed fifteen thousand dollars ($15,000), except that it shall not be employed in actions in which the sole claim is an action on an account, including appeals from magistrates on such actions.

(c1) In cases referred to nonbinding arbitration as provided in this section, a fee of one hundred dollars ($100.00) shall be assessed per arbitration, to be divided equally among the parties, to cover the cost of providing arbitrators.

Fees assessed under this section shall be paid to the clerk of superior court in the county where the case was filed and remitted by the clerk to the State Treasurer.

(d) This procedure may be implemented in a judicial district, in selected counties within a district, or in any court within a district, if the Director of the Administrative Office of the Courts, and the cognizant Senior Resident Superior Court Judge or the Chief District Court Judge of any court selected for this procedure, determine that use of this procedure may assist in the administration of justice toward achieving objectives stated in subsection (a) of this section in a judicial district, county, or court. The Director of the Administrative Office of the Courts, acting upon the recommendation of the cognizant Senior Resident Superior Court Judge or Chief District Court Judge of any court selected for this procedure, may terminate this procedure in any judicial district, county, or court upon a determination that its use has not accomplished objectives stated in subsection (a) of this section.

(e) Arbitrators in this procedure shall have the same immunity as judges from civil liability for their official conduct. (1989, c. 301, s. 1; 2002-126, s. 14.3(a); 2003-284, s. 36A.1.)

Editor's Note. — Session Laws 1989, c. 301, s. 1, provided: "Nothing herein contained shall be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act."

The exception in subsection (c), added by Session Laws 2002-126, s. 14.3(a), effective October 1, 2002, is applicable to actions and cases filed on or after that date.

Legal Periodicals. — For note, "No-Frills Justice: North Carolina Experiments with Court-Ordered Arbitration," see 66 N.C.L. Rev. 395 (1988).

For article, "Court-Ordered Arbitration in North Carolina: Selected Issues of Practice and Procedure," see 21 Campbell L. Rev. 191 (1999).

CASE NOTES

Failure to Attend. — Unlike G.S. 7A-38.1, authorizing mediated settlement conferences in superior court civil actions, this section does not require the attendance of the parties, their attorneys and other persons or entities with authority, by law or by contract, to settle the parties' claims, nor does the court-ordered arbitration statute require sanctions as does the mediated settlement conference statute; thus, there was insufficient evidence to support the trial court's sanction based on the fact that defendant motorist appeared at the arbitration only through his counsel. Bledsole v. Johnson, 357 N.C. 133, 579 S.E.2d 379, 2003 N.C. LEXIS 418 (2003).

Cited in Mohamad v. Simmons, 139 N.C. App. 610, 534 S.E.2d 616, 2000 N.C. App. LEXIS 993 (2000); Johnson v. Brewington, 150 N.C. App. 425, 562 S.E.2d 919, 2002 N.C. App. LEXIS 484 (2002); Bledsole v. Johnson, 150 N.C. App. 619, 564 S.E.2d 902, 2002 N.C. App. LEXIS 652 (2002), cert. granted, 356 N.C. 297, 570 S.E.2d 498 (2002).

§ 7A-38: Repealed by Session Laws 1995, c. 500, s. 3.

Editor's Note. — Session Laws 1995, c. 500, s. 6, provided that s. 3, which repealed this section, became effective October 1, 1995, and shall apply, after the Supreme Court has adopted rules implementing the act, to all superior court civil actions filed in any county after the date the program is implemented in that county. The act also applies to all previously filed actions which are or have been specifically ordered to a mediated settlement conference by a senior resident superior court judge under G.S. 7A-38 prior to its repeal.

Session Laws 1995, c. 358, s. 3(b), as amended by Session Laws 1995, c. 437, s. 2(b), by Session Laws 1995, c. 467, s. 2(b), and by Session Laws 1995, c. 500, s. 2, authorized the use of funds for the purpose of operating the pilot program formerly provided under this section.

Former subsection (o) of this section, as enacted by Session Laws 1991, c. 207, s. 1, provided for expiration of the pilot program created by this section on June 30, 1995. This date was extended by Session Laws 1995, c. 358, s. 3(a) to July 14, 1995, by Session Laws 1995, c. 437, s. 2(a) to July 21, 1995, by Session Laws

1995, c. 467, s. 2(a) to July 28, 1995, and by Session Laws 1995, c. 500, s. 2 to October 1, 1995.

Session Laws 1995, c. 500, s. 5, contains a severability clause.

§ 7A-38.1. Mediated settlement conferences in superior court civil actions.

(a) Purpose. — The General Assembly finds that a system of court-ordered mediated settlement conferences should be established to facilitate the settlement of superior court civil actions and to make civil litigation more economical, efficient, and satisfactory to litigants and the State. Therefore, this section is enacted to require parties to superior court civil actions and their representatives to attend a pretrial, mediated settlement conference conducted pursuant to this section and pursuant to rules of the Supreme Court adopted to implement this section.

(b) Definitions. — As used in this section:

(1) "Mediated settlement conference" means a pretrial, court-ordered conference of the parties to a civil action and their representatives conducted by a mediator.

(2) "Mediation" means an informal process conducted by a mediator with the objective of helping parties voluntarily settle their dispute.

(3) "Mediator" means a neutral person who acts to encourage and facilitate a resolution of a pending civil action. A mediator does not make an award or render a judgment as to the merits of the action.

(c) Rules of procedure. — The Supreme Court may adopt rules to implement this section.

(d) Statewide implementation. — Mediated settlement conferences authorized by this section shall be implemented in all judicial districts as soon as practicable, as determined by the Director of the Administrative Office of the Courts.

(e) Cases selected for mediated settlement conferences. — The senior resident superior court judge of any participating district may order a mediated settlement conference for any superior court civil action pending in the district. The senior resident superior court judge may by local rule order all cases, not otherwise exempted by the Supreme Court rule, to mediated settlement conference.

(f) Attendance of parties. — The parties to a superior court civil action in which a mediated settlement conference is ordered, their attorneys and other persons or entities with authority, by law or by contract, to settle the parties' claims shall attend the mediated settlement conference unless excused by rules of the Supreme Court or by order of the senior resident superior court judge. Nothing in this section shall require any party or other participant in the conference to make a settlement offer or demand which it deems is contrary to its best interests.

(g) Sanctions. — Any person required to attend a mediated settlement conference who, without good cause, fails to attend in compliance with this section and the rules adopted under this section, shall be subject to any appropriate monetary sanction imposed by a resident or presiding superior court judge, including the payment of attorneys' fees, mediator fees, and expenses incurred in attending the conference. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence.

(h) Selection of mediator. — The parties to a superior court civil action in which a mediated settlement conference is to be held pursuant to this section shall have the right to designate a mediator. Upon failure of the parties to designate a mediator within the time established by the rules of the Supreme Court, a mediator shall be appointed by the senior resident superior court judge.

(i) Promotion of other settlement procedures. — Nothing in this section is intended to preclude the use of other dispute resolution methods within the superior court. Parties to a superior court civil action are encouraged to select other available dispute resolution methods. The senior resident superior court judge, at the request of and with the consent of the parties, may order the parties to attend and participate in any other settlement procedure authorized by rules of the Supreme Court or by the local superior court rules, in lieu of attending a mediated settlement conference. Neutral third parties acting pursuant to this section shall be selected and compensated in accordance with such rules or pursuant to agreement of the parties. Nothing in this section shall prohibit the parties from participating in, or the court from ordering, other dispute resolution procedures, including arbitration to the extent authorized under State or federal law.

(j) Immunity. — Mediator and other neutrals acting pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice, except that mediators and other neutrals may be disciplined in accordance with enforcement procedures adopted by the Supreme Court pursuant to G.S. 7A-38.2.

(k) Costs of mediated settlement conference. — Costs of mediated settlement conferences shall be borne by the parties. Unless otherwise ordered by the court or agreed to by the parties, the mediator's fees shall be paid in equal shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented by the same counsel. The rules adopted by the Supreme Court implementing this section shall set out a method whereby parties found by the court to be unable to pay the costs of the mediated settlement conference are afforded an opportunity to participate without cost. The rules adopted by the Supreme Court shall set the fees to be paid a mediator appointed by a judge upon the failure of the parties to designate a mediator.

(*l*) Inadmissibility of negotiations. — Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

(1) In proceedings for sanctions under this section;
(2) In proceedings to enforce or rescind a settlement of the action;
(3) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or
(4) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this section, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediated settlement conference or other settlement proceeding.

No mediator, other neutral, or neutral observer present at a settlement proceeding shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(m) Right to jury trial. — Nothing in this section or the rules adopted by the Supreme Court implementing this section shall restrict the right to jury trial. (1995, c. 500, s. 1; 1999-354, s. 5; 2005-167, s. 1.)

Cross References. — As to court ordered, mediated settlement conferences in superior court civil actions, see Rule 1, Med. Settle. Rules, in the Annotated Rules of North Carolina.

Editor's Note. — Subsection (l), as rewritten by Session Laws 2005-167, s. 1, effective October 1, 2005, is applicable to mediations commenced on or after that date.

Legal Periodicals. — For comment, "An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in North Carolina Superior Courts," see 71 N.C.L. Rev. 1857 (1993).

For comment, "Good Faith Mediation: Improving Efficiency, Cost, and Satisfaction in North Carolina's Pre-Trial Process," 18 Campbell L. Rev. 281 (1996).

For article, "Court-Ordered Arbitration in North Carolina: Selected Issues of Practice and Procedure," see 21 Campbell L. Rev. 191 (1999).

For note, "A Mediation Nightmare?: The Effect of the North Carolina Supreme Court's Decision in Chappell v. Roth on the Enforceability and Integrity of Mediated Settlement Agreements," see 27 Wake Forest L. Rev. 643 (2002).

CASE NOTES

Sanctions for Failure to Attend. — Trial court did not abuse its discretion by striking defendant's answer and entering default where corporate defendant had no good cause for failing to have officer mediation settlement conference and was not excused, less severe sanctions were considered rejected as inappropriate, and the sanctions entered were specifically authorized by former Rule 37(b)(2)c (repealed by 1993 Session Laws, c. 553, s. 1). Triad Mack Sales & Serv., Inc. v. Clement Bros. Co., 113 N.C. App. 405, 438 S.E.2d 485 (1994).

Unlike this section, authorizing mediated settlement conferences in superior court civil actions, G.S. 7A-37.1 does not require the attendance of the parties, their attorneys and other persons or entities with authority, by law or by contract, to settle the parties' claims, nor does the court-ordered arbitration statute require sanctions as does the mediated settlement conference statute; thus, there was insufficient evidence to support the trial court's sanction based on the fact that defendant motorist appeared at the arbitration only through his counsel. Bledsole v. Johnson, 357 N.C. 133, 579 S.E.2d 379, 2003 N.C. LEXIS 418 (2003).

Sanction Not Authorized for Violation of Agreement. — Trial court was without authority under G.S. 7A-38.1(g), or its inherent authority, to sanction the parents for violating the terms of the settlement agreement because the parents complied with the Mediation Rules in creating a settlement agreement but subsequently violated the terms of the agreement. Estate of Barber v. Guilford County Sheriff's Dep't, 161 N.C. App. 658, 589 S.E.2d 433, 2003 N.C. App. LEXIS 2256 (2003).

Mediator May Be Compelled for Evidence of Agreement. — A mediator is both competent and compellable to testify or produce evidence on whether the parties reached a settlement agreement, where a judge is making that determination. Few v. Hammack Enters., Inc., 132 N.C. App. 291, 511 S.E.2d 665 (1999).

Mediation Settlement Outcomes Admissible. — Admission of the outcome of a mediation settlement conference is not prohibited where a judge is making a determination of whether an agreement was reached and the terms of the agreement. Few v. Hammack Enters., Inc., 132 N.C. App. 291, 511 S.E.2d 665 (1999).

A party who claims that a settlement agreement is invalid and unenforceable should have to overcome the strong presumption expressed in this section that a settlement agreement reached by the parties through court-ordered mediation under the guidance of a mediator is a valid contract. Chappell v. Roth, 141 N.C. App. 502, 539 S.E.2d 666, 2000 N.C. App. LEXIS 1392 (2000).

Conversation Not Part of Negotiations. — The trial judge properly determined that admitted portions of an answering machine message and a subsequent conversation between the plaintiff mother of a boy injured on an amusement ride and the deceased defendant ride operator in which he admitted the possibility that he had not fastened the boy properly were not part of settlement negotiations; there was no mention of an intent to compromise or negotiate in the admitted portions of the conversation and the testimony was an admission of fact during a telephone conversation initiated by a party to the dispute. Breedlove v. Aerotrim, U.S.A., Inc., 142 N.C. App. 447, 543 S.E.2d 213, 2001 N.C. App. LEXIS 147 (2001).

Breach. — Record supported the trial court's judgment that a general contractor made three of six payments it was required to make under a settlement agreement on time, that a subcontractor that was entitled to receive those payments breached the settlement agreement by refusing to authorize release of a letter of credit, and that the general contractor was relieved of its obligation to make the remaining payments because of the subcontractor's breach. McClure Lumber Co. v. Helmsman Constr., Inc., 160 N.C. App. 190, 585 S.E.2d 234, 2003 N.C. App. LEXIS 1733 (2003).

Summary Judgment Proper Upon Reaching Settlement Agreement. — Where the parties to a real estate commission dispute reached a settlement agreement at mediation, but the brokerage did not sign the written settlement agreement, and never moved the trial court to enforce the settlement agreement, the trial court did not err in granting summary judgment dismissing the case rather than entering an order enforcing the agreement. Cohen Schatz Assocs. v. Perry, 169 N.C. App. 834, 611 S.E.2d 229, 2005 N.C. App. LEXIS 807 (2005).

Dismissal Upon Failure to Agree on Mediator Was Error. — Both G.S. 7A-38.1(h) and Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions 2C contemplated that if the parties to a lawsuit failed to agree on a settlement conference mediator or that plaintiff failed to report this to the senior resident superior court judge, that the judge was to have appointed a mediator; trial court's dismissal of an action after the parties failed to agree on mediator was error. Gailey v. Triangle Billiards & Blues Club, Inc., — N.C. App. —, 635 S.E.2d 482, 2006 N.C. App. LEXIS 2132 (2006).

Costs of Mediation Recoverable. — In a medical malpractice case, trial court erred in denying motion seeking to recover mediation costs because mediation was ordered in all civil actions, and the cost was recoverable under G.S. 7A-305(d)(7). Miller v. Forsyth Mem'l Hosp., Inc., 173 N.C. App. 385, 618 S.E.2d 838, 2005 N.C. App. LEXIS 2040 (2005).

Applied in Lord v. Customized Consulting Specialty, Inc., 164 N.C. App. 730, 596 S.E.2d 891, 2004 N.C. App. LEXIS 1144 (2004).

Cited in Powell v. Bulluck, 155 N.C. App. 613, 573 S.E.2d 699, 2002 N.C. App. LEXIS 1628 (2002).

§ 7A-38.2. Regulation of mediators and other neutrals.

(a) The Supreme Court may adopt standards of conduct for mediators and other neutrals who are certified or otherwise qualified pursuant to G.S. 7A-38.1, 7A-38.3, 7A-38.3B, 7A-38.3D, and 7A-38.4A, or who participate in proceedings conducted pursuant to those sections. The standards may also regulate mediator and other neutral training programs. The Supreme Court may adopt procedures for the enforcement of those standards.

(b) The administration of the certification and qualification of mediators and other neutrals, and mediator and other neutral training programs shall be conducted through the Dispute Resolution Commission, established under the Judicial Department. The Supreme Court shall adopt rules and regulations governing the operation of the Commission. The Commission shall exercise all of its duties independently of the Director of the Administrative Office of the Courts, except that the Commission shall consult with the Director regarding personnel and budgeting matters.

(c) The Dispute Resolution Commission shall consist of 16 members: five judges appointed by the Chief Justice of the Supreme Court, at least two of whom shall be superior court judges, and at least two of whom shall be district court judges; one clerk of superior court appointed by the Chief Justice of the Supreme Court; two mediators certified to conduct superior court mediated settlement conferences and two mediators certified to conduct equitable distribution mediated settlement conferences appointed by the Chief Justice of the Supreme Court; one certified district criminal court mediator who is a representative of a community mediation center appointed by the Chief Justice of the Supreme Court; two practicing attorneys who are not certified as mediators appointed by the President of the North Carolina State Bar, one of whom shall be a family law specialist; and three citizens knowledgeable about mediation, one of whom shall be appointed by the Governor, one by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121, and one by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121. Members shall initially serve four-year terms, except that one judge, one mediator, one attorney, and the citizen member appointed by the Governor, shall be appointed for an initial term of two years. Incumbent members as of September 30, 1998 shall serve the remainder of the terms to which they were appointed. Members appointed to newly-created membership positions effective October 1, 1998 shall serve initial terms of two years. Thereafter, members shall serve three-year terms and shall be ineligible to serve more than two consecutive terms. The Chief Justice shall designate one of the members to serve as chair for a two-year term. Members of the Commission shall be compensated pursuant to G.S. 138-5.

Vacancies shall be filled for unexpired terms and full terms in the same manner as incumbents were appointed. Appointing authorities may receive and consider suggestions and recommendations of persons for appointment from the Dispute Resolution Commission, the Family Law, Litigation, and Dispute Resolution Sections of the North Carolina Bar Association, the North Carolina Association of Professional Family Mediators, the North Carolina Conference of Clerks of Superior Court, the North Carolina Conference of Court Administrators, the Mediation Network of North Carolina, the Dispute Resolution Committee of the Supreme Court, the Conference of Chief District Court Judges, the Conference of Superior Court Judges, the Director of the Administrative Office of the Courts, and the Child Custody Mediation Advisory Committee of the Administrative Office of the Courts.

(d) An administrative fee, not to exceed two hundred dollars ($200.00), may be charged by the Administrative Office of the Courts to applicants for certification and annual renewal of certification for mediators and mediation training programs operating under this Article. The fees collected may be used by the Director of the Administrative Office of the Courts to establish and maintain the operations of the Commission and its staff.

(e) The chair of the Commission may employ an executive secretary and other staff as necessary to assist the Commission in carrying out its duties. The chair may also employ special counsel or call upon the Attorney General to furnish counsel to assist the Commission in conducting hearings pursuant to its certification or qualification and regulatory responsibilities. Special counsel or counsel furnished by the Attorney General may present the evidence in support of a denial or revocation of certification or qualification or a complaint against a mediator, other neutral, training program, or trainers or staff affiliated with a program. Special counsel or counsel furnished by the Attorney General may also represent the Commission when its final determinations are the subject of an appeal.

(f) In connection with any investigation or hearing conducted pursuant to an application for certification or qualification of any mediator, other neutral, or training program, or conducted pursuant to any disciplinary matter, the chair of the Dispute Resolution Commission or his/her designee, may:

(1) Administer oaths and affirmations;

(2) Sign and issue subpoenas in the name of the Dispute Resolution Commission or direct its executive secretary to issue such subpoenas on its behalf requiring attendance and the giving of testimony by witnesses and the production of books, papers, and other documentary evidence;

(3) Apply to the General Court of Justice, Superior Court Division, for any order necessary to enforce the power conferred in this section.

(g) The General Court of Justice, Superior Court Division, may enforce subpoenas issued in the name of the Dispute Resolution Commission and requiring attendance and the giving of testimony by witnesses and the production of books, papers, and other documentary evidence.

(h) The Commission shall keep confidential all information in its files pertaining to the certification of mediators, the qualification of other neutrals, the certification or qualification of training programs for mediators or other neutrals, and the renewal of such certifications and qualifications. However, disciplinary matters reported by an applicant for certification or qualification, a mediator, other neutral, trainer, or manager shall be treated as a complaint as set forth below. The Commission shall also keep confidential the identity of those persons requesting informal guidance or the issuance of formal advisory opinions from the Commission or its staff.

Unless an applicant, mediator, other neutral, or training program trainer or manager requests otherwise, all information in the Commission's disciplinary files pertaining to a complaint regarding the conduct of an applicant, mediator, other neutral, trainer, or manager shall remain confidential until such time as a preliminary investigation is completed and a determination is made that probable cause exists to believe that the applicant, mediator, neutral, trainer, or manager's words or actions:

(1) Violate standards for the conduct of mediators or other neutrals;
(2) Violate other standards of professional conduct to which the applicant, mediator, neutral, trainer, or manager is subject;
(3) Violate program rules; or
(4) Consist of conduct or actions that are inconsistent with good moral character or reflect a lack of fitness to serve as a mediator, other neutral, trainer, or manager.

The Commission may publish names, contact information, and biographical information for mediators, neutrals, and training programs that have been certified or qualified.

(i) The Commission shall conduct its initial review of all applications for certification and certification renewal or qualification and qualification renewal in private. The Commission shall also conduct its initial review of complaints regarding the qualifications of any certified mediator, other neutral, or training program, but not involving issues of ethics or conduct, in private. Appeals of denials of applications for certification, qualification, or renewal and appeals of revocations of certification or qualification for reasons that do not relate to ethics or conduct, shall be heard by the Commission in private unless the applicant, certified mediator, qualified neutral, or certified or qualified training program requests a public hearing.

(j) The Commission shall conduct in private its initial review of all matters relating to the ethics or conduct of an applicant for certification, qualification, or renewal of certification or qualification or the ethics or conduct of a mediator, other neutral, trainer, or training program manager. If an applicant appeals the Commission's initial determination that sanctions be imposed, the hearing of such appeal by the Commission shall be open to the public, except that for good cause shown, the presiding officer may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing shall be closed to the public over the objection of an applicant, mediator, other neutral, trainer, or training program manager.

(k) Appeals of final determinations by the Commission to deny certification or renewal of certification, to revoke certification, or to discipline a mediator, trainer, or training program manager shall be filed in the General Court of Justice, Wake County Superior Court Division. Notice of appeal shall be filed within 30 days of the date of the Commission's decision. (1995, c. 500, s. 1; 1998-212, s. 16.19(b), (c); 2005-167, ss. 2, 4; 2007-387, ss. 2, 3.)

Editor's Note. — This section was amended by Session Laws 2005-167, ss. 1 and 4, in the coded bill drafting format provided by G.S. 120-20.1. The amendment by 2005-167, s. 4 did not account for changes made to subsection (a) by Session Laws 2005-167, s. 1. Subsection (a) has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2005-167, s. 4, which amended this section by inserting "G.S. 7A-38.3B" in subsection (a), was contingent on "A Bill to Be Entitled An Act to Authorize The Clerk of Superior Court To Order Mediation In Matters Within The Clerk's Jurisdiction" becoming law. That bill was enacted as Session Laws 2005-67, effective May 26, 2005, and applicable to all matters pending before a clerk of superior court on, or filed with the clerk after, the date the Supreme Court adopts rules implementing Session Laws 2005-67.

Session Laws 2007-387, s. 4, provides: "The Supreme Court shall adopt rules under G.S. 7A-38.3D(d), as enacted in Section 1 of this act, and shall establish requirements for the certification or qualification under G.S. 7A-38.3D(f), as enacted by Section 1 of this act, no later than January 1, 2008." The rules had not yet been adopted as of October 12, 2007.

Session Laws 2007-387, s. 5, provides: "This act is effective when it becomes law [August 19, 2007] and applies to mediations conducted on and after the date the Supreme Court adopts rules and requirements for the certification or qualification under Section 4 of this act."

Effect of Amendments. — Session Laws 2007-387, ss. 2 and 3, effective August 19, 2007, in subsection (a), substituted "may" for "is authorized to" following "The Supreme Court", deleted "G.S." preceding "7A-38.3B," and inserted "7A-38.3D" thereafter; in subsection (c), substituted "16 members" for "15 members" and inserted "one certified district criminal court mediator who is a representative of a community mediation center appointed by the Chief Justice of the Supreme Court" in the first sentence. For applicability provision, see Editor's note.

§ 7A-38.3. Prelitigation mediation of farm nuisance disputes.

(a) Definitions. — As used in this section:

(1) "Farm nuisance dispute" means a claim that the farming activity of a farm resident constitutes a nuisance.

(2) "Farm resident" means a person holding an interest in fee, under a real estate contract, or under a lease, in land used for farming activity when that person manages the operations on the land.

(3) "Farming activity" means the cultivation of farmland for the production of crops, fruits, vegetables, ornamental and flowering plants, and the utilization of farmland for the production of dairy, livestock, poultry, and all other forms of agricultural products having a domestic or foreign market.

(4) "Mediator" means a neutral person who acts to encourage and facilitate a resolution of a farm nuisance dispute.

(5) "Nuisance" means an action that is injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property.

(6) "Party" means any person having a dispute with a farm resident.

(7) "Person" means a natural person, or any corporation, trust, or limited partnership as defined in G.S. 59-102.

(b) Voluntary Mediation. — The parties to a farm nuisance dispute may agree at any time to mediation of the dispute under the provisions of this section.

(c) Mandatory Mediation. — Prior to bringing a civil action involving a farm nuisance dispute, a farm resident or any other party shall initiate mediation pursuant to this section. If a farm resident or any other party brings an action involving a farm nuisance dispute, this action shall, upon the motion of any party prior to trial, be dismissed without prejudice by the court unless any one or more of the following apply:

(1) The dispute involves a claim that has been brought as a class action.

(2) The nonmoving party has satisfied the requirements of this section and such is indicated in a mediator's certification issued under subsection (g) of this section.

(3) The court finds that a mediator improperly failed to issue a certification indicating that the nonmoving party satisfied the requirements of this section.

(4) The court finds good cause for a failure to attempt mediation. Good cause includes, but is not limited to, a determination that the time delay required for mediation would likely result in irreparable harm or that injunctive relief is otherwise warranted.

(d) Initiation of Mediation. — Prelitigation mediation of a farm nuisance dispute shall be initiated by filing a request for mediation with the clerk of superior court in a county in which the action may be brought. The Administrative Office of the Courts shall prescribe a request for mediation form. The party filing the request for mediation also shall mail a copy of the request by certified mail, return receipt requested, to each party to the dispute. The clerk shall provide each party with a list of mediators certified by the Dispute Resolution Commission. If the parties agree in writing to the selection of a mediator from that list, the clerk shall appoint that mediator selected by the parties. If the parties do not agree on the selection of a mediator, the party filing the request for mediation shall bring the matter to the attention of the clerk, and a mediator shall be appointed by the senior resident superior court judge. The clerk shall notify the mediator and the parties of the appointment of the mediator.

(e) Mediation Procedure. — Except as otherwise expressly provided in this section, mediation under this section shall be conducted in accordance with the provisions for mediated settlement of civil cases in G.S. 7A-38.1 and G.S. 7A-38.2 and rules and standards adopted pursuant to those sections. The Supreme Court may adopt additional rules and standards to implement this section, including an exemption from the provisions of G.S. 7A-38.1 for cases in which mediation was attempted under this section.

(f) Waiver of Mediation. — The parties to the dispute may waive the mediation required by this section by informing the mediator of their waiver in writing. No costs shall be assessed to any party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

(g) Certification That Mediation Concluded. — Immediately upon a waiver of mediation under subsection (f) of this section or upon the conclusion of mediation, the mediator shall prepare a certification stating the date on which the mediation was concluded and the general results of the mediation, including, as applicable, that the parties waived the mediation, that an agreement was reached, that mediation was attempted but an agreement was not reached, or that one or more parties, to be specified in the certification, failed or refused without good cause to attend one or more mediation meetings or otherwise participate in the mediation. The mediator shall file the original of the certification with the clerk and provide a copy to each party. Each party to the mediation has satisfied the requirements of this section upon the filing of the certification, except any party specified in the certification as having failed or refused to attend one or more mediation meetings or otherwise participate. The sanctions in G.S. 7A-38.1(g) do not apply to prelitigation mediation conducted under this section.

(h) Time Periods Tolled. — Time periods relating to the filing of a claim or the taking of other action with respect to a farm nuisance dispute, including any applicable statutes of limitations, shall be tolled upon the filing of a request for mediation under this section, until 30 days after the date on which the mediation is concluded as set forth in the mediator's certification, or if the mediator fails to set forth such date, until 30 days after the filing of the certification under subsection (g) of this section. (1995, c. 500, s. 1.)

Legal Periodicals. — For comment, "Good Faith Mediation: Improving Efficiency, Cost, and Satisfaction in North Carolina's Pre-Trial Process," 18 Campbell L. Rev. 281 (1996).

CASE NOTES

Satisfaction of Requirements. — Plaintiffs satisfied the requirements for requesting and participating in pre-litigation mediation as required by G.S. 7A-38.3 and N.C.R. Super. Ct. Mediated Settlement Conf. Rule 4; the pleadings alleged that they participated in pre-litigation mediation, and the mediator's report did not list any party as being absent. Powell v. Bulluck, 155 N.C. App. 613, 573 S.E.2d 699, 2002 N.C. App. LEXIS 1628 (2002).

§ 7A-38.3A. Prelitigation mediation of insurance claims.

(a) Initiation of Mediation. — Prelitigation mediation of an insurance claim may be initiated by an insurer that has provided the policy limits in accordance with G.S. 58-3-33 by filing a request for mediation with the clerk of superior court in a county in which the action may be brought. The insurer also shall mail a copy of the request by certified mail, return receipt requested, to the person who requested the information under G.S. 58-3-33.

(b) Costs of Mediation. — Costs of mediation, including the mediator's fees, shall be borne by the insurer and claimant equally. When an attorney represents a party to the mediation, that party shall pay his or her attorneys' fees.

(c) Mediation Procedure. — Except as otherwise expressly provided in this section, mediation under this section shall be conducted in accordance with the provisions for mediated settlement of civil cases in G.S. 7A-38.1 and G.S. 7A-38.2, and rules and standards adopted pursuant to those sections. The Supreme Court may adopt additional rules and standards to implement this section, including an exemption from the provisions of G.S. 7A-38.1 for cases in which mediation was attempted under this section.

(d) Certification That Mediation Concluded. — Upon the conclusion of mediation, the mediator shall prepare a certification stating the date on which the mediation was concluded and the general results of the mediation, including, as applicable, that an agreement was reached, that mediation was attempted but an agreement was not reached, or that one or more parties, to be specified in the certification, failed or refused without good cause to attend one or more mediation meetings or otherwise participate in the mediation. The mediator shall file the original of the certification with the clerk and provide a copy to each party. Each party to the mediation has satisfied the requirements of this section upon the filing of the certification, except any party specified in the certification as having failed or refused to attend one or more mediation meetings or otherwise participate. The sanctions in G.S. 7A-38.1(g) do not apply to prelitigation mediation conducted under this section.

(e) Time Periods Tolled. — Time periods relating to the filing of a claim or the taking of other action with respect to an insurance claim, including any applicable statutes of limitations, shall be tolled upon the filing of a request for mediation under this section, until 30 days after the date on which the mediation is concluded as set forth in the mediator's certification or, if the mediator fails to set forth such date, until 30 days after the filing of the certification under subsection (d) of this section.

(f) Medical Malpractice Claims Excluded. — This section does not apply to claims seeking recovery for medical malpractice. (2003-307, s. 2.)

Editor's Note. — Session Laws 2003-307, s. 3, made this section effective January 1, 2004, and applicable to claims regarding physical injury or property damage that arise on or after that date.

§ 7A-38.3B. Mediation in matters within the jurisdiction of the clerk of superior court.

(a) Purpose. — The General Assembly finds that the clerk of superior court in the General Court of Justice should have the discretion and authority to order that mediation be conducted in matters within the clerk's jurisdiction in order to facilitate a more economical, efficient, and satisfactory resolution of those matters.

(b) Enabling Authority. — The clerk of superior court may order that mediation be conducted in any matter in which the clerk has exclusive or original jurisdiction, except for matters under Chapters 45 and 48 of the General Statutes and except in matters in which the jurisdiction of the clerk is ancillary. The Supreme Court may adopt rules to implement this section. Such mediations shall be conducted pursuant to this section and the Supreme Court rules as adopted.

(c) Attendance. — In those matters ordered to mediation pursuant to this section, the following persons or entities, along with their attorneys, may be ordered by the clerk to attend the mediation:

(1) Named parties.

(2) Interested persons, meaning persons or entities who have a right, interest, or claim in the matter; heirs or devisees in matters under Chapter 28A of the General Statutes, next of kin under Chapter 35A of the General Statutes, and other persons or entities as the clerk deems necessary for the adjudication of the matter. The meaning of "interested person" may vary according to the issues involved in the matter.

(3) Nonparty participants, meaning any other person or entity identified by the clerk as possessing useful information about the matter and whose attendance would be beneficial to the mediation.

(4) Fiduciaries, meaning persons or entities who serve as fiduciaries, as that term is defined by G.S. 36A-22.1, of named parties, interested persons, or nonparty participants.

Any person or entity ordered to attend a mediation shall be notified of its date, time, and location and shall attend unless excused by rules of the Supreme Court or by order of the clerk. No one attending the mediation shall be required to make a settlement offer or demand that it deems contrary to its best interests.

(d) Selection of Mediator. — Persons ordered to mediation pursuant to this section have the right to designate a mediator in accordance with rules promulgated by the Supreme Court implementing this section. Upon failure of those persons to agree upon a designation within the time established by rules of the Supreme Court, a mediator certified by the Dispute Resolution Commission pursuant to those rules shall be appointed by the clerk.

(e) Immunity. — Mediators acting pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice, except that mediators may be disciplined in accordance with procedures adopted by the Supreme Court pursuant to G.S. 7A-38.2.

(f) Costs of Mediation. — Costs of mediation under this section shall be borne by the named parties, interested persons, and fiduciaries ordered to attend the mediation. The rules adopted by the Supreme Court implementing this section shall set out the manner in which costs shall be paid and a method by which an opportunity to participate without cost shall be afforded to persons found by the clerk to be unable to pay their share of the costs of mediation. Costs may only be assessed against the estate of a decedent, the estate of an adjudicated or alleged incompetent, a trust corpus, or against a fiduciary upon the entry of a written order making specific findings of fact justifying the taxing of costs.

(g) Inadmissibility of Negotiations. — Evidence of statements made or conduct occurring during a mediation conducted pursuant to this section, whether attributable to any participant, mediator, expert, or neutral observer, shall not be subject to discovery and shall be inadmissible in any proceeding in the matter or other civil actions on the same claim, except in:

(1) Proceedings for sanctions pursuant to this section;
(2) Proceedings to enforce or rescind a written and signed settlement agreement;
(3) Incompetency, guardianship, or estate proceedings in which a mediated agreement is presented to the clerk;
(4) Disciplinary proceedings before the North Carolina State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or
(5) Proceedings for abuse, neglect, or dependency of a juvenile, or for abuse, neglect, or exploitation of an adult, for which there is a duty to report under G.S. 7B-301 and Article 6 of Chapter 108A of the General Statutes, respectively.

No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in mediation.

As used in this section, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

(h) Testimony. — No mediator or neutral observer shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to the mediation in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the matter except to attest to the signing of any agreements reached in mediation, and except in:

(1) Proceedings for sanctions pursuant to this section;
(2) Disciplinary proceedings before the North Carolina State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or
(3) Proceedings for abuse, neglect, or dependency of a juvenile, or for abuse, neglect, or exploitation of an adult, for which there is a duty to report under G.S. 7B-301 and Article 6 of Chapter 108A of the General Statutes, respectively.

(i) Agreements. — In matters before the clerk in which agreements are reached in a mediation conducted pursuant to this section, or during one of its recesses, those agreements shall be treated as follows:

(1) Where as a matter of law, a matter may be resolved by agreement of the parties, a settlement is enforceable only if it has been reduced to writing and signed by the parties.
(2) In all other matters before the clerk, including guardianship and estate matters, all agreements shall be delivered to the clerk for consideration in deciding the matter.

(j) Sanctions. — The clerk may sanction any person ordered to attend a mediation conducted pursuant to this section and rules of the Supreme Court who, without good cause, fails to attend the mediation, by imposing an appropriate monetary sanction, including the payment of attorneys' fees, mediator fees, and expenses incurred in attending the conference. If the clerk imposes sanctions, the clerk shall do so, after notice and a hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions is reviewable by the superior court in accordance with G.S. 1-301.2 and G.S. 1-301.3, as applicable, and thereafter by the appellate courts in accordance with G.S. 7A-38.1(g).

(k) Authority to Supplement Procedural Details. — The clerk of superior court shall make all those orders just and necessary to safeguard the interests of all persons and may supplement all necessary procedural details not inconsistent with rules adopted by the Supreme Court implementing this section. (2005-67, s. 1.)

Editor's Note. — Session Laws 2005-67, s. 5, made this section effective May 26, 2005, and applicable to all matters pending before a clerk of superior court on, or filed with the clerk after, the date the Supreme Court adopts rules implementing this act.

§ 7A-38.3C: Repealed by Session Laws 2007-491, s. 4, effective August 21, 2007.

Cross References. — As to authority for electric suppliers to enter into agreements and for Utilities Commission to resolve disputes, see G.S. 160A-331.2.

Editor's Note. — Session Laws 2007-419, s. 4, provides in part: "Any disputes submitted to the Public Staff of the North Carolina Utilities Commission pursuant to G.S. 7A-38.3C(i) are transferred to the North Carolina Utilities Commission to be considered by the Commission pursuant to G.S. 160A-331.2(c), as enacted by this act, and the Commission shall exercise its jurisdiction upon payment of the filing fee required by that subsection by the petitioner."

§ 7A-38.3D. Mediation in matters within the jurisdiction of the district criminal courts.

(a) Purpose. — The General Assembly finds that it is in the public interest to promote high standards for persons who mediate matters in district criminal court. To that end, a program of certification for these mediators shall be established in judicial districts designated by the Dispute Resolution Commission and the Director of the Administrative Office of the Courts and in which the chief district court judge, the district attorney, and the community mediation center agree to participate. This section does not supersede G.S. 7A-38.5.

(b) Enabling Authority. — In each district, the court may encourage mediation for any criminal district court action pending in the district, and the district attorney may delay prosecution of those actions so that the mediation may take place.

(c) Program Administration. — A community mediation center established under G.S. 7A-38.5 and located in a district designated under subsection (a) of this section shall assist the court in administering a program providing mediation services in district criminal court cases. A community mediation center may assist in the screening and scheduling of cases for mediation and provide certified volunteer or staff mediators to conduct district criminal court mediations.

(d) Rules of Procedure. — The Supreme Court shall adopt rules to implement this section. Each mediation shall be conducted pursuant to this section and the Supreme Court Rules as adopted.

(e) Mediator Authority. — In the mediator's discretion, any person whose presence and participation may assist in resolving the dispute or addressing any issues underlying the mediation may be permitted to attend and participate. The mediator shall have discretion to exclude any individual who seeks to attend the mediation but whose participation the mediator deems would be counterproductive. Lawyers for the participants may attend and participate in the mediation.

(f) Mediator Qualification. — The Supreme Court shall establish requirements for the certification or qualification of mediators serving under this section. The Court shall also establish requirements for the qualification of training programs and trainers, including community mediation center staff, that train these mediators. The Court shall also adopt rules regulating the conduct of these mediators and trainers.

(g) Oversight and Evaluation. — The Supreme Court may require community mediation centers and their volunteer or staff mediators to collect and report caseload statistics, referral sources, fees collected, and any other information deemed essential for program oversight and evaluation purposes.

(h) Immunity. — A mediator under this section has judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice, except that a mediator may be disciplined in accordance with procedures adopted by the Supreme Court. A community mediation center and its staff involved in supplying volunteer or staff mediators or other personnel to schedule cases or perform other duties under this section are immune from suit in any civil action, except in any case of willful or wanton misconduct.

(i) Confidentiality. — Any memorandum, work note, or product of the mediator and any case file maintained by a community mediation center acting under this section and any mediator certification application are confidential.

(j) Inadmissibility of Negotiations. — Evidence of any statement made and conduct occurring during a mediation under this section shall not be subject to discovery and shall be inadmissible in any proceeding in the action from which the mediation arises. Any participant in a mediation conducted under this section, including the mediator, may report to law enforcement personnel any statement made or conduct occurring during the mediation process that threatens or threatened the safety of any person or property. A mediator has discretion to warn a person whose safety or property has been threatened. No evidence otherwise discoverable is inadmissible for the reason it is presented or discussed in a mediated settlement conference or other settlement proceeding under this section.

(k) Testimony. — No mediator or neutral observer present at the mediation shall be compelled to testify or produce evidence concerning statements made and conduct occurring in or related to a mediation conducted under this section in any proceeding in the same action for any purpose, except in:

(1) Proceedings for abuse, neglect, or dependency of a juvenile, or for abuse, neglect, or exploitation of an adult, for which there is a duty to report under G.S. 7B-301 and Article 6 of Chapter 108A of the General Statutes, respectively.

(2) Disciplinary proceedings before the North Carolina State Bar or any agency established to enforce standards of conduct for mediators.

(3) Proceedings in which the mediator acts as a witness pursuant to subsection (j) of this section.

(4) Trials of a felony, during which a presiding judge may compel the disclosure of any evidence arising out of the mediation, excluding a statement made by the defendant in the action under mediation, if it is to be introduced in the trial or disposition of the felony and the judge determines that the introduction of the evidence is necessary to the proper administration of justice and the evidence cannot be obtained from any other source.

(*l*) Written Agreements. — Any agreement reached in mediation shall be reduced to writing and signed by the parties. A non-attorney mediator may assist parties in reducing the agreement to writing.

(m) Dismissal Fee. — Where an agreement has been reached in mediation and the case will be dismissed, the defendant shall pay to the clerk the dismissal fee of court set forth in G.S. 7A-38.7. By agreement, all or any portion of the fee may be paid by a person other than the defendant. The judge may in the judge's discretion waive the fee for good cause shown.

(n) Definitions. — As used in this section, the following definitions apply:

(1) Court. — A district court judge, a district attorney, or the designee of a district court judge or district attorney.

(2) Neutral observer. — Includes any person seeking mediator certification, any person studying any dispute resolution process, and any person acting as an interpreter. (2007-387, s. 1.)

Editor's Note. — Session Laws 2007-387, s. 4, provides: "The Supreme Court shall adopt rules under G.S. 7A-38.3D(d), as enacted in Section 1 of this act, and shall establish requirements for the certification or qualification under G.S. 7A-38.3D(f), as enacted by Section 1 of this act, no later than January 1, 2008." The rules had not yet been adopted as of October 12, 2007.

Session Laws 2007-387, s. 5, provides: "This act is effective when it becomes law [August 19, 2007] and applies to mediations conducted on and after the date the Supreme Court adopts rules and requirements for the certification or qualification under Section 4 of this act."

§ 7A-38.4: Repealed by Session Laws 2001-320, s. 1, effective October 1, 2001.

Cross References. — As to settlement procedures in district court actions, see G.S. 7A-38.4A.

§ 7A-38.4A. Settlement procedures in district court actions.

(a) The General Assembly finds that a system of settlement events should be established to facilitate the settlement of district court actions involving equitable distribution, alimony, or support and to make that litigation more economical, efficient, and satisfactory to the parties, their representatives, and the State. District courts should be able to require parties to those actions and their representatives to attend a pretrial mediated settlement conference or other settlement procedure conducted under this section and rules adopted by the Supreme Court to implement this section.

(b) The definitions in G.S. 7A-38.1(b)(2) and (b)(3) apply in this section.

(c) Any chief district court judge in a judicial district may order a mediated settlement conference or another settlement procedure, as provided under subsection (g) of this section, for any action pending in that district involving issues of equitable distribution, alimony, child or post separation support, or claims arising out of contracts between the parties under G.S. 52-10, G.S. 52-10.1, or Chapter 52B of the General Statutes. The chief district court judge may adopt local rules that order settlement procedures in all of the foregoing actions and designate other district court judges or administrative personnel to issue orders implementing those settlement procedures. However, local rules adopted by a chief district court judge shall not be inconsistent with any rules adopted by the Supreme Court.

(d) The parties to a district court action where a mediated settlement conference or other settlement procedure is ordered, their attorneys, and other persons or entities with authority, by law or contract, to settle a party's claim, shall attend the mediated settlement conference or other settlement procedure, unless the rules ordering the settlement procedure provide otherwise. No party or other participant in a mediated settlement conference or other settlement procedure is required to make a settlement offer or demand that the party or participant deems contrary to that party's or participant's best interests. Parties who have been victims of domestic violence may be excused from physically attending or participating in a mediated settlement conference or other settlement procedure.

(e) Any person required to attend a mediated settlement conference or other settlement procedure under this section who, without good cause fails to attend, is subject to any appropriate monetary sanction imposed by a district court judge, including the payment of attorneys' fees, mediator fees, and expenses incurred in attending the settlement procedure. If the court imposes sanctions, it shall do so, after notice and hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal, and the entire record shall be reviewed to determine whether the order is supported by substantial evidence.

(f) The parties to a district court action in which a mediated settlement conference is to be held under this section shall have the right to designate a mediator. Upon failure of the parties to designate within the time established by the rules adopted by the Supreme Court, a mediator shall be appointed by a district court judge.

(g) A chief district court judge or that judge's designee, at the request of a party and with the consent of all parties, may order the parties to attend and participate in any other settlement procedure authorized by rules adopted by the Supreme Court or adopted by local district court rules, in lieu of attending a mediated settlement conference. Neutrals acting under this section shall be selected and compensated in accordance with rules adopted by the Supreme Court. Nothing herein shall prohibit the parties from participating in other dispute resolution procedures, including arbitration, to the extent authorized under State or federal law. Nothing herein shall prohibit the parties from participating in mediation at a community mediation center operating under G.S. 7A-38.5.

(h) Mediators and other neutrals acting under this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice, except that mediators and other neutrals may be disciplined in accordance with enforcement procedures adopted by the Supreme Court under G.S. 7A-38.2.

(i) Costs of mediated settlement conferences and other settlement procedures shall be borne by the parties. Unless otherwise ordered by the court or agreed to by the parties, the mediator's fees shall be paid in equal shares by the parties. The rules adopted by the Supreme Court shall set out a method whereby a party found by the court to be unable to pay the costs of settlement procedures is afforded an opportunity to participate without cost to that party and without expenditure of State funds.

(j) Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

(1) In proceedings for sanctions under this section;
(2) In proceedings to enforce or rescind a settlement of the action;
(3) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or
(4) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this subsection, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this section or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties and in all other respects complies with the requirements of Chapter 50 of the General Statutes. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, other neutral, or neutral observer present at a settlement proceeding under this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(k) The Supreme Court may adopt standards for the certification and conduct of mediators and other neutrals who participate in settlement procedures conducted under this section. The standards may also regulate mediator training programs. The Supreme Court may adopt procedures for the enforcement of those standards. The administration of mediator certification, regulation of mediator conduct, and decertification shall be conducted through the Dispute Resolution Commission.

(l) An administrative fee not to exceed two hundred dollars ($200.00) may be charged by the Administrative Office of the Courts to applicants for certification and annual renewal of certification for mediators and mediator training programs operating under this section. The fees collected may be used by the Director of the Administrative Office of the Courts to establish and maintain the operations of the Commission and its staff. The administrative fee shall be set by the Director of the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

(m) The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the chief district court judge of any district to report statistical data about settlement procedures conducted under this section for administrative purposes.

(n) Nothing in this section or in rules adopted by the Supreme Court implementing this section shall restrict a party's right to a trial by jury.

(o) The Supreme Court may adopt rules to implement this section. (1997-229, s. 1; 1998-212, s. 16.19(a); 1999-354, s. 6; 2000-140, s. 1; 2001-320, s. 2; 2001-487, s. 39; 2005-167, s. 3.)

Editor's Note. — This section was enacted by Session Laws 2001-320, which repealed G.S. 7A-38.4, pertaining to a similar subject matter. The historical citation to repealed G.S. 7A-38.4 has been placed under this section at the direction of the Revisor of Statutes.

Subsection (j), as rewritten by Session Laws 2005-167, s. 3, effective October 1, 2005, is applicable to mediations commenced on or after that date.

§ 7A-38.5. Community mediation centers.

(a) The General Assembly finds that it is in the public interest to encourage the establishment of community mediation centers, also known as dispute settlement centers or dispute resolution centers, to support the work of these centers in facilitating communication, understanding, reconciliation, and settlement of conflicts in communities, courts, and schools, and to promote the widest possible use of these centers by the courts and law enforcement officials across the State.

(b) Community mediation centers, functioning as or within nonprofit organizations and local governmental entities, may receive referrals from courts, law enforcement agencies, and other public entities for the purpose of facilitating communication, understanding, reconciliation, and settlement of conflicts.

(c) Each chief district court judge and district attorney shall encourage mediation for any criminal district court action pending in the district when the judge and district attorney determine that mediation is an appropriate alternative.

(d) Each chief district court judge shall encourage mediation for any civil district court action pending in the district when the judge determines that mediation is an appropriate alternative. (1999-354, s. 1.)

Legal Periodicals. — For case note, "Nunn v. Allen, Living Separate and Apart in North Carolina, Separation Agreements, Sex, the Meaning of Unmarried, and Liability of Third Parties," 25 N.C. Cent. L.J. 242 (2003).

§ 7A-38.6. Report on community mediation centers.

(a) All community mediation centers currently receiving State funds shall report annually to the Mediation Network of North Carolina on the program's funding and activities, including:

(1) Types of dispute settlement services provided;
(2) Clients receiving each type of dispute settlement service;
(3) Number and type of referrals received, cases actually mediated (identified by docket number), cases resolved in mediation, and total clients served in the cases mediated;
(4) Total program funding and funding sources;
(5) Itemization of the use of funds, including operating expenses and personnel;
(6) Itemization of the use of State funds appropriated to the center;
(7) Level of volunteer activity; and
(8) Identification of future service demands and budget requirements.

The Mediation Network of North Carolina shall compile and summarize the information provided pursuant to this subsection and shall provide the information to the Chairs of the House of Representatives and Senate Appropriations Committees and the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety by February 1 of each year.

The Mediation Network of North Carolina shall also submit a copy of its report to the Administrative Office of the Courts. The receipt and review of this report by the Administrative Office of the Courts shall satisfy any program monitoring, evaluation, and contracting requirements imposed on the Administrative Office of the Courts by G.S. 143-6.2 and any rules adopted under that section.

(b) A community mediation center requesting State funds for the first time shall provide the General Assembly with the information enumerated in subsection (a) of this section, or projections where historical data are not available, as well as a detailed statement justifying the need for State funding.

(c) Each community mediation center receiving State funds for the first time shall document in the information provided pursuant to this section that, after the second year of receiving State funds, at least ten percent (10%) of total funding comes from non-State sources.

(d) Each community mediation center receiving State funds for the third, fourth, or fifth year shall document that at least twenty percent (20%) of total funding comes from non-State sources.

(e) Each community mediation center receiving State funds for six or more years shall document that at least fifty percent (50%) of total funding comes from non-State sources.

(f) Each community mediation center currently receiving State funds that has achieved a funding level from non-State sources greater than that provided for that center by subsection (c), (d), or (e) of this section shall make a good faith effort to maintain that level of funding.

(g) The percentage that State funds comprise of the total funding of each community mediation center shall be determined at the conclusion of each fiscal year with the information provided pursuant to this section and is intended as a funding ratio and not a matching funds requirement. Community mediation centers may include the market value of donated office space, utilities, and professional legal and accounting services in determining total funding.

(h) A community mediation center having difficulty meeting the funding ratio provided for that center by subsection (c), (d), or (e) of this section may request a waiver or special consideration through the Mediation Network of North Carolina for consideration by the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety.

(i) The provisions of G.S. 143C-4-5 do not apply to community mediation centers receiving State funds.

(j) Each community mediation center receiving State funds shall function as, or as part of, a nonprofit organization or local government entity. A community mediation center functioning as a nonprofit organization shall have a governing board of directors that consists of a significant number of citizens from the surrounding community. State funds may not be used for indirect costs associated with contracts between the community mediation center and another entity for the provision of management-related services. (2001-424, s. 22.2; 2003-284, s. 13.15(c); 2006-66, s. 14.12; 2006-203, s. 10.)

Editor's Note. — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Session Laws 2006-66, s. 14.12, effective July 1, 2006, added the third paragraph of subsection (a).

Session Laws 2006-203, s. 10, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "G.S. 143C-4-5" for "G.S. 143-31.4" in subsection (i).

§ 7A-38.7. Dispute resolution fee for cases resolved in mediation.

(a) In each criminal case filed in the General Court of Justice that is resolved through referral to a community mediation center, a dispute resolution fee shall be assessed in the sum of sixty dollars ($60.00) per mediation for the support of the General Court of Justice. Fees assessed under this section shall be paid to the clerk of superior court in the county where the case was filed and remitted by the clerk to the State Treasurer.

(b) Before providing the district attorney with a dismissal form, the community mediation center shall require proof that the defendant has paid the dispute resolution fee as required by subsection (a) of this section and shall attach the receipt to the dismissal form. (2002-126, s. 29A.11(a); 2003-284, s. 13.13.)

Editor's Note. — Session Laws 2002-126, s. 29A.11(c), made this section effective November 1, 2002, and applicable to cases resolved on or after that date.

Session Laws 2002-126, s. 29A.11(b), provides: "Each community mediation center shall maintain records as to the number of cases in which dispute resolution fees are assessed and paid. The Mediation Network of North Carolina shall collect this information from each center annually.

"Each community mediation center shall also maintain records as to the source of referral for all court-referred cases. Each center receiving State funds shall use a standardized form and methodology to determine the referral source and report that information annually to the Mediation Network of North Carolina.

"The Mediation Network of North Carolina shall report by March 15, 2003, to the Chairs of the Senate and House of Representatives Appropriations Committees and the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety on the fees collected year-to-date and the sources of referral of court-referred cases during the 2002-2003 fiscal year."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6, contains a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

§ 7A-39. Cancellation of court sessions and closing court offices; extension of statutes of limitations in catastrophic conditions.

(a) *Cancellation of Court Sessions, Closing Court Offices.* — In response to adverse weather or other emergency situations, any session of any court of the General Court of Justice may be cancelled, postponed, or altered by judicial officials, and court offices may be closed by judicial branch hiring authorities, pursuant to uniform statewide guidelines prescribed by the Director of the Administrative Office of the Courts.

(b) *Authority of Chief Justice.* — When the Chief Justice of the North Carolina Supreme Court determines and declares that catastrophic conditions exist or have existed in one or more counties of the State, the Chief Justice may by order entered pursuant to this subsection extend, to a date certain no fewer than 10 days after the effective date of the order, the time or period of limitation within which pleadings, motions, notices, and other documents and papers may be timely filed and other acts may be timely done in civil actions, criminal actions, estates, and special proceedings in each county named in the order.

(1) *Catastrophic conditions defined.* — As used in this subsection, "catastrophic conditions" means any set of circumstances that make it impossible or extremely hazardous for judicial officials, employees, parties, witnesses, or other persons with business before the courts to reach a courthouse, or that create a significant risk of physical harm to persons in a courthouse, or that would otherwise convince a reasonable person to avoid travelling to or being in the courthouse.

(2) *Entry of order.* — The Chief Justice may enter an order under this subsection at any time after catastrophic conditions have ceased to exist. The order shall be in writing and shall become effective for each affected county upon the date set forth in the order, and if no date is set forth in the order, then upon the date the order is signed by the Chief Justice.

(c) *In Chambers Jurisdiction Not Affected.* — Nothing in this section prohibits a judge or other judicial officer from exercising, during adverse weather or other emergency situations, any in chambers or ex parte jurisdiction conferred by law upon that judge or judicial officer, as provided by law. The effectiveness of any such exercise shall not be affected by a determination by the Chief Justice that catastrophic conditions existed at the time it was exercised. (2000-166, s. 1; 2006-187, s. 6.)

Effect of Amendments. — Session Laws 2006-187, s. 6, effective August 3, 2006, in the section heading, substituted "Cancellation" for "Adverse weather cancellation"; in subsection (a), deleted "comparable" preceding "emergency situations"; in subsection (b), substituted "Justice" for "Justice to Extend Statutes of Limitations" in the subheading, and added "or period of limitation"; in subdivision (b)(1), deleted "including conditions that may result from hurricane, tornado, flood, snowstorm, ice storm, other severe natural disaster, fire, or riot" from the end; and in subdivision (b)(2), substituted "the date set forth in the order, and if no date is set forth in the order, then upon the date the order is signed by the Chief Justice" for "being filed in the office of the clerk of superior court of that county."

ARTICLE 6.

Retirement of Justices and Judges of the Appellate Division; Retirement Compensation; Recall to Emergency Service; Disability Retirement.

§ 7A-39.1. Justice, emergency justice, judge and emergency judge defined.

(a) As herein used "justice of the Supreme Court" includes the Chief Justice of the Supreme Court and "judge of the Court of Appeals" includes the Chief Judge of the Court of Appeals, unless the context clearly indicates a contrary intent.

(b) As used herein, "emergency justice", "emergency judge", or "emergency recall judge" means any justice of the Supreme Court or any judge of the Court of Appeals, respectively, who has retired subject to recall for temporary service. (1967, c. 108, s. 1; 1985, c. 698, s. 16(a); 1995, c. 108, s. 2.)

CASE NOTES

Cited in Gentry v. Uniform Judicial Retirement Sys., 378 F. Supp. 1 (M.D.N.C. 1974).

§ 7A-39.2. Age and service requirements for retirement of justices of the Supreme Court and judges of the Court of Appeals.

(a) Any justice of the Supreme Court or judge of the Court of Appeals who has attained the age of 65 years, and who has served for a total of 15 years, whether consecutive or not, on the Supreme Court, the Court of Appeals, or the superior court, or as Administrative Officer of the Courts, or in any combination of these offices, may retire from his present office and receive for life compensation equal to two thirds of the total annual compensation, including longevity, but excluding any payments in the nature of reimbursement for expenses, from time to time received by the occupant or occupants of the office from which he retired.

(b) Any justice of the Supreme Court or judge of the Court of Appeals who has attained the age of 65 years, and who has served as justice or judge, or both, in the Appellate Division for 12 consecutive years may retire and receive for life compensation equal to two thirds of the total annual compensation, including longevity, but excluding any payments in the nature of reimbursement for expenses, from time to time received by the occupant or occupants of the office from which he retired.

(c) Any justice or judge of the Appellate Division, who has served for a total of 24 years, whether continuously or not, as justice of the Supreme Court, judge of the Court of Appeals, judge of the superior court, or Administrative Officer of the Courts, or in any combination of these offices, may retire, regardless of age, and receive for life compensation equal to two thirds of the total annual compensation, including longevity, but excluding any payments in the nature of reimbursement for expenses, from time to time received by the occupant or occupants of the office from which he retired. In determining eligibility for retirement under this subsection, time served as a district solicitor of the superior court prior to January 1, 1971, may be included, provided the person has served at least eight years as a justice, judge, or Administrative Officer of the Courts, or in any combination of these offices.

(d) For purposes of this section, the "occupant or occupants of the office from which" the retired judge retired will be deemed to be a judge or justice of the Appellate Division holding the same office and with the same service as the retired judge had immediately prior to retirement. (1967, c. 108, s. 1; 1971, c. 508, s. 2; 1983 (Reg. Sess., 1984), c. 1109, ss. 13.6-13.9.)

Legal Periodicals. — For note entitled, "Gregory v. Ashcroft: The Plain Statement Rule and Judicial Supervision of Federal-State Relations," see 70 N.C.L. Rev. 1563 (1992).

§ 7A-39.3. Retired justices and judges may become emergency justices and judges subject to recall to active service; compensation for emergency justices and judges on recall.

(a) Justices of the Supreme Court and judges of the Court of Appeals who have not reached the mandatory retirement age specified in G.S. 7A-4.20, but who have retired under the provisions of G.S. 7A-39.2, or under the Uniform Judicial Retirement Act after having completed 12 years of creditable service, may apply as provided in G.S. 7A-39.6 to become emergency justices or judges and upon being commissioned as an emergency justice or emergency judge shall be subject to temporary recall to active service in place of a justice or judge who is temporarily incapacitated as provided in G.S. 7A-39.5.

(b) In addition to the compensation or retirement allowance he would otherwise be entitled to receive by law, each emergency justice or emergency judge recalled for temporary active service shall be paid by the State his actual expenses, plus three hundred dollars ($300.00) for each day of active service rendered upon recall. No recalled retired or emergency justice or judge shall receive from the State total annual compensation for judicial services in excess of that received by an active justice or judge of the bench to which the justice or judge is being recalled. (1967, c. 108, s. 1; 1973, c. 640, s. 3; 1977, c. 736, s. 1; 1979, c. 884, s. 1; 1981, c. 455, s. 3; c. 859, s. 46; 1981 (Reg. Sess., 1982), c. 1253, s. 2; 1983, c. 784; 1985, c. 698, ss. 9(a), 16(b); 1987 (Reg. Sess., 1988), c. 1086, s. 31(a); 2002-159, s. 25.)

Cross References. — For the Consolidated Judicial Retirement Act, see G.S. 135-50 et seq.

§ 7A-39.4. Retirement creates vacancy.

The retirement of any justice of the Supreme Court or any judge of the Court of Appeals under the provisions of this Article shall create a vacancy in his office to be filled as provided by law. (1967, c. 108, s. 1.)

§ 7A-39.5. Recall of emergency justice or emergency judge upon temporary incapacity of a justice or judge.

(a) Upon the request of any justice of the Supreme Court who has been advised in writing by a reputable and competent physician that he is temporarily incapable of performing efficiently and promptly all the duties of his office, the Chief Justice may recall any emergency justice who, in his opinion, is competent to perform the duties of an associate justice, to serve temporarily in the place of the justice in whose behalf he is recalled; provided, that when the incapacity of a justice of the Supreme Court is such that he cannot request the recall of an emergency justice to serve in his place, an order of recall may be issued by the Chief Justice upon satisfactory medical proof of the facts upon which the order of recall must be based. Orders of recall shall be in writing and entered upon the minutes of the court.

(b) Upon the request of any judge of the Court of Appeals who has been advised in writing by a reputable and competent physician that he is temporarily incapable of performing efficiently and promptly all the duties of his office, the Chief Judge may recall any emergency judge who, in his opinion, is competent to perform the duties of a judge of the Court of Appeals, to serve temporarily in the place of the judge in whose behalf he is recalled; provided, that when the incapacity of a judge of the Court of Appeals is such that he cannot request the recall of an emergency judge to serve in his place, an order of recall may be issued by the Chief Judge upon satisfactory medical proof of the facts upon which the order of recall must be based. If the Chief Judge does not recall an emergency judge to serve in the place of the temporarily incapacitated judge, the Chief Justice may recall an emergency justice who, in his opinion, is competent to perform the duties of a judge of the Court of Appeals, to serve temporarily in the place of the judge in whose behalf he is recalled. In no case, however, may more than one emergency justice or emergency judge serve on one panel of the Court of Appeals at any given time. Orders of recall shall be in writing and entered upon the minutes of the court. (1967, c. 108, s. 1; 1985, c. 698, s. 16(c).)

§ 7A-39.6. Application to the Governor; commission as emergency justice or emergency judge.

No retired justice of the Supreme Court or retired judge of the Court of Appeals may become an emergency justice or emergency judge except upon his written application to the Governor certifying his desire and ability to serve as an emergency justice or emergency judge. If the Governor is satisfied that the applicant qualifies under G.S. 7A-39.3(a) to become an emergency justice or emergency judge and that he is physically and mentally able to perform the official duties of an emergency justice or emergency judge, he shall issue to such applicant a commission as an emergency justice or emergency judge of the court from which he retired. The commission shall be effective upon the date of its issue and shall terminate when the judge to whom it is issued reaches the maximum age for judicial service under G.S. 7A-4.20(a). (1967, c. 108, s. 1; 1977, c. 736, s. 2; 1979, c. 884, s. 2.)

§ 7A-39.7. Jurisdiction and authority of emergency justices and emergency judges.

An emergency justice or emergency judge shall not have or possess any jurisdiction or authority to hear arguments or participate in the consideration and decision of any cause or perform any other duty or function of a justice of the Supreme Court or judge of the Court of Appeals, respectively, except while serving under an order of recall and in respect to appeals, motions, and other matters heard, considered, and decided by the court during the period of his temporary service under such order; and the justice of the Supreme Court or judge of the Court of Appeals in whose behalf an emergency justice or emergency judge is recalled to active service shall be disqualified to participate in the consideration and decision of any question presented to the court by appeal, motion or otherwise in which any emergency justice or emergency judge recalled in his behalf participated. (1967, c. 108, s. 1.)

§ 7A-39.8. Court authorized to adopt rules.

The Supreme Court shall prescribe rules respecting the filing of opinions prepared by an emergency justice or an emergency judge after his period of temporary service has expired, and any other matter deemed necessary and consistent with the provisions of this Article. (1967, c. 108, s. 1.)

§ 7A-39.9. Chief Justice and Chief Judge may recall and terminate recall of justices and judges; procedure when Chief Justice or Chief Judge incapacitated.

(a) Decisions of the Chief Justice and the Chief Judge regarding recall of emergency justices and emergency judges, when not in conflict with the provisions of this Article, are final.

(b) The Chief Justice or Chief Judge, may, at any time, in his discretion, cancel any order of recall issued by him or fix the termination date thereof.

(c) Whenever the Chief Justice is the justice in whose behalf an emergency justice is recalled to temporary service, the powers vested in him as Chief Justice by this article shall be exercised by the associate justice senior in point of time served on the Supreme Court. Whenever the Chief Judge is the judge in whose behalf an emergency judge or justice is recalled to temporary service the powers vested in him as Chief Judge by this article shall be exercised by the associate judge senior in point of time served on the Court of Appeals. If two or more judges have served the same length of time on the Court of Appeals, the eldest shall be deemed the senior judge. (1967, c. 108, s. 1; 1985, c. 698, s. 16(d), (e).)

§ 7A-39.10. Article applicable to previously retired justices.

All provisions of this Article shall apply to every justice of the Supreme Court who has heretofore retired and is receiving compensation as an emergency justice. (1967, c. 108, s. 1.)

§ 7A-39.11. Retirement on account of total and permanent disability.

Every justice of the Supreme Court or judge of the Court of Appeals who has served for eight years or more on the Supreme Court, the Court of Appeals, or the superior court, or as Administrative Officer of the Courts, or in any combination of these offices, and who while in active service becomes totally and permanently disabled so as to be unable to perform efficiently the duties of his office, and who retires by reason of such disability, shall receive for life compensation equal to two thirds of the annual salary from time to time received by the occupant or occupants of the office from which he retired. In determining whether a judge is eligible for retirement under this section, time served as district solicitor of the superior court prior to January 1, 1971, may be included. Whenever any justice or judge claims retirement benefits under this section on account of total and permanent disability, the Governor and Council of State, acting together, shall, after notice and an opportunity to be heard is given the applicant, by a majority vote of said body, make findings of fact from the evidence offered. Such findings of fact shall be reduced to writing and entered upon the minutes of the Council of State. The findings so made shall be conclusive as to such matters and determine the right of the applicant to retirement benefits under this section. Justices and judges retired under the provisions of this section are not subject to recall as emergency justices or judges. (1967, c. 108, s. 1.)

§ 7A-39.12. Applicability of §§ 7A-39.2 and 7A-39.11.

The provisions of G.S. 7A-39.2 and 7A-39.11 shall apply only to justices and judges who entered into office prior to January 1, 1974. The extent of such application is specified in Chapter 135, Article 4 (Uniform Judicial Retirement Act). (1973, c. 640, s. 5.)

§ 7A-39.13. Recall of active and emergency justices and judges who have reached mandatory retirement age.

Justices and judges retired because they have reached the mandatory retirement age, and emergency justices and judges whose commissions have expired because they have reached the mandatory retirement age, may be temporarily recalled to active service under the following circumstances:

(1) The justice or judge must consent to the recall.

(2) The Chief Justice may recall retired justices to serve on the Supreme Court or on the Court of Appeals, and the Chief Judge may recall retired judges of the Court of Appeals to serve on that court.

(3) The period of recall shall not exceed six months, but it may be renewed for an additional six months if the emergency for which the recall was ordered continues.

(4) Prior to recall, the Chief Justice or the Chief Judge, as the case may be, shall satisfy himself that the justice or judge being recalled is capable of efficiently and promptly performing the duties of the office to which recalled.

(5) Recall is authorized only to replace an active justice or judge who is temporarily incapacitated.

(6) Jurisdiction and authority of a recalled justice or judge is as specified in G.S. 7A-39.7.

(7) The Supreme Court and the Court of Appeals, as the case may be, shall prescribe rules respecting the filing of opinions prepared by a retired justice or judge after his period of temporary service has expired, and respecting any other matter deemed necessary and consistent with this section.

(8) Compensation of recalled retired justices and judges is the same as for recalled emergency justices and judges under G.S. 7A-39.3(b).

(9) Recall shall be evidenced by a commission signed by the Chief Justice or Chief Judge, as the case may be. (1981, c. 455, s. 2; 1985, c. 698, s. 16(f).)

§ 7A-39.14. Recall by Chief Justice of retired or emergency justices or judges for temporary vacancy.

(a) In addition to the authority granted to the Chief Justice under G.S. 7A-39.5 to recall emergency justices and under G.S. 7A-39.13 to recall retired justices, the Chief Justice may recall not more than one retired or emergency justice or retired emergency judge of the Court of Appeals, including an emergency justice or judge whose commission has expired because he has reached the mandatory retirement age, in the following circumstances:

(1) If a vacancy exists on the Supreme Court, he may recall an emergency or retired justice to serve on that court until the vacancy is filled in accordance with law.

(2) If a vacancy exists on the Court of Appeals, he may recall an emergency or retired justice of the Supreme Court or judge of the Court of Appeals to serve on the Court of Appeals until the vacancy is filled in accordance with law.

(3) With the concurrence of a majority of the Supreme Court, he may recall an emergency or retired justice to serve on the Supreme Court in place of a sitting justice who, as determined by the Chief Justice, is temporarily unable to perform all of the duties of his office.

(4) With the concurrence of a majority of the Supreme Court, he may recall an emergency or retired justice of the Supreme Court or judge of the Court of Appeals to serve on the Court of Appeals in place of a sitting judge who, as determined by the Chief Justice, is temporarily unable to perform all of the duties of his office.

(b) No judge or justice may be recalled unless he consents to the recall. Orders of recall issued pursuant to this section must be in writing and entered on the minutes of the court. In addition, if the judge or justice is recalled pursuant to subdivision (a)(3) or (a)(4), the order shall contain a finding by the Chief Justice setting out, in detail, the reason for the recall.

(c) A judge or justice recalled pursuant to subdivision (a)(1) or (a)(2) of this section:

(1) Has the same authority and jurisdiction granted to emergency justices and judges under G.S. 7A-39.7;

(2) Is subject to rules adopted pursuant to G.S. 7A-39.8 regarding filing of opinions and other matters; and

(3) Is compensated as are other retired or emergency justices or judges recalled for service pursuant to G.S. 7A-39.5 or G.S. 7A-39.13.

(d) A judge or justice recalled pursuant to subdivision (a)(3) or (a)(4) of this section:

(1) Has the same authority and jurisdiction granted to emergency justices and judges under G.S. 7A-39.7;

(2) Is subject to rules adopted pursuant to G.S. 7A-39.8 regarding filing of opinions and other matters;

(3) May, after the return of the judge or justice in whose place he was sitting, complete the duties assigned to him before the return of that judge or justice; and

(4) Is compensated as are other retired or emergency justices or judges recalled for service pursuant to G.S. 7A-39.5 or G.S. 7A-39.13.

(e) A retired or emergency justice or judge may serve on the Supreme Court or Court of Appeals pursuant to subdivision (a)(3) or (a)(4) only if he is recalled to serve temporarily in place of a sitting justice or judge who is not temporarily incapacitated under circumstances that would permit temporary service of the retired or emergency justice or judge pursuant to G.S. 7A-39.5 or G.S. 7A-39.13. This section does not authorize more than seven justices to serve on the Supreme Court at any given time, nor does it authorize more than 12 justices and judges to serve on the Court of Appeals at any given time. In no case may more than one emergency justice or emergency judge serve on one panel of the Court of Appeals at any given time.

(f) Repealed by Session Laws 1989, c. 795, s. 27.1. (1985, c. 698, s. 15(a), (b); 1985 (Reg. Sess., 1986), c. 851, s. 3; c. 1014, s. 225; 1987, c. 703, s. 5; c. 738, ss. 131(a), (b); 1989, c. 795, s. 27.1.)

§ 7A-39.15. Emergency recall judges of the Court of Appeals.

(a) A retired justice or judge of the Appellate Division of the General Court of Justice is eligible to be appointed as an emergency recall judge of the Court of Appeals under the following circumstances:

(1) The justice or judge has retired under the provisions of the Consolidated Judicial Retirement Act, Article 4 of Chapter 135 of the General Statutes, or is eligible to receive a retirement allowance under that act;

(2) The justice or judge has not reached the mandatory retirement age specified in G.S. 7A-4.20;

(3) The justice or judge has served a total of at least five years as a judge or justice of the General Court of Justice, provided that at least six months was served in the Appellate Division, whether or not otherwise eligible to serve as an emergency justice or judge of the Appellate Division of the General Court of Justice;

(4) The judicial service of the justice or judge ended within the preceding 15 years; and

(5) The justice or judge has applied to the Governor for appointment as an emergency recall judge of the Court of Appeals in the same manner as is provided for application in G.S. 7A-53. If the Governor is satisfied that the applicant meets the requirements of this section and is physically and mentally able to perform the duties of a judge of the Court of Appeals, the Governor shall issue a commission appointing the applicant as an emergency recall judge of the Court of Appeals until the applicant reaches the mandatory retirement age for judges of the Court of Appeals specified in G.S. 7A-4.20.

Any former justice or judge of the Appellate Division of the General Court of Justice who otherwise meets the requirements of this section to be appointed an emergency recall judge of the Court of Appeals, but who has already reached the mandatory retirement age for judges of the Court of Appeals set forth in G.S. 7A-4.20, may apply to the Governor to be appointed as an emergency recall judge of the Court of Appeals as provided in this section. If the Governor issues a commission to the applicant, the retired justice or judge is subject to recall as an emergency recall judge of the Court of Appeals as provided in this section.

(b) Notwithstanding any other provision of law, the Chief Judge of the Court of Appeals may recall and assign one or more emergency recall judges of the Court of Appeals, not to exceed three at any one time, provided funds are available, if the Chief Judge determines that one or more emergency recall judges of the Court of Appeals are necessary to discharge the court's business expeditiously.

(c) Any emergency recall judge of the Court of Appeals appointed as provided in this section shall be subject to recall in the following manner:

(1) The judge shall consent to the recall;
(2) The Chief Judge of the Court of Appeals may order the recall;
(3) Prior to ordering recall, the Chief Judge of the Court of Appeals shall be satisfied that the recalled judge is capable of efficiently and promptly discharging the duties of the office to which recalled;
(4) Orders of recall and assignment shall be in writing, evidenced by a commission signed by the Chief Judge of the Court of Appeals, and entered upon the minutes of the permanent records of the Court of Appeals;
(5) Compensation, expenses, and allowances of emergency recall judges of the Court of Appeals are the same as for recalled emergency superior court judges under G.S. 7A-52(b);
(6) Emergency recall judges assigned under those provisions shall have the same powers and duties, when duly assigned to hold court, as provided for by law for judges of the Court of Appeals;
(7) Emergency recall judges of the Court of Appeals are subject to assignment in the same manner as provided for by G.S. 7A-16 and G.S. 7A-19;
(8) Emergency recall judges of the Court of Appeals shall be subject to rules adopted pursuant to G.S. 7A-39.8 regarding the filing of opinions and other matters;
(9) Emergency recall judges of the Court of Appeals shall be subject to the provisions and requirements of the Canons of Judicial Conduct during the term of assignment; and
(10) An emergency recall judge of the Court of Appeals shall not engage in the practice of law during any period for which the emergency recall Court of Appeals judgeship is commissioned. However, this subdivision shall not be construed to prohibit an emergency recall judge of the Court of Appeals appointed pursuant to this section from serving as a referee, arbitrator, or mediator during service as an emergency recall judge of the Court of Appeals so long as the service does not conflict with or interfere with the judge's service as an emergency recall judge of the Court of Appeals.

(d) A justice or judge commissioned as an emergency recall judge of the Court of Appeals is also eligible to receive a commission as an emergency special superior court judge. However, no justice or judge who has been recalled as provided in this section shall, during the period so recalled and assigned, contemporaneously serve as an emergency special superior court judge or emergency justice of the General Court of Justice. (1995, c. 108, s. 1.)

SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 7.

Organization.

§ 7A-40. Composition; judicial powers of clerk.

The Superior Court Division of the General Court of Justice consists of the several superior courts of the State. The clerk of superior court in the exercise of the judicial power conferred upon him as ex officio judge of probate, and in the exercise of other judicial powers conferred upon him by law in respect of special proceedings and the administration of guardianships and trusts, is a judicial officer of the Superior Court Division, and not a separate court. (1965, c. 310, s. 1; 1967, c. 691, s. 1; 1969, c. 1190, s. 4; 1971, c. 377, s. 4.)

Editor's Note. — This section was originally G.S. 7A-39.1. It was transferred and renumbered G.S. 7A-42 by Session Laws 1967, c. 691, s. 1, effective July 1, 1967. It was again transferred, and renumbered G.S. 7A-40, by Session Laws 1969, c. 1190, s. 4, effective July 1, 1969.

CASE NOTES

This section confers judicial power in special proceedings upon the clerk. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

The legitimation procedure, which is identified in G.S. 49-10 as "a special proceeding in the superior court of the county in which the putative father resides," is within the jurisdictional purview of the clerk of superior court. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Applied in Wyatt v. Wyatt, 69 N.C. App. 747, 318 S.E.2d 251 (1984).

Cited in Yale v. National Indem. Co., 602 F.2d 642 (4th Cir. 1979).

§ 7A-41. Superior court divisions and districts; judges.

(a) **(Effective until January 1, 2009)** The counties of the State are organized into judicial divisions and superior court districts, and each superior court district has the counties, and the number of regular resident superior court judges set forth in the following table, and for districts of less than a whole county, as set out in subsection (b) of this section:

Judicial Division	Superior Court District	Counties	No. of Resident Judges
First	1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	2
First	2	Beaufort, Hyde, Martin, Tyrrell, Washington	1
First	3A	Pitt	2
Second	3B	Carteret, Craven, Pamlico	3
Second	4A	Duplin, Jones, Sampson	1
Second	4B	Onslow	1
Second	5A	(part of New Hanover, part of Pender see subsection (b))	1
	5B	(part of New Hanover, part of Pender see subsection (b))	1
	5C	(part of New Hanover, see subsection (b))	1
First	6A	Halifax	1
First	6B	Bertie, Hertford,	1

G.S. 7A-41(a) is set out three times. See note.

Judicial Division	Superior Court District	Counties	No. of Resident Judges
		Northampton	
First	7A	Nash	1
First	7B	(part of Wilson, part of Edgecombe, see subsection (b))	1
First	7C	(part of Wilson, part of Edgecombe, see subsection (b))	1
Second	8A	Lenoir and Greene	1
Second	8B	Wayne	1
Third	9	Franklin, Granville, Vance, Warren	2
Third	9A	Person, Caswell	1
Third	10A	(part of Wake, see subsection (b))	2
Third	10B	(part of Wake, see subsection (b))	2
Third	10C	(part of Wake, see subsection (b))	1
Third	10D	(part of Wake, see subsection (b))	1
Fourth	11A	Harnett, Lee	1
Fourth	11B	Johnston	1
Fourth	12A	(part of Cumberland, see subsection (b))	1
Fourth	12B	(part of Cumberland, see subsection (b))	1
Fourth	12C	(part of Cumberland, see subsection (b))	2
Fourth	13A	Bladen, Columbus	1
Fourth	13B	Brunswick	1
Third	14A	(part of Durham, see subsection (b))	1
Third	14B	(part of Durham, see subsection (b))	3
Third	15A	Alamance	2
Third	15B	Orange, Chatham	2
Fourth	16A	Scotland, Hoke	1
Fourth	16B	Robeson	2
Fifth	17A	Rockingham	2
Fifth	17B	Stokes, Surry	2
Fifth	18A	(part of Guilford, see subsection (b))	1
Fifth	18B	(part of Guilford,	1

G.S. 7A-41(a) is set out three times. See note.

Judicial Division	Superior Court District	Counties	No. of Resident Judges
		see subsection (b))	
Fifth	18C	(part of Guilford, see subsection (b))	1
Fifth	18D	(part of Guilford, see subsection (b))	1
Fifth	18E	(part of Guilford, see subsection (b))	1
Sixth	19A	Cabarrus	1
Fifth	19B	Montgomery, Randolph	1
Sixth	19C	Rowan	1
Fifth	19D	Moore	1
Sixth	20A	Anson, Richmond, Stanley	2
Sixth	20B	Union	1
Fifth	21A	(part of Forsyth, see subsection (b))	1
Fifth	21B	(part of Forsyth, see subsection (b))	1
Fifth	21C	(part of Forsyth, see subsection (b))	1
Fifth	21D	(part of Forsyth, see subsection (b))	1
Sixth	22	Alexander, Davidson, Davie, Iredell	3
Fifth	23	Alleghany, Ashe, Wilkes, Yadkin	1
Eighth	24	Avery, Madison, Mitchell, Watauga, Yancey	2
Seventh	25A	Burke, Caldwell	2
Seventh	25B	Catawba	2
Seventh	26A	(part of Mecklenburg, see subsection (b))	2
Seventh	26B	(part of Mecklenburg, see subsection (b))	3
Seventh	26C	(part of Mecklenburg, see subsection (b))	2
Seventh	27A	Gaston	2
Seventh	27B	Cleveland, Lincoln	2
Eighth	28	Buncombe	2
Eighth	29A	McDowell, Rutherford	1
Eighth	29B	Henderson, Polk, Transylvania	1
Eighth	30A	Cherokee, Clay,	1

G.S. 7A-41(a) is set out three times. See note.

Judicial Division	Superior Court District	Counties	No. of Resident Judges
		Graham, Macon, Swain	
Eighth	30B	Haywood, Jackson	1.

(a) **(Effective January 1, 2009, until January 1, 2011)** The counties of the State are organized into judicial divisions and superior court districts, and each superior court district has the counties, and the number of regular resident superior court judges set forth in the following table, and for districts of less than a whole county, as set out in subsection (b) of this section:

Judicial Division	Superior Court District	Counties	No. of Resident Judges
First	1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	2
First	2	Beaufort, Hyde, Martin, Tyrrell, Washington	1
First	3A	Pitt	2
Second	3B	Carteret, Craven, Pamlico	3
Second	4A	Duplin, Jones, Sampson	1
Second	4B	Onslow	1
Second	5A	(part of New Hanover, part of Pender see subsection (b))	1
	5B	(part of New Hanover, part of Pender see subsection (b))	1
	5C	(part of New Hanover, see subsection (b))	1
First	6A	Halifax	1
First	6B	Bertie, Hertford, Northampton	1
First	7A	Nash	1
First	7B	(part of Wilson, part of Edgecombe, see subsection (b))	1
First	7C	(part of Wilson, part of Edgecombe,	1

G.S. 7A-41(a) is set out three times. See note.

Judicial Division	Superior Court District	Counties	No. of Resident Judges
		see subsection (b))	
Second	8A	Lenoir and Greene	1
Second	8B	Wayne	1
Third	9	Franklin, Granville, Vance, Warren	2
Third	9A	Person, Caswell	1
Third	10A	(part of Wake, see subsection (b))	2
Third	10B	(part of Wake, see subsection (b))	2
Third	10C	(part of Wake, see subsection (b))	1
Third	10D	(part of Wake, see subsection (b))	1
Fourth	11A	Harnett, Lee	1
Fourth	11B	Johnston	1
Fourth	12A	(part of Cumberland, see subsection (b))	1
Fourth	12B	(part of Cumberland, see subsection (b))	1
Fourth	12C	(part of Cumberland, see subsection (b))	2
Fourth	13A	Bladen, Columbus	1
Fourth	13B	Brunswick	1
Third	14A	(part of Durham, see subsection (b))	1
Third	14B	(part of Durham, see subsection (b))	3
Third	15A	Alamance	2
Third	15B	Orange, Chatham	2
Fourth	16A	Scotland, Hoke	1
Fourth	16B	Robeson	2
Fifth	17A	Rockingham	2
Fifth	17B	Stokes, Surry	2
Fifth	18A	(part of Guilford, see subsection (b))	1
Fifth	18B	(part of Guilford, see subsection (b))	1
Fifth	18C	(part of Guilford, see subsection (b))	1
Fifth	18D	(part of Guilford, see subsection (b))	1
Fifth	18E	(part of Guilford, see subsection (b))	1

G.S. 7A-41(a) is set out three times. See note.

Judicial Division	Superior Court District	Counties	No. of Resident Judges
Sixth	19A	Cabarrus	1
Fifth	19B	Montgomery, Randolph	1
Sixth	19C	Rowan	1
Fifth	19D	Moore	1
Sixth	20A	Anson, Richmond, Stanley	2
Sixth	20B	Union	1
Fifth	21A	(part of Forsyth, see subsection (b))	1
Fifth	21B	(part of Forsyth, see subsection (b))	1
Fifth	21C	(part of Forsyth, see subsection (b))	1
Fifth	21D	(part of Forsyth, see subsection (b))	1
Sixth	22A	Alexander, Iredell	2
Sixth	22B	Davidson, Davie	2
Fifth	23	Alleghany, Ashe, Wilkes, Yadkin	1
Eighth	24	Avery, Madison, Mitchell, Watauga, Yancey	2
Seventh	25A	Burke, Caldwell	2
Seventh	25B	Catawba	2
Seventh	26A	(part of Mecklenburg, see subsection (b))	2
Seventh	26B	(part of Mecklenburg, see subsection (b))	3
Seventh	26C	(part of Mecklenburg, see subsection (b))	2
Seventh	27A	Gaston	2
Seventh	27B	Cleveland, Lincoln	2
Eighth	28	Buncombe	2
Eighth	29A	McDowell, Rutherford	1
Eighth	29B	Henderson, Polk, Transylvania	1
Eighth	30A	Cherokee, Clay, Graham, Macon, Swain	1
Eighth	30B	Haywood, Jackson	1.

(a) **(Effective January 1, 2011)** The counties of the State are organized into judicial divisions and superior court districts, and each superior court district has the counties, and the number of regular resident superior court

G.S. 7A-41(a) is set out three times. See note.

judges set forth in the following table, and for districts of less than a whole county, as set out in subsection (b) of this section:

Judicial Division	Superior Court District	Counties	No. of Resident Judges
First	1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	2
First	2	Beaufort, Hyde, Martin, Tyrrell, Washington	1
First	3A	Pitt	2
Second	3B	Carteret, Craven, Pamlico	3
Second	4A	Duplin, Jones, Sampson	1
Second	4B	Onslow	1
Second	5A	(part of New Hanover, part of Pender see subsection (b))	1
	5B	(part of New Hanover, part of Pender see subsection (b))	1
	5C	(part of New Hanover, see subsection (b))	1
First	6A	Halifax	1
First	6B	Bertie, Hertford, Northampton	1
First	7A	Nash	1
First	7B	(part of Wilson, part of Edgecombe, see subsection (b))	1
First	7C	(part of Wilson, part of Edgecombe, see subsection (b))	1
Second	8A	Lenoir and Greene	1
Second	8B	Wayne	1
Third	9	Franklin, Granville, Vance, Warren	2
Third	9A	Person, Caswell	1
Third	10A	(part of Wake, see subsection (b))	2
Third	10B	(part of Wake, see subsection (b))	2
Third	10C	(part of Wake,	1

G.S. 7A-41(a) is set out three times. See note.

Judicial Division	Superior Court District	Counties	No. of Resident Judges
		see subsection (b))	
Third	10D	(part of Wake, see subsection (b))	1
Fourth	11A	Harnett, Lee	1
Fourth	11B	Johnston	1
Fourth	12A	(part of Cumberland, see subsection (b))	1
Fourth	12B	(part of Cumberland, see subsection (b))	1
Fourth	12C	(part of Cumberland, see subsection (b))	2
Fourth	13A	Bladen, Columbus	1
Fourth	13B	Brunswick	1
Third	14A	(part of Durham, see subsection (b))	1
Third	14B	(part of Durham, see subsection (b))	3
Third	15A	Alamance	2
Third	15B	Orange, Chatham	2
Fourth	16A	Scotland, Hoke	1
Fourth	16B	Robeson	2
Fifth	17A	Rockingham	2
Fifth	17B	Stokes, Surry	2
Fifth	18A	(part of Guilford, see subsection (b))	1
Fifth	18B	(part of Guilford, see subsection (b))	1
Fifth	18C	(part of Guilford, see subsection (b))	1
Fifth	18D	(part of Guilford, see subsection (b))	1
Fifth	18E	(part of Guilford, see subsection (b))	1
Sixth	19A	Cabarrus	1
Fifth	19B	Montgomery, Randolph	1
Sixth	19C	Rowan	1
Fifth	19D	Moore	1
Sixth	20A	Anson, Richmond, Stanley	2
Sixth	20B	Union	2
Fifth	21A	(part of Forsyth, see subsection (b))	1
Fifth	21B	(part of Forsyth, see subsection (b))	1

G.S. 7A-41(a) is set out three times. See note.

Judicial Division	Superior Court District	Counties	No. of Resident Judges
Fifth	21C	(part of Forsyth, see subsection (b))	1
Fifth	21D	(part of Forsyth, see subsection (b))	1
Sixth	22A	Alexander, Iredell	2
Sixth	22B	Davidson, Davie	2
Fifth	23	Alleghany, Ashe, Wilkes, Yadkin	1
Eighth	24	Avery, Madison, Mitchell, Watauga, Yancey	2
Seventh	25A	Burke, Caldwell	2
Seventh	25B	Catawba	2
Seventh	26A	(part of Mecklenburg, see subsection (b))	2
Seventh	26B	(part of Mecklenburg, see subsection (b))	3
Seventh	26C	(part of Mecklenburg, see subsection (b))	2
Seventh	27A	Gaston	2
Seventh	27B	Cleveland, Lincoln	2
Eighth	28	Buncombe	2
Eighth	29A	McDowell, Rutherford	1
Eighth	29B	Henderson, Polk, Transylvania	1
Eighth	30A	Cherokee, Clay, Graham, Macon, Swain	1
Eighth	30B	Haywood, Jackson	1.

(b) For superior court districts of less than a whole county, or with part of one county with part of another, the composition of the district and the number of judges is as follows:

(1) Superior Court District 7B consists of County Commissioner Districts 1, 2 and 3 of Wilson County, Blocks 127 and 128 of Census Tract 6 of Wilson County, and Townships 12 and 14 of Edgecombe County. It has one judge.

(2) Superior Court District 7C consists of the remainder of Edgecombe and Wilson Counties not in Judicial District 7B. It has one judge.

(3) Superior Court District 10A consists of Wake County Precincts 01-12, 01-13, 01-14, 01-18, 01-19, 01-20, 01-22, 01-25, 01-26, 01-28, 01-34, 01-35, 01-40, 01-50, 17-03, and 17-07. It has two judges.

(4) Superior Court District 10B consists of Wake County Precincts 01-01, 01-02, 01-03, 01-04, 01-05, 01-06, 01-07, 01-07A, 01-09, 01-10, 01- 11, 01-16, 01-21, 01-23, 01-27, 01-29, 01-31, 01-32, 01-33, 01-36, 01-41,

G.S. 7A-41(a) is set out three times. See note.

01-48, 01-49, 03-00, 04-01, 04-02, 04-03, 04-04, 04-05, 04-06, 04-07, 04-08, 04-09, 04-10, 04-11, 04-12, 04-13, 04-14, 04-15, 04-16, 04-17, 04-18, 04-19, 04-20, 05-01, 05-02, 06-01, 06-02, 06-03, 07-01, 07-10, 11-01, 11-02, 12-01, 12-02, 12-03, 12-04, 12-05, 12-06, 18-01, 18-02, 18-03, 18-04, 18-05, 18-06, 18-07, 18-08, 20-01, 20-02, 20-03, 20-04, 20-05, 20-06, 20-07, 20-08, 20-09, and 20-10. It has two judges.

(5) Superior Court District 10C consists of Wake County Precincts 02-01, 02-02, 02-03, 02-04, 02-05, 02-06, 07-02, 07-12, 08-01, 08-02, 08-03, 08-04, 08-05, 08-06, 08-07, 08-08, 09-01, 09-02, 09-03, 10-01, 10-02, 10-03, 10-04, 14-01, 14-02, 15-01, 15-02, 15-03, 15-04, 16-01, 16-02, 16-03, 16-04, 16-05, 16-06, 16-07, 19-01, 19-02, 19-03, 19-04, 19-05, 19-06, 19-07, and 19-08. It has one judge.

(6) Superior Court District 10D consists of Wake County Precincts 01-15, 01-17, 01-30, 01-37, 01-38, 01-39, 01-42, 01-43, 01-44, 01-45, 01-46, 01-47, 01-51, 07-03, 07-04, 07-05, 07-06, 07-07, 07-07A, 07-09, 07-11, 13-01, 13-02, 13-03, 13-04, 13-05, 17-01, 17-02, 17-04, 17-05, 17-06, and 17-08. It has one judge.

(7) Superior Court District 12A consists of that part of Cross Creek Precinct #18 north of Raeford Road, Montclair Precinct, that part of Precinct 71-1 not in Judicial District 12B, Precinct 71-2, Morganton #2 Precinct, Cottonade Precinct, Cumberland Precincts 1 and 2, and Brentwood Precinct. It has one judge.

(8) Superior Court District 12B consists of all of State House of Representatives District 17, except for Westarea Precinct, and it also includes that part of Cross Creek Precinct #15 east of Village Drive. It has one judge.

(9) Superior Court District 12C consists of the remainder of Cumberland County not in Superior Court Districts 12A or 12B. It has two judges.

(10) Superior Court District 14A consists of Durham Precincts 9, 11, 12, 13, 14, 15, 18, 34, 40, 41, and 42, and that part of Durham Precinct 39 east of North Carolina Highway #751. It has one judge.

(10a) Effective with the 2004 election, in addition to the boundaries provided for in this section, Superior Court District 14A also includes that portion of Durham Precinct 53 east of North Carolina Highway #751.

(11) Superior Court District 14B consists of the remainder of Durham County not in Superior Court District 14A. It has three judges.

(12) Superior Court District 18A consists of Fentress Precincts 1 and 2; Greensboro Precincts 4, 5, 6, 46, 52, 67, 68, 69, 70, 71, 72, 73, 74, and 75; North Clay Precinct; Pleasant Garden Precincts 1 and 2; and South Clay Precinct. It has one judge.

(13) Superior Court District 18B consists of High Point Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27; HP Precinct; Jamestown Precincts 1 and 5; North Deep River Precinct; and South Deep River Precinct. It has one judge.

(14) Superior Court District 18C consists of Center Grove Precincts 1, 2, and 3; Friendship Precincts 1, 2, 3, 4, and 5; Greensboro Precincts 17, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40A, 40B, 41, 42, 43, 64, 65, and 66; Jamestown Precincts 2, 3, and 4; Monroe Precinct 3; North Center Grove Precinct; Oak Ridge Precincts 1 and 2; Summerfield Precincts 1, 2, 3, and 4; and Stokesdale Precinct. It has one judge.

(15) Superior Court District 18D consists of Greensboro Precincts 1, 11, 12, 13, 14, 15, 16, 19, 35, 44, 45, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, and 63; and Sumner Precincts 1, 2, 3, and 4. It has one judge.

G.S. 7A-41(a) is set out three times. See note.

(16) Superior Court District 18E consists of Gibsonville Precinct; Greene Precinct; Greensboro Precincts 2, 3, 7, 8, 9, 10, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 29; Jefferson Precincts 1, 2, 3, and 4; Monroe Precincts 1 and 2; North Madison Precinct; North Washington Precinct; Rock Creek Precincts 1 and 2; South Madison Precinct; and South Washington Precinct. It has one judge.

(17) Superior Court District 21A consists of Forsyth County Precincts 051, 052, 053, 054, 055, 071, 072, 073, 074, 075, 091, 092, 122, 123, 131, 132, 133, 701, 702, 703, 704, 705, 706, 707, 708, 709, 806, 807, and 808. It has one judge.

(18) Superior Court District 21B consists of Forsyth County Precincts 042, 043, 501, 502, 503, 504, 505, 506, 507, 601, 602, 603, 604, 605, 606, 607, 901, 902, 903, 904, 905, and 907. It has one judge.

(19) Superior Court District 21C consists of Forsyth County Precincts 011, 012, 013, 014, 015, 021, 031, 032, 033, 034, 061, 062, 063, 064, 065, 066, 067, 068, 101, 111, 112, 801, 802, 803, 804, 805, 809, 906, 908, and 909. It has one judge.

(20) Superior Court District 21D consists of Forsyth County Precincts 081, 082, 083, 201, 203, 204, 205, 206, 207, 301, 302, 303, 304, 305, 306, 401, 402, 403, 404, and 405. It has one judge.

(21) Superior Court District 26A consists of Charlotte Precincts 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 27, 31, 33, 39, 41, 42, 46, 52, 54, 55, 56, 58, 60, 77, 78, and 82, and Long Creek Precinct #2 of Mecklenburg County. It has two judges.

(22) Superior Court District 26B consists of Charlotte Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 17, 18, 20, 21, 28, 29, 30, 32, 34, 35, 36, 37, 38, 43, 44, 45, 47, 51, 61, 62, 63, 65, 66, 67, 68, 69, 71, 74, 83, 84, and 86, Crab Orchard Precincts 1 and 2, and Mallard Creek Precinct 1. It has two judges.

(23) Superior Court District 26C consists of the remainder of Mecklenburg County not in Superior Court Districts 26A or 26B. It has two judges.

(24), (25) Repealed by Session Laws 2003-284, s. 13.14.(b), effective July 1, 2003.

(26) Superior Court District 5A consists of the New Hanover County precincts of Cape Fear #1, Cape Fear #2, Harnett #1, Harnett #4, Harnett #6, Wilmington #1, Wilmington #2, Wilmington #3, Wilmington #4, Wilmington #6, Wilmington #7, Wilmington #8, Wilmington #9, Wilmington #10, Wilmington #15, Wilmington #19, and the part of Harnett #7 that consists of the part of Block Group 6 of 1990 Census Tract 0116.02 containing Blocks 601B, 602B, 603, 611, 612, 613, 614, 615, 616, 617, 618, 619; and the Pender County precincts of Canetuck, Caswell, Columbia, Grady, Upper Holly, and Upper Union. It has one judge.

(27) Superior Court District 5B consists of the New Hanover County precincts of Cape Fear #3, Harnett #2, Harnett #5, the part of Harnett #7 that is not in Superior Court District 5A, Harnett #8, Wrightsville Beach, Wilmington #11, Wilmington #12, Wilmington #13, Wilmington #22, Wilmington #24, and the part of Harnett #3 that consists of the part of Block Group 1 of 1990 Census Tract 0119.01 containing Blocks 102, 105, 106A, 106B, 107A, 107B, 107C, 107D, and 108, the part of Block Group 1 of 1990 Census Tract 0119.02 containing Blocks 103, 104, and 114, and the part of Block Group 1 of 1990 Census Tract 0120.01 containing Blocks 101A, 101B, 101C, 101D, 102A, 102B, 103,

104, 105A, 105B, 115A, and 115B; and the following precincts of Pender County: North Burgaw, South Burgaw, Middle Holly, Long Creek, Penderlea, Lower Union, Rocky Point, Lower Topsail, Upper Topsail, Scotts Hill, and Surf City. It has one judge.

(28) Superior Court District 5C consists of the part of New Hanover County that is not in Superior Court Districts 5A or 5B. It has one judge.

(c) In subsection (b) above:

(1) The names and boundaries of townships are as they were legally defined and in effect as of January 1, 1980, and recognized in the 1980 U.S. Census;

(2) For Guilford County, the precincts are as they were legally defined and recognized as voting districts of the same name in the 2000 U.S. Census, except Greensboro Precincts 40A and 40B are as they were modified by the Guilford County Board of Elections and are as shown on the Legislative Services Office's redistricting computer database on May 1, 2001;

(2a) For Wake County, the precincts are as they were adopted by the Wake County Board of Elections and in effect as of January 1, 2001;

(3) For Mecklenburg and Durham Counties, precinct boundaries are as shown on the current maps in use by the appropriate county board of elections as of January 31, 1984, in accordance with G.S. 163-128(b);

(4) For Wilson County, commissioner districts are those in use for election of members of the county board of commissioners as of January 1, 1987;

(5) For Cumberland County, House District 17 is in accordance with the boundaries in effect on January 1, 1987. Precincts are in accordance with those as approved by the United States Department of Justice on February 28, 1986; and

(6) For Forsyth County, the precincts are as they were legally defined and recognized in the 2000 U.S. Census as of January 1, 2001; and

(7) The names and boundaries of precincts in Montgomery, Moore, and Randolph Counties are those in existence on March 15, 1999.

(8) The names and boundaries of precincts in New Hanover and Pender Counties are those in existence on December 1, 1999.

If any changes in precinct boundaries, wards, commissioner districts, or House of Representative districts have been made since the dates specified, or are made, those changes shall not change the boundaries of the superior court districts; provided that if any of those boundaries have changed, a precinct is divided by a superior court judicial district boundary, and the precinct was not so divided at the time of enactment of this section in 1987, the boundaries of the superior court judicial district are changed to place the entirety of the precinct in the superior court judicial district where the majority of the residents of the precinct reside, according to the 1990 Federal Census if:

(1) Such change does not result in placing a superior court judge in another superior court district;

(2) Such change does not make a district that has an effective racial minority electorate not have an effective racial minority electorate; and

(3) The change is approved by the county board of elections where the precinct is located, State Board of Elections and by the Secretary of State upon finding that the change:

   a. Will improve election administration; and
   b. Complies with subdivisions (1) and (2) of this subsection.

G.S. 7A-41(a) is set out three times. See note.

(d) The several judges, their terms of office, and their assignments to districts are as follows:

(1) In the first superior court district, J. Herbert Small and Thomas S. Watts serve terms expiring December 31, 1994.

(2) In the second superior court district, William C. Griffin serves a term expiring December 31, 1994.

(3) In the third-A superior court district, David E. Reid serves a term expiring on December 31, 1992.

(4) In the third-B superior court district, Herbert O. Phillips, III, serves a term expiring on December 31, 1994.

(5) In the fourth-A superior court district, Henry L. Stevens, III, serves a term expiring December 31, 1994.

(6) In the fourth-B superior court district, James R. Strickland serves a term expiring December 31, 1992.

(7) In the fifth superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Bradford Tillery, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins January 1, 1995. In the fifth superior court district, Napoleon B. Barefoot serves a term expiring December 31, 1994.

(8) In the sixth-A superior court district, Richard B. Allsbrook serves a term expiring December 31, 1990.

(9) In the sixth-B superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(10) In the seventh-A superior court district, Charles B. Winberry, serves a term expiring December 31, 1994.

(11) In the seventh-B superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(12) In the seventh-C superior court district, Franklin R. Brown serves a term expiring December 31, 1990.

(13) In the eighth-A superior court district, James D. Llewellyn serves a term expiring December 31, 1994.

(14) In the eighth-B superior court district, Paul M. Wright serves a term expiring December 31, 1992.

(15) In the ninth superior court district, Robert H. Hobgood and Henry W. Hight, Jr., serve terms expiring December 31, 1994.

(16) In the tenth-A superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(17) In the tenth-B superior court district, Robert L. Farmer serves a term expiring December 31, 1992. In the tenth-B superior court district, no election shall be held in 1990 for the full term of the seat now occupied by Henry V. Barnette, Jr., and the holder of that seat shall serve until a successor is elected in 1992 and qualifies. The succeeding term begins January 1, 1993.

(18) In the tenth-C superior court district, Edwin S. Preston, serves a term expiring December 31, 1990. In the tenth-D superior court district, Donald Stephens serves a term expiring December 31, 1988.

(19) In the eleventh superior court district, Wiley F. Bowen serves a term expiring December 31, 1990.

(20) In the twelfth-A superior court district, D.B. Herring, Jr., serves a term expiring December 31, 1990.

(21) In the twelfth-B superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(22) In the twelfth-C superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Coy E. Brewer, Jr.,

G.S. 7A-41(a) is set out three times. See note.

and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins January 1, 1995. In the twelfth-C superior court district, E. Lynn Johnson serves a term expiring December 31, 1994.

(23) In the thirteenth superior court district, Giles R. Clark serves a term expiring December 31, 1994.

(24) In the fourteenth-A superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(25) In the fourteenth-B superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Anthony M. Brannon, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins July 1, 1995.

(26) In the fourteenth-B superior court district, no election shall be held in 1990 for the full term of the seat now occupied by Thomas H. Lee, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins January 1, 1995. In the fourteenth-B superior court district, J. Milton Read, Jr., serves a term expiring December 31, 1994.

(27) In the fifteenth-A superior court district, J.B. Allen, Jr., serves a term expiring December 31, 1994.

(28) In the fifteenth-B superior court district, F. Gordon Battle serves a term expiring December 31, 1994.

(29) In the sixteenth-A superior court district, B. Craig Ellis serves a term expiring December 31, 1994.

(30) In the sixteenth-B superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989. In the sixteenth-B judicial [superior court] district, a judge shall be appointed by the Governor to serve until the results of the 1990 general election are certified. A person shall be elected in the 1990 general election to serve the remainder of the term expiring December 31, 1996.

(31) In the seventeenth-A superior court district, Melzer A. Morgan, Jr., serves a term expiring December 31, 1990.

(32) In the seventeenth-B superior court district, James M. Long serves a term expiring December 31, 1994.

(33) In the eighteenth-A superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(34) In the eighteenth-B superior court district, Edward K. Washington's term expired December 31, 1986, but he is holding over because of a court order enjoining an election from being held in 1986. A successor shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(35) In the eighteenth-C superior court district, W. Douglas Albright serves a term expiring December 31, 1990.

(36) In the eighteenth-D superior court district, Thomas W. Ross's term expired December 31, 1986, but he is holding over because of a court order enjoining an election from being held in 1986. A successor shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(37) In the eighteenth-E superior court district, Joseph John's term expired December 31, 1986, but he is holding over because of a court order enjoining an election from being held in 1986. A successor shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

G.S. 7A-41(a) is set out three times. See note.

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(38) In the nineteenth-A superior court district, James C. Davis serves a term expiring December 31, 1992.

(39) In the nineteenth-B1 superior court district, Russell G. Walker, Jr., serves a term expiring December 31, 1990. No election shall be held in 1998 for the full term of the seat now occupied by Russell G. Walker, Jr., and the holder of that seat shall serve until a successor is elected in 2000 and qualifies. The succeeding term shall begin January 1, 2001. The superior court judgeship held on June 12, 1996, in Superior Court District 20A by a resident of Moore County (James M. Webb) is allocated to Superior Court District 19B2. The term of that judge expires December 31, 2000. The judge's successor shall be elected in the 2000 general election.

(40) In the nineteenth-C superior court district, Thomas W. Seay, Jr., serves a term expiring December 31, 1990.

(41) In the twentieth-A superior court district, F. Fetzer Mills serves a term expiring December 31, 1992.

(42) In the twentieth-B superior court district, William H. Helms serves a term expiring December 31, 1990.

(43) In the twenty-first-A superior court district, William Z. Wood serves a term expiring December 31, 1990.

(44) In the twenty-first-B superior court district, Judson D. DeRamus, Jr., serves a term expiring December 31, 1988.

(45) In the twenty-first-C superior court district, William H. Freeman serves a term expiring December 31, 1990.

(46) In the twenty-first-D superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(47) In the twenty-second superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Preston Cornelius, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term shall begin January 1, 1995. In the twenty-second superior court district, Robert A. Collier serves a term expiring December 31, 1994.

(48) In the twenty-third superior court district, Julius A. Rousseau, Jr., serves a term expiring December 31, 1990.

(49) In the twenty-fourth superior court district, Charles C. Lamm, Jr., serves a term expiring December 31, 1994.

(50) In the twenty-fifth-A superior court district, Claude S. Sitton serves a term expiring December 31, 1994.

(51) In the twenty-fifth-B superior court district, Forrest A. Ferrell serves a term expiring December 31, 1990.

(52) In the twenty-sixth-A superior court district, no election shall be held in 1994 for the full term of the seat now occupied by W. Terry Sherrill, and the holder of that seat shall serve until a successor is elected in 1996 and qualifies. The succeeding term shall begin January 1, 1997. In the twenty-sixth-A superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(53) In the twenty-sixth-B superior court district, Frank W. Snepp, Jr., and Kenneth A. Griffin serve terms expiring December 31, 1990.

(54) In the twenty-sixth-C superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Chase Boone Saunders, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term shall begin January 1, 1995. In the twenty-sixth-C superior court district, Robert M. Burroughs serves a term expiring December 31, 1994.

G.S. 7A-41(a) is set out three times. See note.

(55) In the twenty-seventh-A superior court district, no election shall be held in 1988 for the full term of the seat now occupied by Robert E. Gaines, and the holder of that seat shall serve until a successor is elected in 1990 and qualifies. The succeeding term begins January 1, 1991. In the twenty-seventh-A superior court district, Robert W. Kirby serves a term expiring December 31, 1990.

(56) In the twenty-seventh-B superior court district, John M. Gardner serves a term expiring December 31, 1994.

(57) In the twenty-eighth superior court district, Robert D. Lewis and C. Walter Allen serve terms expiring December 31, 1990.

(58) In the twenty-ninth superior court district, Hollis M. Owens, Jr., serves a term expiring December 31, 1990.

(59) In the thirtieth-A superior court district, James U. Downs serves a term expiring December 31, 1990.

(60) In the thirtieth-B superior court district, Janet M. Hyatt serves a term expiring December 31, 1994. (1969, c. 1171, ss. 1-3; c. 1190, s. 4; 1971, c. 377, s. 5; c. 997; 1973, c. 47, s. 2; c. 646; c. 855, s. 1; 1975, c. 529; c. 956, ss. 1, 2; 1975, 2nd Sess., c. 983, s. 114; 1977, c. 1119, ss. 1, 3, 4; c. 1130, ss. 1, 2; 1977, 2nd Sess., c. 1238, s. 1; c. 1243, s. 4; 1979, c. 838, s. 119; c. 1072, s. 1; 1979, 2nd Sess., c. 1221, s. 1; 1981, c. 964, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1282, s. 71.2; 1983 (Reg. Sess., 1984), c. 1109, ss. 4, 4.1; 1985, c. 698, s. 11(a); 1987, c. 509, s. 1; c. 549, s. 6.6; c. 738, s. 124; 1987 (Reg. Sess., 1988), c. 1037, s. 1; c. 1056, ss. 14, 15; 1989, c. 795, s. 22(a); 1991, c. 746, s. 1; 1993, c. 321, ss. 200.4(a), 200.5(a), (d); 1995, c. 51, s. 1; c. 509, s. 3; 1995 (Reg. Sess., 1996), c. 589, s. 1(a), (c); 1998-212, s. 16.16A(a); 1998-217, s. 67.3(c); 1999-237, ss. 17.12(b), 17.19(a)-(d), 17.20(a)-(c); 1999-396, s. 1; 2000-67, s. 15.6(a); 2000-140, s. 36; 2001-333, ss. 1, 2; 2001-424, s. 22.4(b); 2001-507, ss. 3, 4; 2003-284, ss. 13.14(a), 13.14(b); 2004-124, s. 14.6(b); 2004-127, s. 2(a); 2005-276, ss. 14.2(a), 14.2(e1); 2006-96, s. 2; 2007-323, s. 14.25(a).)

Subsection (a) is set out three times. — The first version of subsection (a) set out above is effective until January 1, 2009. The second version of subsection (a) set out above is effective from January 1, 2009, until January 1, 2011. The third version of subsection (a) set out above is effective January 1, 2011.

Preclearance Under § 5 of the Voting Rights Act. — For information on receipt of preclearance, please refer to the *North Carolina Register* (website at http://www.oah.state.nc.us/rules/register) or the Administrative Office of the Courts (website at http://www.nccourts.org) as described in Chapter 120, Article 6A, G.S. 120-30.9A et seq.

Session Laws 1993, c. 321, s. 200.4, which amended subsection (a), was effective November 1, 1993, or 15 days after the date upon which s. 200.4(a) and (b) were approved under Section 5 of the Voting Rights Act of 1965, whichever was later. Preclearance was received from the U.S. Department of Justice by letter dated February 14, 1994.

Session Laws 1993, c. 321, s. 200.5(a), which amended this section, was effective November 1, 1993, or the date upon which s. 200.5(a) and (b) were approved under Section 5 of the Voting Rights Act of 1965, whichever was later. Preclearance was received from the U.S. Department of Justice by letter dated February 14, 1994.

Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 5 provides that c. 589, s. 1, which amended this section, becomes effective January 4, 1997, or the date upon which that section is approved under section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated December 16, 1996.

Session Laws 2000-67, s. 15.6(c), provides that subsection (a) of the section becomes effective December 15, 2000, as to any district in which no county is subject to section 5 of the Voting Rights Act of 1965 (Act) and, as to any district in which any county is subject to section 5 of the Act, subsection (a) becomes effective December 15, 2000, or 15 days after the date upon which that subsection is approved under section 5 of the Act, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated October 26, 2000.

Session Laws 2001-333, s. 3, provides: "As to a district in a county not subject to section 5 of the Voting Rights Act of 1965, as amended, this act is effective when it becomes law. As to a district in a county subject to section 5 of the Voting Rights Act of 1965, as amended, this act becomes effective when the district is precleared pursuant to section 5 of the Voting Rights Act of 1965, as amended." Preclearance was received from the U.S. Department of Justice by letter dated December 20, 2001.

Session Laws 2001-424, s. 22.4(d), provides that the amendment to this section by s. 22.4(b) is effective October 1, 2001, except that the elimination of the vacant judgeship in Superior Court District 4B becomes effective the later of October 1, 2001, or the date upon which it is approved under section 5 of the Voting Rights Act of 1965.

Session Laws 2005-276, s. 14.2(a), which amended subsection (a), was effective December 1, 2005, or the date upon which subsection (a) is approved under section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated January 5, 2006.

Session Laws 2005-276, s. 14.2(e1), which also amended subsection (a), is effective January 1, 2011, or the date on which subsection (a) is approved under section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated January 5, 2006.

Session Laws 2006-96, s. 5, provides, in part: "Sections 2, 3, and 4 of the act become effective October 1, 2006, or the date upon which Section 2 of this act is approved under section 5 of the Voting Rights Act of 1965, whichever is later." Preclearance was received by letter dated December 21, 2006.

Appointment of Superior Court Judge by Governor. — Session Laws 2001-424, s. 22.4(c), provides: "The Governor shall appoint a superior court judge for the additional judgeship in Superior Court District 24 as authorized by subsection (b) of this section [s. 22.4(b) of Session Laws 2001-424] to serve a term expiring December 31, 2002. The successor to that judge shall be elected in the 2002 general election to serve a term expiring December 31, 2010."

The reference to superior court districts has been inserted in brackets in the second sentence of subdivision (d)(30) at the direction of the Revisor of Statutes in view of Session Laws 1987 (Reg. Sess., 1988), c. 1037, s. 1.

Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 4, provides: "Notwithstanding G.S. 7A-44.1, if any judge who on June 12, 1996, was a senior resident superior court judge ceases to be the senior resident superior court judge for a superior court district as a result of the transfer of a county from one superior court district to another, that judge may nevertheless appoint a judicial secretary to serve that judge's clerical and secretarial needs during that judge's continuation in office, at that judge's pleasure and under that judge's direction." Session Laws 2002-159, s. 91.3, provides that notwithstanding the provisions of Session Laws 2002-126, the provisions of Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 4, remain in effect, and that the Judicial Department shall use $38,132 in available funds to continue a superior court judicial assistant position in Superior Court District 19B. In the event the position becomes vacant, it shall be reassigned to the senior resident superior court judge.

Session Laws 2003-284, s. 13.14(c) and (d), provides: "The superior court judgeship established for District 19B by subsection (a) of this section shall be filled by the superior court judge from current District 19B who resides in Randolph County. That judge's term expires on December 31, 2008. The successor to that judge shall be elected in the 2008 general election to serve an eight-year term.

"The superior court judgeship established for District 19D by subsection (a) of this section shall be filled by the superior court judge from current District 19B who resides in Moore County. That judge's term expires on December 31, 2008. The successor to that judge shall be elected in the 2008 general election to serve an eight-year term."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5, contains a severability clause.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 14.6(d) provides: "As to District 15B, subsection (b) of this section becomes effective December 1, 2004. As to District 3B, subsection (b) of this section becomes effective December 1, 2004, or 15 days after the date upon which that subsection is approved under section 5 of the Voting Rights Act of 1965, whichever is later." As of October 19, 2004, preclearance under the Voting Rights Act was still pending.

Session Laws 2004-124, s. 33.3, provides:

"Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2005-276, s. 14.2(b), provides: "The superior court judgeship transferred from District 20B to 20A by subsection (a) of this section shall be filled by the judge currently serving District 20B who resides in Stanly County. That judge's current term expires on December 31, 2006. No election shall be held in 2006 for that judge's seat, and that judge shall serve until a successor is elected in the 2008 general election, in order to provide for unstaggered terms for multiple judgeships in the same district."

Session Laws 2005-276, s. 14.2(c), provides: "The superior court judgeship for District 29A under subsection (a) of this section shall be filled by the superior court judge from current District 29 who resides in Rutherford County. That judge's term expires on December 31, 2012, and a successor shall be elected in the 2012 general election."

Session Laws 2005-276, ss. 14.2(d) and (e), provide: "(d) The superior court judgeship for District 29B under subsection (a) of this section shall be filled by the superior court judge from current District 29 who resides in Henderson County. That judge's term expires on December 31, 2006, and a successor shall be elected in the 2006 general election.

"(e) The trial court administrator serving current District 29 shall serve as trial court administrator for both District 29A and District 29B."

Session Laws 2005-276, s. 14.2(e2), provides: "The superior court judgeship established for District 20B by subsection (e1) of this section effective January 1, 2011, shall be filled by election in the 2010 general election. No election shall be held in 2006 for the seat of the judge currently serving District 20B and residing in Union County, and that judge shall serve until a successor is elected in the 2010 general election, in order to provide for unstaggered terms for multiple judgeships in the same district."

Session Laws 2005-276, s. 14.2(q), provides in part: "With respect to the realignment of Superior Court Districts 20A and 20B, subsections (a) through (e) of this section become effective December 1, 2005, or the date upon which subsection (a) of this section is approved under section 5 of the Voting Rights Act of 1965, whichever is later. With respect to the addition of a judge in Superior Court District 20B, subsections (e1) and (e2) of this section become effective January 1, 2011, or the date upon which subsection (e1) of this section is approved under section 5 of the Voting Rights Act of 1965, whichever is later. With respect to the division of Superior Court District 29, subsections (a) through (e) of this section become effective December 1, 2005."

Session Laws 2006-96, s. 3, provides: "The superior court judgeship established for District 13A by Section 2 of this act shall be filled by the judge currently serving District 13 who resides in Bladen or Columbus County, who shall serve until the expiration of that judge's current term."

Session Laws 2006-96, s. 4, provides: "The superior court judgeship established for District 13B by Section 2 of this act shall be filled by the judge currently serving District 13 who resides in Brunswick County, who shall serve until the expiration of that judge's current term."

Session Laws 2007-323, s. 14.25(b)-(d), provides: "(b) The two superior court judgeships established for District 22A by subsection (a) of this section shall be filled by the two judges currently serving District 22 who reside in Alexander and Iredell Counties. The term of one of those judges expires December 31, 2008, and a successor shall be elected in the 2008 election. The term of the other judges expires December 31, 2010, and a successor shall be elected in the 2010 election.

"(c) One of the superior court judgeships established for District 22B by subsection (a) of this section shall be filled by the judge currently serving District 22 who resides in Davidson County. That judge's term expires December 31, 2014, and a successor shall be elected in the 2014 election.

"(d) The additional judgeship established for District 22B by subsection (a) of this section shall be filled by election in the 2008 election for an eight-year term expiring December 31, 2016. That judge's successor shall be elected in the 2016 election."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-276, s. 14.2(a), effective December 1, 2005, or the date upon which preclearance is granted under section 5 of the Voting Rights Act of 1965, whichever is later, added "Stanly" to District 20A and changed the number of judges from one to two; deleted "Stanly" from the list of counties in District 20B and changed the number of judges from two to one; and substituted Districts 29A and 29B for District 29.

Session Laws 2005-276, s. 14.2(e1), effective January 1, 2011, or the date upon which preclearance is granted under section 5 of the Voting Rights Act of 1965, whichever is later, changed the number of resident judges in Superior Court District 20B, from one to two.

Session Laws 2006-96, s. 2, effective October 1, 2006, or the date that this section is approved under Section 5 of the Voting Rights Act of 1965, whichever is later, redesignated District 13 as District 13A; in District 13A, deleted "Brunswick" following "Bladen" and substituted "1" for "2"; and added District 13B.

Session Laws 2007-323, s. 14.25(a), effective January 1, 2009, and applicable to the 2008 election as provided in the terms of this section, in the second version of subsection (a), in the Sixth Judicial Division, substituted "22A" for "22," deleted "Davidson, Davie," preceding "Iredell," and substituted "2" for "3," and added the Superior Court District 22B in the Sixth Judicial Division.

Legal Periodicals. — For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

CASE NOTES

1987 Amendment Held Constitutional. — The provisions of Session Laws 1987, c. 509, which amended subsection (d) of this section, did not violate the North Carolina Constitution. State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989).

The provisions of Session Laws 1987, c. 509, which amended subsection (d) of this section, creating a one-time delay of elections and a one-time interim or hiatus between terms of office for certain superior court judgeships (causing the incumbents to hold over until the next elections were held and the succeeding terms of office began) served a public purpose and did not violate the Constitution of North Carolina. State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989).

By enacting Session Laws 1987, c. 509, the legislature eliminated staggered terms within multi-seat judicial districts by creating a one-time interim or hiatus between certain terms of office; as the Constitution anticipates such "hold over" situations by providing that elected judges remain in office "until their successors are elected and qualified," the act was not unconstitutional. State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989).

Constitutionality. — Redistricting plan for the superior courts in a county enacted pursuant to G.S. 7A-41 did not violate N.C. Const., Art. I, § 19, as the one person, one vote principle did not apply to judicial elections. Blankenship v. Bartlett, — N.C. App. —, 646 S.E.2d 584, 2007 N.C. App. LEXIS 1452 (2007).

Preclearance of Acts Pursuant to Voting Rights Act. — Where superior court judges were elected pursuant to Session Laws 1965, c. 262, Session Laws 1967, c. 997, Session Laws 1977, cc. 1119, 1130 and 1238, and Session Laws 1983, c. 1109, and such legislative acts had not been precleared by the Attorney General as required by section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, the federal district court would enjoin such elections retroactively in those counties subject to section 5 of the Voting Rights Act; the fact that an election law deals with the election of members of the judiciary does not remove it from the ambit of section 5 of the Voting Rights Act. Haith v. Martin, 618 F. Supp. 410 (E.D.N.C. 1985), aff'd, 477 U.S. 901, 106 S. Ct. 3268, 91 L. Ed. 2d 559 (1986).

Elections proposed to be held in Judicial Districts 3, 4, 8 and 12 would not offend provisions of federal court order of Sept. 24, 1985, and thus would not be enjoined, as such elections would not result in any retrogression in the voting right privileges of racial minorities in those districts, and the judgeships to be filled in those districts in 1986, all of which were created under law prior to section 5 of the Voting Rights Act, have not become an integral part of the voting procedures established by the North Carolina statutes creating new judgeships in those districts. Haith v. Martin, 643 F. Supp. 253 (E.D.N.C. 1986).

New Judicial District Was Not Arbitrary and Capricious. — Creation of the Wake County Superior Court judicial district was not arbitrary and capricious where the General Assembly had consulted with the Administrative Office of the Courts and the new judgeship was based on heavy caseloads and maintaining minority districts. Blankenship v. Bartlett, — N.C. App. —, 646 S.E.2d 584, 2007 N.C. App. LEXIS 1452 (2007).

Cited in Kelly v. Davenport, 7 N.C. App. 670, 173 S.E.2d 600 (1970); Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971); Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971); State v. Braswell, 283 N.C. 332, 196 S.E.2d 185 (1973); Republican Party v. Martin, 980 F.2d 943 (4th Cir. 1992), rehearing denied, 991 F.2d 1202 (4th Cir.), cert. denied, 510 U.S. 828, 114 S. Ct. 93, 126 L. Ed. 2d 60 (1993).

§ 7A-41.1. District and set of districts defined; senior resident superior court judges and their authority.

(a) In this section and in any other law which refers to this section:

(1) "District" means any superior court district established by G.S. 7A-41 which consists exclusively of one or more entire counties;

(2) "Set of districts" means any set of two or more superior court districts established under G.S. 7A-41, none of which consists exclusively of one or more entire counties, but both or all of which include territory from the same county or counties and together comprise all of the territory of that county or those counties;

(3) "Regular resident superior court judge of the district or set of districts" means a regular superior court judge who is a resident judge of any of the superior court districts established under G.S. 7A-41 which comprise or are included in a district or set of districts as defined herein.

(b) There shall be one and only one senior resident superior court judge for each district or set of districts as defined in subsection (a) of this section, who shall be:

(1) Where there is only one regular resident superior court judge for the district, that judge; and

(2) Where there are two or more regular resident superior court judges for the district or set of districts, the judge who, from among all the regular resident superior court judges of the district or set of districts, has the most continuous service as a regular resident superior court judge; provided if two or more judges are of equal seniority, the oldest of those judges shall be the senior regular resident superior court judge.

(c) Senior resident superior court judges and regular resident superior court judges possess equal judicial jurisdiction, power, authority and status, but all duties placed by the Constitution or statutes on the resident judge of a superior court district, including the appointment to and removal from office, which are not related to a case, controversy or judicial proceeding and which do not involve the exercise of judicial power, shall be discharged, throughout a district as defined in subsection (a) of this section or throughout all of the districts comprising a set of districts so defined, for each county in that district or set of districts, by the senior resident superior court judge for that district or set of districts. That senior resident superior court judge alone among the superior court judges of that district or set of districts shall receive the salary and benefits of a senior resident superior court judge.

(d) A senior resident superior court judge for a district or set of districts as defined in subsection (a) of this section with two or more regular resident superior court judges, by notice in writing to the Administrative Officer of the Courts, may decline to exercise the authority vested in him by this section, in which event such authority shall be exercised by the regular resident superior court judge who, among the other regular resident superior court judges of the district or set of districts, is next senior in point of service or age, respectively.

(e) In the event a senior resident superior court judge for a district or set of districts with one or more regular resident superior court judges is unable, due to mental or physical incapacity, to exercise the authority vested in him by the statute, and the Chief Justice, in his discretion, has determined that such incapacity exists, the Chief Justice shall appoint an acting senior regular resident superior court judge from the other regular resident judges of the district or set of districts, to exercise, temporarily, the authority of the senior regular resident judge. Such appointee shall serve at the pleasure of the Chief Justice and until his temporary appointment is vacated by appropriate order. (1987 (Reg. Sess., 1988), c. 1037, s. 2.)

OPINIONS OF ATTORNEY GENERAL

Regarding requirements for becoming a Senior Resident Superior Court Judge, see opinion of Attorney General to Honorable Thomas Ross, Superior Court Judge, N.C. General Assembly, 1999 N.C.A.G. 14 (5/27/99).

CASE NOTES

Cited in Moore v. Charlotte-Mecklenburg Bd. of Educ., — N.C. App. —, 649 S.E.2d 410, 2007 N.C. App. LEXIS 1936 (2007).

§ 7A-41.2. Nomination and election of regular superior court judges.

Candidates for the office of regular superior court judge shall be both nominated and elected by the qualified voters of the superior court district for which the election is sought. (1996, 2nd Ex. Sess., c. 9, s. 1.)

Editor's Note. — Session Laws 1996, Second Extra Session, c. 9, s. 23, provides: "Part 1 of this act becomes effective only if Parts 1 and 2 of this act are both effective under section 5 of the Voting Rights Act of 1965." Preclearance was received by letter dated October 1, 1996.

Session Laws 1996, Second Extra Session, c. 9, s. 24, makes this section effective upon ratification, and applicable beginning with the 1996 elections, except that Sections 1 and 2 of that act shall be applied to the 1994 general election and the results of that election validated and confirmed under those sections. The Act was ratified August 2, 1996. Preclearance was received by letter dated October 1, 1996.

§ 7A-42. Sessions of superior court in cities other than county seats.

(a) Sessions of the superior court shall be held in each city in the State which is not a county seat and which has a population of 35,000 or more, according to the 1960 federal census.

(a1) In addition to the sessions of superior court authorized by subsection (a) of this section, sessions of superior court in the following counties may be held in the additional seats of court listed by order of the Senior Resident Superior Court Judge after consultation with the Chief District Court Judge:

County	Additional Seats of Court
Davidson	Thomasville
Iredell	Mooresville

The courtrooms and related judicial facilities for these sessions of superior court may be provided by the municipality, and in such cases the facilities fee collected for the State by the clerk of superior court shall be remitted to the municipality to assist in meeting the expense of providing those facilities.

(b) For the purpose of segregating the cases to be tried in any city referred to in subsection (a), and to designate the place of trial, the clerk of superior court in any county having one or more such cities shall set up a criminal docket and a civil docket, which dockets shall indicate the cases and proceedings to be tried in each such city in his county. Such dockets shall bear the name of the city in which such sessions of court are to be held, followed by the word "Division." Summons in actions to be tried in any such city shall clearly designate the place of trial.

(c) For the purpose of determining the proper place of trial of any action or proceeding, whether civil or criminal, the county in which any city described in subsection (a) is located shall be divided into divisions, and the territory embraced in the division in which each such city is located shall consist of the township in which such city lies and all contiguous townships within such county, such division of the superior court to be known by the name of such city followed by the word "Division." All other townships of any such county shall constitute a division of the superior court to be known by the name of the county seat followed by the word "Division." All laws, rules, and regulations now or hereafter in force and effect in determining the proper venue as between the superior courts of the several counties of the State shall apply for the purpose of determining the proper place of trial as between such divisions within such county and as between each of such divisions and any other county of the superior court in North Carolina.

(d) The clerk of superior court of any county with an additional seat of superior court may, but shall not be required to, hear matters in any place other than at his office at the county seat.

(e) The grand jury for the several divisions of court of any county in which a city described in subsection (a) is located shall be drawn from the whole county, and may hold hearings and meetings at either the county seat or elsewhere within the county as it may elect, or as it may be directed by the judge holding any session of superior court within such county; provided, however, that in arranging the sessions of the court for the trial of criminal cases for any county in which any such city is located a session of one week or more shall be held at the county seat preceding any session of one week or more to be held in any such city, so as to facilitate the work of the grand jury, and so as to confine its meetings to the county seat as fully as may be practicable. All petit jurors for all sessions of court in the several divisions of such county shall be drawn, as now or hereafter provided by law, from the whole of the county in which any such city is located for all sessions of courts in the several divisions of such county.

(f) Special sessions of court for the trial of either civil or criminal cases in any city described in subsection (a) may be arranged as by law now or hereafter provided for special sessions of the superior court.

(g) All court records of all such divisions of the superior court of any such county shall be kept in the office of the clerk of the superior court at the county seat, but they may be temporarily removed under the direction and supervision of the clerk to any such division or divisions. No judgment or order rendered at any session held in any such city shall become a lien upon or otherwise affect the title to any real estate within such county until it has been docketed in the office of the clerk of the superior court at the county seat as now or may hereafter be provided by law; provided, that nothing herein shall affect the provisions of G.S. 1-233 and the equities therein provided for shall be preserved as to all judgments and orders rendered at any session of the superior court in any such city.

(h) It shall be the duty of the board of county commissioners of the county in which any such city is located to provide a suitable place for holding such sessions of court, and to provide for the payment of the extra expense, if any, of the sheriff and his deputies in attending the sessions of court of any such division, and the expense of keeping, housing and feeding prisoners while awaiting trial.

(i) Notwithstanding the provisions of this section, when exigent circumstances exist, sessions of superior court may be conducted at a location outside a county seat by order of the Senior Resident Superior Court Judge of a county, with the prior approval of the location and the facilities by the Administrative Office of the Courts and after consultation with the Clerk of Superior Court and county officials of the county. An order entered under this subsection shall be filed in the office of the Clerk of Superior Court in the county and posted at the courthouse within the county seat and notice shall be posted in other conspicuous locations. The order shall be limited to such session or sessions as are approved by the Chief Justice of the Supreme Court of North Carolina. (1943, c. 121; 1969, c. 1190, s. 48; 1987 (Reg. Sess., 1988), c. 1037, s. 2.1; 1997-304, s. 4.)

Editor's Note. — This section was formerly G.S. 7-70.2. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 48.

CASE NOTES

Obligation to Provide "Suitable" Facilities. — In cities other than county seats where sessions of superior court are held, boards of commissioners are obligated by statute to provide "suitable" places for holding such sessions of court. In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991).

Hearing Ordered to Probe Adequacy of Court Facilities. — A hearing ordered by a superior court judge to inquire into the adequacy of the Alamance County court facilities probes the scope of the court's inherent power to direct county commissioners to ameliorate such facilities and the proper means of effecting that end. Such power exists, but the order invoking it was procedurally and substantively flawed where the commissioners against whom the order was directed were not made parties to the action, the order was ex parte, and the order intruded on discretion that properly belonged to the commissioners. In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991).

§ **7A-43:** Reserved for future codification purposes.

§§ **7A-43.1 through 7A-43.3:** Repealed by Session Laws 1967, c. 1049, s. 6.

§ 7A-44. Salary and expenses of superior court judge.

(a) A judge of the superior court, regular or special, shall receive the annual salary set forth in the Current Operations Appropriations Act, and in addition shall be paid the same travel allowance as State employees generally by G.S. 138-6(a)(1) and (2), provided that no travel allowance be paid for travel within his county of residence. In addition, a judge of the superior court shall be allowed seven thousand dollars ($7,000) per year, payable monthly, in lieu of necessary subsistence expenses while attending court or transacting official business at a place other than in the county of his residence and in lieu of other professional expenses incurred in the discharge of his official duties. The Administrative Officer of the Courts may also reimburse superior court judges, in addition to the above funds for travel and subsistence, for travel and subsistence expenses incurred for professional education.

(b) In lieu of merit and other increment raises paid to regular State employees, a judge of the superior court, regular or special, shall receive as longevity pay an annual amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, nineteen and two-tenths percent (19.2%) after 20 years of service, and twenty-four percent (24%) after 25 years of service. "Service" means service as a justice or judge of the General Court of Justice or as a member of the Utilities Commission or as director or assistant director of the Administrative Office of the Courts. Service shall also mean service as a district attorney or as a clerk of superior court. (Code, ss. 918, 3734; 1891, c. 193; 1901, c. 167; 1905, c. 208; Rev., s. 2765; 1907, c. 988; 1909, c. 85; 1911, c. 82; 1919, c. 51; C.S., s. 3884; 1921, c. 25, s. 3; 1925, c. 227; 1927, c. 69, s. 2; 1949, c. 157, s. 1; 1953, c. 1080, s. 1; 1957, c. 1416; 1961, c. 957, s. 2; 1963, c. 839, s. 2; 1965, c. 921, s. 2; 1967, c. 691, s. 40; 1969, c. 1190, s. 36; 1973, c. 1474; 1975, 2nd Sess., c. 983, s. 13; 1977, c. 802, s. 41.1; 1979, 2nd Sess., c. 1137, s. 28; 1981, c. 964, s. 18; 1983, c. 761, s. 244; 1983 (Reg. Sess., 1984), c. 1034, s. 165; c. 1109, ss. 2.2, 11, 13.1; 1985, c. 698, s. 10(a); 1987 (Reg. Sess., 1988), c. 1086, s. 30(b); c. 1100, s. 15(c); 2007-323, s. 28.18A(c).)

Cross References. — As to salaries of judges, see N.C. Const., Art. IV, § 20.

Editor's Note. — This section was formerly G.S. 7-42. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 36.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-322, s. 28.18A(c), effective July 1, 2007, in the first sentence of subsection (b), deleted "and" preceding "nineteen" and added "and twenty-four percent (24%) after 25 years of service" at the end.

CASE NOTES

Additional Compensation. — Additional compensation of $100.00 given to a superior court judge by former G.S. 7-42 for services in holding a special term was a part of his salary. Buxton v. Commissioners of Rutherford, 82 N.C. 91 (1880).

OPINIONS OF ATTORNEY GENERAL

A Resident Superior Court Judge on assignment by the Chief Justice to perform the duties of Director of the Administrative Office of the Courts would be entitled to continue to draw the salaries and expenses set out in this section. See opinion of Attorney General to Honorable Thomas Ross, Superior Court Judge, N.C. General Assembly, 1999 N.C.A.G. 14 (5/27/99).

Length of Service. — Associate Justice of the North Carolina Supreme Court was entitled to have his service as Director and Assistant Director of the Administrative Office of the Courts to be taken into account in calculating his service for longevity purposes, but his service as assistant district attorney could not be taken into account. See opinion of Attorney General to The Honorable Thomas W. Ross, Director, The Administrative Office of the Courts, 1999 N.C. AG LEXIS 28 (9/28/99).

§ 7A-44.1. Secretarial and clerical help.

(a) Each senior resident superior court judge may appoint a judicial secretary to serve at his pleasure and under his direction the secretarial and clerical needs of the superior court judges of the district or set of districts as defined by G.S. 7A-41.1(a) for which he is the senior resident superior court judge. The appointment may be full- or part-time and the compensation and allowances of such secretary shall be fixed by the senior regular resident superior court judge, within limits determined by the Administrative Office of the Courts, and paid by the State.

(b) Each senior resident superior court judge may apply to the Director of the Administrative Office of the Courts to enter into contracts with local governments for the provision by the State of services of judicial secretaries pursuant to G.S. 153A-212.1 or G.S. 160A-289.1.

(c) The Director of the Administrative Office of the Courts may provide assistance requested pursuant to subsection (b) of this section only upon a showing by the senior resident superior court judge, supported by facts, that the overwhelming public interest warrants the use of additional resources for the speedy disposition of cases involving drug offenses, domestic violence, or other offenses involving a threat to public safety.

(d) The terms of any contract entered into with local governments pursuant to subsection (b) of this section shall be fixed by the Director of the Administrative Office of the Courts in each case. Nothing in this section shall be construed to obligate the General Assembly to make any appropriation to implement the provisions of this section or to obligate the Administrative Office of the Courts to provide the administrative costs of establishing or maintaining the positions or services provided for under this section. Further, nothing in this section shall be construed to obligate the Administrative Office of the Courts to maintain positions or services initially provided for under this section. (1975, c. 956, s. 3; 1987 (Reg. Sess., 1988), c. 1037, s. 3; 2000-67, s. 15.4(a).)

Editor's Note. — Additional secretarial positions were created by Session Laws 1981, c. 964, s. 5.

§ 7A-45: Repealed by Session Laws 1987, c. 509, s. 7, effective January 1, 1989.

§ 7A-45.1. Special judges.

(a) Effective November 1, 1993, the Governor may appoint two special superior court judges to serve terms expiring September 30, 2000. Effective October 1, 2000, one of those positions is abolished. Successors to the special superior court judge appointed pursuant to this subsection shall be appointed to a five-year term. A special judge takes the same oath of office and is subject to the same requirements and disabilities as are or may be prescribed by law for regular judges of the superior court, save the requirement of residence in a particular district.

(a1) Effective October 1, 1995, the Governor may appoint two special superior court judges to serve terms expiring September 30, 2000. Successors to the special superior court judges appointed pursuant to this subsection shall be appointed to five-year terms. A special judge takes the same oath of office and is subject to the same requirements and disabilities as are or may be prescribed by law for regular judges of the superior court, save the requirement of residence in a particular district.

(a2) Effective December 15, 1996, the Governor may appoint four special superior court judges to serve terms expiring five years from the date that each judge takes office. Successors to the special superior court judges appointed pursuant to this subsection shall be appointed to five-year terms. A special judge takes the same oath of office and is subject to the same requirements and disabilities as are or may be prescribed by law for regular judges of the superior court, save the requirement of residence in a particular district.

(a3) Effective December 15, 1998, the Governor may appoint a special superior court judge to serve a term expiring five years from the date that judge takes office. Successors to the special superior court judge appointed pursuant to this subsection shall be appointed to five-year terms. A special judge takes the same oath of office and is subject to the same requirements and disabilities as are or may be prescribed by law for regular judges of the superior court, save the requirement of residence in a particular district.

(a4) Effective October 1, 1999, the Governor may appoint four special superior court judges to serve terms expiring five years from the date that each judge takes office. Successors to the special superior court judges appointed pursuant to this subsection shall be appointed to five-year terms. A special judge takes the same oath of office and is subject to the same requirements and disabilities as are or may be prescribed by law for regular judges of the superior court, save the requirement of residence in a particular district.

(a5) Effective October 1, 2001, the Governor may appoint a special superior court judge to serve a term expiring five years from the date that judge takes office. Successors to the special superior court judge appointed pursuant to this subsection shall be appointed to five-year terms. A special judge takes the same oath of office and is subject to the same requirements and disabilities as are or may be prescribed by law for regular judges of the superior court, save the requirement of residence in a particular district.

(a6) Effective December 1, 2004, the Governor may appoint a special superior court judge to serve a term expiring five years from the date that each judge takes office. Successors to the special superior court judge appointed pursuant to this subsection shall be appointed to five-year terms. A special judge takes the same oath of office and is subject to the same requirements and disabilities as are or may be prescribed by law for regular judges of the superior court, save the requirement of residence in a particular district.

(a7) Effective January 1, 2008, the Governor may appoint two special superior court judges to serve terms expiring five years from the date that each judge takes office. Successors to the special superior court judges appointed pursuant to this subsection shall be appointed to five-year terms. A special judge takes the same oath of office and is subject to the same requirements and disabilities as are or may be prescribed by law for regular judges of the superior court, save the requirement of residence in a particular district.

(b) A special judge is subject to removal from office for the same causes and in the same manner as a regular judge of the superior court, and a vacancy occurring in the office of special judge is filled by the Governor by appointment for the unexpired term.

(c) A special judge, in any court in which he is duly appointed to hold, has the same power and authority in all matters that a regular judge holding the same court would have. A special judge, duly assigned to hold the court of a particular county, has during the session of court in that county, in open court and in chambers, the same power and authority of a regular judge in all matters arising in the district or set of districts as defined in G.S. 7A-41.1(a) in which that county is located, that could properly be heard or determined by a regular judge holding the same session of court.

(d) A special judge is authorized to settle cases on appeal and to make all proper orders in regard thereto after the time for which he was commissioned has expired. (1987, c. 738, s. 123(a); 1987 (Reg. Sess., 1988), c. 1037, s. 5; 1993, c. 321, s. 200.5(g); 1995, c. 507, s. 21.1(f); 1996, 2nd Ex. Sess., c. 18, s. 22.6(a); 1998-212, s. 16.22(a), (b); 1999-237, s. 17.12(a); 2000-67, s. 15.8(a); 2001-424, s. 22.4(a); 2004-124, s. 14.6(a); 2007-323, s. 14.24.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 24.7, as amended by Session Laws 1996, Second Extra Session, c. 18, s. 22.6(b), and Session Laws 2000-67, s. 15.8(b), provides: "Notwithstanding G.S. 7A-45, G.S. 7A-45.1, Section 7 of Chapter 509 of the 1987 Session Laws, or any other provision of law, if any special superior court judge who is holding office on the effective date of this act first took office as an appointed or elected regular or special superior court judge in the calendar year 1986, the term of that judge is extended through December 31, 2000."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

Session Laws 1996, Second Extra Session, c. 18, s. 29.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1996-97 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1996-97 fiscal year."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 14.24, effective July 1, 2007, added subsection (a7).

CASE NOTES

Editor's Note. — *Many of the cases below were decided under former statutory provisions.*

A special judge enjoys the power and authority of a regular judge only during the session of court in that county in which the special judge is duly appointed to hold court. Green ex rel. Green v. Maness, 69 N.C. App. 403, 316 S.E.2d 911, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

No Jurisdiction When Not Holding Term of Court. — A special or emergency judge has no authority to determine a controversy without action at chambers when not holding a term of court. Greene v. Stadiem, 197 N.C. 472, 149 S.E. 685 (1929). See Bohannon v. Virginia Trust Co., 198 N.C. 702, 153 S.E. 263 (1930).

Special Judge May Hear Matter Out of Term by Consent. — Once having acquired jurisdiction at term, a special or emergency judge, by consent, may hear the matter out of term nunc pro tunc. Shepard v. Leonard, 223 N.C. 110, 25 S.E.2d 445 (1943).

A judgment signed by a special judge out-of-session without the consent of the parties is void. Green ex rel. Green v. Maness, 69 N.C. App. 403, 316 S.E.2d 911, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Judicial Notice of Appointment as Special Judge. — The appellate court will take judicial notice on appeal of the appointment of a certain person as a special judge. Greene v. Stadiem, 197 N.C. 472, 149 S.E. 685 (1929).

When necessary for the determination of a case on appeal, the appellate court will take judicial notice of the counties comprising a judicial district, and that a judge holding a term in one of the counties was a special judge appointed by the Governor. Reid v. Reid, 199 N.C. 740, 155 S.E. 719 (1930).

Motions in Cause Made at Term. — Civil actions pending on the civil issue docket of a county are always subject to motion in the cause. These motions may be made before the judge at term. In many instances they may be made out of term. When made at term the judge presiding, whether regular or special, has jurisdiction. To this extent this section has full constitutional sanction. Shepard v. Leonard, 223 N.C. 110, 25 S.E.2d 445 (1943).

Proceeding to Obtain Custody of Child. — A special judge has concurrent jurisdiction with the judge of the district to hear and determine a proceeding instituted by the mother of a child to obtain its custody, provided the proceeding can be heard and judgment rendered during the term of court the special judge is commissioned to hold. In re Cranford, 231 N.C. 91, 56 S.E.2d 35 (1949).

Motion for Alimony. — Where a special judge was authorized under commission of the Governor to hold a term of court in only one county of a district, he could not issue an order for alimony, attorneys' fees and costs in a proceeding in an action for divorce a vinculo pending in another county of the district and continued to be heard before a judge regularly holding the terms of court in that district. Public Laws 1929, c. 137, under which the special judge was commissioned, provided that writs, orders and notices should be returnable before special judges only in the county where the suit, proceeding or other cause was pending, unless such special judge was then holding the courts of that district, in which case the same might be returnable before him as before the regular judge. Reid v. Reid, 199 N.C. 740, 155 S.E. 719 (1930).

§ 7A-45.2. Emergency special judges of the superior court; qualifications, appointment, removal, and authority.

(a) Any justice or judge of the appellate division of the General Court of Justice who:

(1) Retires under the provisions of the Consolidated Judicial Retirement Act, Article 4 of Chapter 135 of the General Statutes, or who is eligible to receive a retirement allowance under that act;

(2) Has not reached the mandatory retirement age specified in G.S. 7A-4.20;

(3) Has served at least five years as a superior court judge or five years as a justice or judge of the appellate division of the General Court of Justice, or any combination thereof, whether or not eligible to serve as an emergency justice or judge of the appellate division of the General Court of Justice; and

(4) Whose judicial service ended within the preceding 10 years;

may apply to the Governor for appointment as an emergency special superior court judge in the same manner as is provided for application as an emergency superior court judge in G.S. 7A-53. If the Governor is satisfied that the applicant meets the requirements of this section and is physically and mentally able to perform the duties of a superior court judge, the Governor shall issue a commission appointing the applicant as an emergency special superior court judge until the applicant reaches the mandatory retirement age for superior court judges specified in G.S. 7A-4.20.

(b) Any emergency special superior court judge appointed as provided in this section shall:

(1) Have the same powers and duties, when duly assigned to hold court, as provided for an emergency superior court judge by G.S. 7A-48;

(2) Be subject to assignment in the same manner as provided for an emergency superior court judge by G.S. 7A-46;

(3) Receive the same compensation, expenses, and allowances, when assigned to hold court, as an emergency superior court judge as provided by G.S. 7A-52(b);

(4) Be subject to the provisions and requirements of the Canons of Judicial Conduct; and

(5) Not engage in the practice of law during any period for which the emergency special superior court judgeship is commissioned. However, this subdivision shall not be construed to prohibit an emergency special superior court judge appointed pursuant to this section from serving as a referee, arbitrator, or mediator, during service as an emergency special superior court judge when the service does not conflict with or interfere with the emergency special superior court judge's judicial service in emergency status.

(c) Upon reaching mandatory retirement age for superior court judges as set forth in G.S. 7A-4.20, any emergency special superior court judge appointed pursuant to this section, whose commission has expired, may be recalled as a recalled emergency special superior court judge to preside over any regular or special session of the superior court under the following circumstances:

(1) The judge shall consent to the recall;

(2) The Chief Justice may order the recall;

(3) Prior to ordering recall, the Chief Justice shall be satisfied that the recalled judge is capable of efficiently and promptly discharging the duties of the office to which recalled;

(4) Jurisdiction of a recalled emergency special superior court judge is as set forth in G.S. 7A-48;

(5) Orders of recall and assignment shall be in writing and entered upon the minutes of the court to which assigned; and

(6) Compensation, expenses, and allowances of recalled emergency special superior court judges are the same as for recalled emergency superior court judges under G.S. 7A-52(b).

(d) Any former justice or judge of the appellate division of the General Court of Justice who otherwise meets the requirements of subsection (a) of this section to be appointed an emergency special superior court judge but has already reached the mandatory retirement age for superior court judges set forth in G.S. 7A-4.20 on retirement may, in lieu of serving as an emergency judge of the court from which he retired, apply to the Governor to be appointed as an emergency special superior court judge as provided in this section. If the Governor issues a commission to the applicant, the retired justice or judge is subject to recall as an emergency special superior court judge as provided in subsection (c) of this section.

(e) No justice or judge appointed as an emergency special superior court judge or subject to recall as provided in this section shall, during the period so appointed or subject to recall, contemporaneously serve as an emergency justice or judge of the appellate division of the General Court of Justice. (1993, c. 321, s. 199.)

§ 7A-45.3. Superior court judges designated for complex business cases.

The Chief Justice may exercise the authority under rules of practice prescribed pursuant to G.S. 7A-34 to designate one or more of the special superior court judges authorized by G.S. 7A-45.1 to hear and decide complex business cases as prescribed by the rules of practice. Any judge so designated shall be known as a Business Court Judge and shall preside in the Business Court. If there is more than one business court judge, the Chief Justice may designate one of them as the Senior Business Court Judge. If there is no designation by the Chief Justice, the judge with the longest term of service on the court shall serve as Senior Business Court Judge until the Chief Justice makes an appointment to the position. (2005-425, s. 1.1.)

Editor's Note. — Session Laws 2005-425, s. 4, made this section effective January 1, 2006, and applicable to fees assessed or collected on or after that date.

Session Laws 2007-323, s. 14.7, provides: "The Administrative Office of the Courts shall report to the Chairs of the House of Representatives and Senate Appropriations Committees and the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety by March 1 of each year on the activities of each North Carolina Business Court site, including the number of new, closed, and pending cases; average age of pending cases, and annual expenditures for the prior fiscal year."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 7A-45.4. Designation of mandatory complex business cases.

(a) A mandatory complex business case is an action that involves a material issue related to:

(1) The law governing corporations, except charitable and religious organizations qualified under G.S. 55A-1-40(4) on the grounds of religious purpose, partnerships, limited liability companies, and limited liability partnerships, including issues concerning governance, involuntary dissolution of a corporation, mergers and acquisitions, breach of duty of directors, election or removal of directors, enforcement or interpretation of shareholder agreements, and derivative actions.

(2) Securities law, including proxy disputes and tender offer disputes.
(3) Antitrust law, except claims based solely on unfair competition under G.S. 75-1.1.
(4) State trademark or unfair competition law, except claims based solely on unfair competition under G.S. 75-1.1.
(5) Intellectual property law, including software licensing disputes.
(6) The Internet, electronic commerce, and biotechnology.
(7) Tax law, when the dispute has been the subject of a contested tax case for which judicial review is requested under G.S. 105-241.16 or the dispute is a civil action under G.S. 105-241.17.

(b) Any party may designate a civil action or a petition for judicial review under G.S. 105-241.16 as a mandatory complex business case by filing a Notice of Designation in the Superior Court in which the action has been filed and simultaneously serving the notice on each opposing party or counsel and on the Special Superior Court Judge for Complex Business Cases who is then the senior Business Court Judge. A copy of the notice shall also be sent contemporaneously by e-mail or facsimile transmission to the Chief Justice of the Supreme Court for approval of the designation of the action as a mandatory complex business case and assignment to a specific Business Court Judge.

(c) The Notice of Designation shall, in good faith and based on information reasonably available, succinctly state the basis of the designation and include a certificate by or on behalf of the designating party that the civil action meets the criteria for designation as a mandatory complex business case pursuant to subsection (a) of this section.

(d) The Notice of Designation shall be filed:
(1) By the plaintiff, the third-party plaintiff, or the petitioner for judicial review contemporaneously with the filing of the complaint, third-party complaint, or the petition for judicial review in the action.
(2) By any intervenor when the intervenor files a motion for permission to intervene in the action.
(3) By any defendant or any other party within 30 days of receipt of service of the pleading seeking relief from the defendant or party.

(e) Within 30 days after service of the Notice of Designation, any other party may, in good faith, file and serve an opposition to the designation of the action as a mandatory business case. Based on the opposition or ex mero motu, the Business Court Judge may determine that the action should not be designated as a mandatory complex business case. If a party disagrees with the decision, the party may appeal to the Chief Justice of the Supreme Court.

(f) Once a designation is filed under subsection (d) of this section, and after preliminary approval by the Chief Justice, a case shall be designated and administered a complex business case. All proceedings in the action shall be before the Business Court Judge to whom it has been assigned unless and until an order has been entered under subsection (e) of this section ordering that the case not be designated a mandatory complex business case or the Chief Justice revokes approval. If complex business case status is revoked or denied, the action shall be treated as any other civil action, unless it is designated as an exceptional civil case or a discretionary complex business case pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts. (2005-425, s. 2; 2007-491, s. 4.)

Editor's Note. — Session Laws 2005-425, s. 4, made this section effective January 1, 2006, and applicable to cases filed on or after that date.

Session Laws 2007-491, s. 47, provides in part: "The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act."

Effect of Amendments. — Session Laws 2007-491, s. 4, effective January 1, 2008, added subdivision (a)(7); inserted "or a petition for judicial review under G.S. 105-241.16" in the first sentence of subsection (b); and in subdivision (d)(1), substituted "plaintiff, the third-party plaintiff, or the petitioner for judicial review" for "plaintiff or third-party plaintiff" and "complaint, third-party complaint, or the petition for judicial review" for "complaint or third-party complaint."

§ 7A-46. Special sessions.

Whenever it appears to the Chief Justice of the Supreme Court that there is need for a special session of superior court in any county, he may order a special session in that county, and order any regular, special, or emergency judge to hold such session. The Chief Justice shall notify the clerk of the superior court of the county, who shall initiate action under Chapter 9 of the General Statutes to provide a jury for the special session, if a jury is required.

Special sessions have all the jurisdiction and powers that regular sessions have. (R.C., c. 31, s. 22; 1868-9, c. 273; 1876-7, c. 44; Code, ss. 914, 915, 916; Rev., ss. 1512, 1513, 1516; C.S., ss. 1450, 1452, 1455; Ex. Sess. 1924, c. 100; 1951, c. 491, ss. 1, 3; 1959, c. 360; 1969, c. 1190, s. 46.)

Editor's Note. — This section combines former G.S. 7-78, 7-80 and 7-83. The former sections were revised, combined and transferred to their present position by Session Laws 1969, c. 1190, s. 46.

Legal Periodicals. — For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

CASE NOTES

Editor's Note. — *Most of the cases in the following annotations were decided under former statutory provisions.*

Constitutionality. — See State v. Ketchey, 70 N.C. 621 (1874).

The power to order special terms is not restricted to instances where there is accumulation of business, nor, when such fact is recited as a reason in the commission, is the power of the judge restricted to the trial of indictments found before that term. State v. Register, 133 N.C. 746, 46 S.E. 21 (1903).

No reason need be assigned by the Governor (now the Chief Justice) for calling special terms. State v. Watson, 75 N.C. 136 (1876). He is the sole judge of the evidence necessitating such action. State v. Lewis, 107 N.C. 967, 12 S.E. 457, 13 S.E. 247 (1890).

Regular Order Presumed. — When it appears from the record that a cause was tried at a special term of a superior court, it is presumed prima facie that an order for holding it was duly made, and that it was duly held. Sparkman v. Daughtry, 35 N.C. 168 (1851).

Plea Denying Existence of Court. — A plea of the defendant that the court was unlawfully called because the Governor (now the Chief Justice) was absent from the State when he attempted to order the holding of the court was properly overruled. State v. Hall, 142 N.C. 710, 55 S.E. 806 (1906).

Appointment of Judge. — When the Governor (now the Chief Justice) has ordered a special term to be held in any county of this State, it is his duty to appoint one of the judges of the superior court to hold such term, and to issue to the judge appointed by him a commission authorizing him to hold such court. State v. Baxter, 208 N.C. 90, 179 S.E. 450 (1935).

Court Held Outside Judge's District. — A judge specially commissioned to hold court in a certain county outside his district has the same jurisdiction of matters transferred to that court, by consent, from another county, as the judge of the district comprising both counties. Henry v. Hilliard, 120 N.C. 479, 27 S.E. 130 (1897).

Arraignment at Regular Term Not Required. — It is not necessary that a prisoner should be arraigned and plead at a preceding regular term to the special term at which he is tried. State v. Ketchey, 70 N.C. 621 (1874).

Removal of Cause. — A superior court at a special term has the same power to remove a cause to another county that it has at a regular term. Sparkman v. Daughtry, 35 N.C. 168 (1851).

Judgment by Default. — Whether at a regular or special term of the court, notice to the adverse party of a motion in term for judgment by default for want of an answer is not necessary. Reynolds v. Greensboro Boiler & Mach. Co., 153 N.C. 342, 69 S.E. 248 (1910).

Show Cause Order Entered Out of Term. — Where the Chief Justice on May 1, 1990, issued a commission for a judge to hold a special session of superior court for Graham County "to begin May 25, 1990, and continue one day, or until the business is disposed of," and on May 3, 1990, the judge issued an order to show cause directing respondent to appear in court on May 25, 1990, at which time the judge was not assigned to Graham County, the show cause order was entered out of term and the court was without jurisdiction to enter the order. In re Delk, 103 N.C. App. 659, 406 S.E.2d 601 (1991).

Applied in State v. Boykin, 211 N.C. 407, 191 S.E. 18 (1937).

Cited in State v. Baxter, 208 N.C. 90, 179 S.E. 450 (1935); State v. Kornegay, 313 N.C. 1, 326 S.E.2d 881 (1985).

§ 7A-47. Powers of regular judges holding courts by assignment or exchange.

A regular superior court judge, duly assigned to hold the courts of a county, or holding such courts by exchange, shall have the same powers in the district or set of districts as defined in G.S. 7A-41.1(a) in which that county is located, in open court and in chambers as the resident judge or any judge regularly assigned to hold the courts of the district or set of districts as defined in G.S. 7A-41.1(a) has, and his jurisdiction in chambers shall extend until the session is adjourned or the session expires by operation of law, whichever is later. (1951, c. 740; 1969, c. 1190, s. 42; 1987 (Reg. Sess., 1988), c. 1037, s. 6.)

Editor's Note. — This section was formerly G.S. 7-61.1. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 42.

CASE NOTES

Order Signed After Judge's Term Expired and Outside Time of Consent Between Parties. — Where the parties had given consent to an order to be entered up to ten days after the expiration of a judge's term, judgment entered long after the ten days was void and case was remanded. In re Brooks, 93 N.C. App. 86, 376 S.E.2d 250 (1989).

Authority of Assigned Presiding Superior Court Judge. — Presiding superior court judge, duly assigned by the Chief Justice of the North Carolina Supreme Court, acted with the power of the resident superior court judge; thus, the judge from another county who was assigned to serve as resident superior court judge was technically acting in a "resident" capacity when he ruled on a motion for an extension of time to file pleadings. Best v. Wayne Mem. Hosp., 147 N.C. App. 628, 556 S.E.2d 629, 2001 N.C. App. LEXIS 1259 (2001).

Applied in Howard v. Vaughn, 155 N.C. App. 200, 573 S.E.2d 253, 2002 N.C. App. LEXIS 1609 (2002), cert. denied, 357 N.C. 62, 579 S.E.2d 389 (2003).

Cited in Andrews v. Peters, 89 N.C. App. 315, 365 S.E.2d 709 (1988); Vance Constr. Co. v. Duane White Land Corp., 127 N.C. App. 493, 490 S.E.2d 588 (1997).

§ 7A-47.1. Jurisdiction in vacation or in session.

In any case in which the superior court in vacation has jurisdiction, and all the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or during a session of court, at their election. Any regular resident superior court judge of the district or set of districts as defined in G.S. 7A-41.1(a) and any special superior court judge residing in the district or set of districts and the judge regularly presiding over the courts of the district or set of districts have concurrent jurisdiction throughout the district or set of districts in all matters and proceedings in which the superior court has jurisdiction out of session; provided, that in all matters and proceedings not requiring a jury or in which a jury is waived, any regular resident superior court judge of the district or set of districts and any special superior court judge residing in the district or set of districts shall have concurrent jurisdiction throughout the district or set of districts with the judge holding the courts of the district or set of districts and any such regular or special superior court judge, in the exercise of such concurrent jurisdiction, may hear and pass upon such matters and proceedings in vacation, out of session or during a session of court. (1871-2, c. 3; Code, c. 10, s. 230; Rev., s. 1501; C.S., s. 1438; 1939, c. 69; 1945, c. 142; 1951, c. 78, s. 2; 1969, c. 1190, s. 47; 1987 (Reg. Sess., 1988), c. 1037, s. 7.)

Editor's Note. — This section was formerly G.S. 7-65. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 47.

Legal Periodicals. — For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

CASE NOTES

"Vacation" or "In Chambers" Jurisdiction Generally. — A regular judge holding the courts of the district has general jurisdiction of all "in chambers" matters arising in the district. The general "vacation" or "in chambers" jurisdiction of a regular judge arises out of his general authority. Usually it may be exercised anywhere in the district, and it is never dependent upon and does not arise out of the fact that he is at the time presiding over a designated term of court or in a particular county. As to him, it is limited, ordinarily, to the district to which he is assigned by statute. It may not be exercised even within the district of his residence except when specially authorized by statute. Baker v. Varser, 239 N.C. 180, 79 S.E.2d 757 (1954).

Matters and proceedings not requiring the intervention of a jury, or in which trial by jury has been waived, may be heard in vacation. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Consent of Parties Required. — A judge has no power to render judgment after the expiration of the term of court without the consent of parties. Hardin v. Ray, 89 N.C. 364 (1883).

By consent, the superior court can grant judgment in civil cases in vacation. Coates Bros. v. Wilkes, 94 N.C. 174 (1886).

After leaving the bench for a term of the superior court to expire by limitation, the judge cannot hear motions or other matters outside of the courtroom except by consent, unless they are such as are cognizable at chambers. May v. National Fire Ins. Co., 172 N.C. 795, 90 S.E. 890 (1916).

Transaction of Business Out of Term. — The courts have recognized the power and authority of the legislature to provide for the transaction of business in the superior court out of term except for the trial of issues of fact requiring a jury. Capital Outdoor Adv., Inc. v. City of Raleigh, 337 N.C. 150, 446 S.E.2d 289, rehearing denied, 337 N.C. 807, 449 S.E.2d 566 (1994).

The judge holding the courts of a judicial district has authority to act in all matters within the jurisdiction of the superior court, with the consent of the parties, by signing judgments out of term and in or out of the county and out of the district. Edmundson v. Edmundson, 222 N.C. 181, 22 S.E.2d 576 (1942).

Jurisdiction Limited to District. — The jurisdiction of a superior court judge is ordinarily limited to the district in which he resides. Vance Constr. Co. v. Duane White Land Corp., 127 N.C. App. 493, 490 S.E.2d 588 (1997).

Demurrers May Be Heard in Chambers. — A special judge has jurisdiction in the county of his residence to hear and determine in chambers a demurrer to the complaint in an action pending in the county. Parker v. Underwood, 239 N.C. 308, 79 S.E.2d 765 (1954); Scott v. Scott, 259 N.C. 642, 131 S.E.2d 478 (1963).

As May Controversies Without Action. — A special judge in the county of his residence has jurisdiction to hear and determine in chambers a controversy without action. Scott v. Scott, 259 N.C. 642, 131 S.E.2d 478 (1963).

And Motions for Judgment of Voluntary Nonsuit. — A resident judge has jurisdiction to hear and determine in chambers a motion for judgment of voluntary nonsuit. Scott v. Scott, 259 N.C. 642, 131 S.E.2d 478 (1963).

And Actions Involving Title to Bank Accounts. — A regular judge has jurisdiction to hear and determine in chambers an action involving title to a bank account in which the answer raised no issues of fact. Scott v. Scott, 259 N.C. 642, 131 S.E.2d 478 (1963).

Interlocutory Order. — The superior court has power to make an amendment to an interlocutory order in an ancillary proceeding out of term. Coates Bros. v. Wilkes, 94 N.C. 174 (1886).

Where resident judge issued order to defendant wife to appear outside county and outside district to show cause why temporary order awarding custody of children to husband should not be made permanent, it was held that the judge was without jurisdiction to hear the matter outside the district, and an order issued upon the hearing of the order to show cause was void ab initio. Patterson v. Patterson, 230 N.C. 481, 53 S.E.2d 658 (1949).

Mandamus Proceedings in Another Dis-

trict Not Within Jurisdiction. — A regular judge of the superior court while assigned by rotation to hold the courts of the judicial district of his residence has no jurisdiction to hear a petition for mandamus in chambers in another judicial district to which he is not assigned to hold court. Baker v. Varser, 239 N.C. 180, 79 S.E.2d 757 (1954).

No Jurisdiction to Order Payment of Expenses Out of the Recovery. — In an action by taxpayers against public officers under G.S. 128-10 to recover public funds unlawfully expended, plaintiffs disclaimed in their complaint any right personally to participate in the recovery. After recovery and the entry of a consent judgment dismissing appeals, and after payment of the judgment, the resident judge, on petition of one of the original taxpayer plaintiffs, was then without jurisdiction under this section to order payments, out of the recovery, of such petitioner's expenses and counsel fees. Hill v. Stanbury, 224 N.C. 356, 30 S.E.2d 150 (1944), commented on in 23 N.C.L. Rev. 40 (1945).

Power of Resident Judge. — The resident judge of a district has no other power within such district in vacation than any other judge of the superior court. State v. Ray, 97 N.C. 510, 1 S.E. 876 (1887).

Concurring Jurisdiction of Judges. — The resident judge of a judicial district and the judge regularly presiding over the courts of the district and any special judge residing in the district have concurrent jurisdiction in all matters and proceedings wherein the superior court has jurisdiction out of term. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Same — Proceeding to Obtain Custody of Child. — A special judge has concurrent jurisdiction with the judge of the district to hear and determine a proceeding instituted by the mother of a child to obtain its custody, provided the proceeding can be heard and judgment rendered during the term of court the special judge is commissioned to hold. In re Cranford, 231 N.C. 91, 56 S.E.2d 35 (1949).

There was both statutory and common law authority for the trial court's entry of its supplemental judgment, as this section and 1A-1, Rule 6(c) both authorize the entry of judgment out of session. Buford v. GMC, 339 N.C. 396, 451 S.E.2d 293 (1994).

Applied in Parmele v. Eaton, 240 N.C. 539, 83 S.E.2d 93 (1954); Towne v. Cope, 32 N.C. App. 660, 233 S.E.2d 624 (1977); E-B Grain Co. v. Denton, 73 N.C. App. 14, 325 S.E.2d 522 (1985).

Cited in Andrews v. Peters, 89 N.C. App. 315, 365 S.E.2d 709 (1988); Bacon v. Lee, 225 F.3d 470, 2000 U.S. App. LEXIS 22231 (4th Cir. 2000), cert. denied, 532 U.S. 950, 121 S. Ct. 1420, 149 L. Ed. 2d 360 (2001).

§ 7A-47.2: Repealed by Session Laws 1987 (Regular Session, 1988), c. 1037, s. 8.

Editor's Note. — The repealed section was enacted by Session Laws 1987, c. 509, s. 2, effective January 1, 1989, and repealed by Session Laws 1987 (Reg. Sess., 1988), c. 1037, s. 8, also effective January 1, 1989. Thus, it never went into effect.

§ 7A-47.3. Rotation and assignment; sessions.

(a) To effect the intent of Article IV, Section 11 of the North Carolina Constitution, each regular resident superior court judge may, upon each rotation, be assigned to hold the courts either of one of the districts or of one of the sets of districts, as defined in G.S. 7A-41.1(a), in that judge's judicial division.

(b) All sessions of superior court shall be for an entire county, whether that county comprises or is located in a district or in a set of districts as defined in G.S. 7A-41.1(a), and at each session all matters and proceedings arising anywhere in the county shall be heard. (1987, c. 509, s. 3; 738, s. 124; 1987 (Reg. Sess., 1988), c. 1037, s. 9.)

§ 7A-48. Jurisdiction of emergency judges.

Emergency superior court judges have the same power and authority in all matters whatsoever, in the courts which they are assigned to hold, that regular judges holding the same courts would have. An emergency judge duly assigned to hold the courts of a county or district or set of districts as defined in G.S. 7A-41.1(a) has the same powers in that county and district or set of districts in open court and in chambers as a resident judge of the district or set of districts or any judge regularly assigned to hold the courts of the district or set of districts would have, but his jurisdiction in chambers extends only until the session is adjourned or the session expires by operation of law, whichever is later. (Ex. Sess. 1921, c. 94, s. 1; C.S., s. 1435(b); 1925, c. 8; 1941, c. 52, s. 2; 1951, c. 88; 1969, c. 1190, s. 39; 1987 (Reg. Sess., 1988), c. 1037, s. 10.)

Editor's Note. — This section was formerly G.S. 7-52. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 39.

CASE NOTES

Jurisdiction to Order Expenses and Fees Paid. — Emergency superior court judge commissioned to preside over a Special Session of County Superior Court continuing two weeks, or until the business was completed, had jurisdiction to sign order taxing deposition expenses and witness fees 6 weeks later. Hockaday v. Lee, 124 N.C. App. 425, 477 S.E.2d 82 (1996), cert. denied, 346 N.C. 178, 486 S.E.2d 204 (1997).

Limitations on Jurisdiction. — The power and authority given to emergency judges are to be exercised only "in the courts which they are assigned to hold." The jurisdiction of an emergency judge "in chambers" terminates with the adjournment or termination of the term of court which he is assigned to hold. Lewis v. Harris, 238 N.C. 642, 78 S.E.2d 715 (1953). But the statute places no such limitation on the "in term" jurisdiction of an emergency judge. Strickland v. Kornegay, 240 N.C. 758, 83 S.E.2d 903 (1954).

Applied in State v. Kornegay, 313 N.C. 1, 326 S.E.2d 881 (1985).

Cited in Spaugh v. City of Charlotte, 239 N.C. 149, 79 S.E.2d 748 (1954).

§ 7A-49. Orders returnable to another judge; notice.

When any special or emergency judge makes any matter returnable before him, and thereafter he is called upon by the Chief Justice to hold court elsewhere, he shall order the matter heard before some other judge, setting forth in the order the time and place where it is to be heard, and he shall send copies of the order to the attorneys representing the parties in such matter. (Ex. Sess. 1921, c. 94, s. 2; C.S., s. 1435(c); 1951, c. 491, s. 1; 1969, c. 1190, s. 40.)

Editor's Note. — This section was formerly G.S. 7-53. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 40.

§ 7A-49.1. Disposition of motions when judge disqualified.

Whenever a judge before whom a motion is made, either in open court or in chambers, disqualifies himself from determining it, he may in his discretion refer the motion for disposition to a regular resident superior court judge of, or any judge regularly holding the courts of, the district or set of districts as defined in G.S. 7A-41.1(a) in which the county in which the cause arose is located, or of any adjoining district or set of districts, who shall have full power and authority to hear and determine the motion in the same manner as if he were the presiding judge of a session of superior court for that county. (1939, c. 48; 1961, c. 50; 1969, c. 1190, s. 43; 1987 (Reg. Sess., 1988), c. 1037, s. 11.)

Editor's Note. — This section was formerly G.S. 7-62. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 43.

§ 7A-49.2. Civil business at criminal sessions; criminal business at civil sessions.

(a) At criminal sessions of court, motions in civil actions may be heard upon due notice, and trials in civil actions may be heard by consent of parties. Motions for confirmation or rejection of referees' reports may also be heard upon 10 days' notice and judgment may be entered on such reports. The court may also enter consent orders and consent judgments, and try uncontested civil actions.

(b) For sessions of court designated for the trial of civil cases only, no grand juries shall be drawn and no criminal process shall be made returnable to any civil session. (1901, c. 28; Rev., ss. 1507, 1508; 1913, c. 196; Ex. Sess. 1913, c. 23; 1915, cc. 68, 240; 1917, c. 13; C.S., ss. 1444, 1445; 1931, c. 394; 1947, c. 25; 1969, c. 1190, s. 44; 1973, c. 503, s. 1.)

Editor's Note. — This section combines former G.S. 7-72 and 7-73. The former sections were revised, combined and transferred to their present position by Session Laws 1969, c. 1190, s. 44.

CASE NOTES

Editor's Note. — *Most of the cases in the following annotations were decided under former statutory provisions.*

Failure to Give Notice. — Due notice must be given of motions in civil actions to be heard at a criminal term of court, and where the movant failed to give the statutory notice of his motion, and the superior court ordered a dismissal of the action, the judgment was reversed on appeal. Dawkins v. Phillips, 185 N.C. 608, 116 S.E. 723 (1923).

The superior court has authority to hear motions in civil actions at criminal terms only after due notice to the adverse party, and therefore when it did not affirmatively appear that due notice was given of plaintiff's motion to be allowed to amend, the granting of the motion at a term of court for criminal cases only would be held to be error as being presumptively outside the authority of the court. Beck v. Lexington Coca-Cola Bottling Co., 216 N.C. 579, 5 S.E.2d 855 (1939).

Notice of Motion for Default. — Under G.S. 1A-1, Rule 7, an application for default judgment is considered a motion in a civil action; therefore, as subsection (a) of this section requires notice to be given before motions in civil actions may be heard at criminal sessions of court, and no notice was given defendant, default judgment granted plaintiff would be vacated. Miller v. Belk, 18 N.C. App. 70, 196 S.E.2d 44, cert. denied, 283 N.C. 665, 197 S.E.2d 874 (1973).

Motion for New Trial in Criminal Case May Not Be Determined at Civil Term. — A motion which, if allowed, would set aside a verdict and judgment in a case on the criminal docket, specifically, a motion for a new trial on the ground of newly discovered evidence, may not be determined at a term expressly restricted by statute as a term "for the trial of civil cases only." Such a motion is for determination at a term of the court (in which the verdict and judgment to which the motion is addressed were rendered) provided for the trial of criminal cases. In re Renfrow, 247 N.C. 55, 100 S.E.2d 315 (1957).

Contested Divorce Action at Civil Session. — The purported trial of a contested divorce action conducted over defendant's protest and in disregard of his motion for continuance for trial at a civil session was a nullity. Branch v. Branch, 282 N.C. 133, 191 S.E.2d 671 (1972).

Jurisdiction to Hear Criminal Case. — Trial court that was assigned to hold civil court had jurisdiction to conduct a criminal trial where an order from the Chief Justice of the North Carolina Supreme Court mandated that the trial court hear both civil and criminal cases. State v. Thomas, 132 N.C. App. 515, 512 S.E.2d 436 (1999).

Even though the official transcript from a session of court designated the session as civil, no violation of G.S. 7A-49.2 occurred because the record showed that both civil and criminal cases were heard. State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005).

Applied in Whedbee v. Powell, 41 N.C. App. 250, 254 S.E.2d 645 (1979).

§ 7A-49.3: Repealed by Session Laws 1999-428, s. 2, effective January 1, 2000.

§ 7A-49.4. Superior court criminal case docketing.

(a) Criminal Docketing. — Criminal cases in superior court shall be calendared by the district attorney at administrative settings according to a criminal case docketing plan developed by the district attorney for each superior court district in consultation with the superior court judges residing in that district and after opportunity for comment by members of the local bar. Each criminal case docketing plan shall, at a minimum, comply with the provisions of this section, but may contain additional provisions not inconsistent with this section.

(b) Administrative Settings. — An administrative setting shall be calendared for each felony within 60 days of indictment or service of notice of indictment if required by law, or at the next regularly scheduled session of superior court if later than 60 days from indictment or service if required. At an administrative setting:

(1) The court shall determine the status of the defendant's representation by counsel;

(2) After hearing from the parties, the court shall set deadlines for the delivery of discovery, arraignment if necessary, and filing of motions;

(3) If the district attorney has made a determination regarding a plea arrangement, the district attorney shall inform the defendant as to whether a plea arrangement will be offered and the terms of any proposed plea arrangement, and the court may conduct a plea conference if supported by the interest of justice;

(4) The court may hear pending pretrial motions, set such motions for hearing on a date certain, or defer ruling on motions until the trial of the case; and

(5) The court may schedule more than one administrative setting if requested by the parties or if it is found to be necessary to promote the fair administration of justice in a timely manner.

Whenever practical, administrative settings shall be held by a superior court judge residing within the district, but may otherwise be held by any superior court judge.

If the parties have not otherwise agreed upon a trial date, then upon the conclusion of the final administrative setting, the district attorney shall announce a proposed trial date. The court shall set that date as the tentative trial date unless, after providing the parties an opportunity to be heard, the court determines that the interests of justice require the setting of a different date. In that event, the district attorney shall set another tentative trial date during the final administrative setting. The trial shall occur no sooner than 30 days after the final administrative setting, except by agreement of the State and the defendant.

Nothing in this section precludes the disposition of a criminal case by plea, deferred prosecution, or dismissal prior to an administrative setting.

(c) Definite Trial Date. — When a case has not otherwise been scheduled for trial within 120 days of indictment or of service of notice of indictment if required by law, then upon motion by the defendant at any time thereafter, the senior resident superior court judge, or a superior court judge designated by the senior resident superior court judge, may hold a hearing for the purpose of establishing a trial date for the defendant.

(d) Venue for Administrative Settings. — Venue for administrative settings may be in any county within the district when necessary to comply with the terms of the criminal case docketing plan. The presence of the defendant is only required for administrative settings held in the county where the case originated.

(e) Setting and Publishing of Trial Calendar. — No less than 10 working days before cases are calendared for trial, the district attorney shall publish the trial calendar. The trial calendar shall schedule the cases in the order in which the district attorney anticipates they will be called for trial and should not contain cases that the district attorney does not reasonably expect to be called for trial. In counties in which multiple sessions of court are being held, the district attorney may publish a trial calendar for each session of court.

(f) Order of Trial. — The district attorney, after calling the calendar and determining cases for pleas and other disposition, shall announce to the court the order in which the district attorney intends to call for trial the cases remaining on the calendar. Deviations from the announced order require approval by the presiding judge if the defendant whose case is called for trial objects; but the defendant may not object if all the cases scheduled to be heard before the defendant's case have been disposed of or delayed with the approval of the presiding judge or by consent of the State and the defendant. A case may be continued from the trial calendar only by consent of the State and the defendant or upon order of the presiding judge or resident superior court judge for good cause shown. The district attorney, after consultation with the parties, shall schedule a new trial date for cases not reached during that session of court.

(g) Nothing in this section shall be construed to deprive any victim of the rights granted under Article I, Section 37 of the North Carolina Constitution and Article 46 of Chapter 15A of the General Statutes.

(h) Nothing in this section shall be construed to affect the authority of the court in the call of cases calendared for trial. (1999-428, s. 1.)

Legal Periodicals. — For brief comment on section, see 27 N.C.L. Rev. 451 (1949).

For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

CASE NOTES

Editor's Note. — *The cases below were decided under former G.S. 7A-49.3.*

Prosecutor Controls Calendar. — Under North Carolina practice, the prosecutor controls the criminal calendar and decides when to set cases for trial. Shirley v. North Carolina, 528 F.2d 819 (4th Cir. 1975).

Judge May Consolidate Calendared and Non-Calendared Charges. — When read together, G.S. 15A-926(a) and subsection (a) former G.S. 7A-49.3 (now see this section) permitted a judge in a criminal trial to consolidate calendared charges with non-calendared charges that were based either on the same act or transaction, or on a series of acts of transactions connected together or constituting parts of a single scheme or plan. State v. Thompson, 129 N.C. App. 13, 497 S.E.2d 126 (1998).

The ultimate authority over managing the trial calendar is retained in the court, even though this section gives the district attorney the authority to calendar cases for trial. State v. Monk, 132 N.C. App. 248, 511 S.E.2d 332 (1999).

Because the ultimate authority over managing the trial calendar is retained in the court, it could not be said that prior similar provision infringed upon the court's inherent authority or vested the district attorney with judicial powers in violation of the separation of powers clause. Simeon v. Hardin, 339 N.C. 358, 451 S.E.2d 858 (1994).

Constitutional Application. — Where there were allegations the district attorney placed a large number of cases on the printed trial calendar knowing that all cases would not be called, thereby providing defendants virtually no notice of which cases were going to be called for trial, the allegations were sufficient to state a claim that the statutes were being applied in an unconstitutional manner in the Fourteenth Prosecutorial District. Simeon v. Hardin, 339 N.C. 358, 451 S.E.2d 858 (1994).

Filing of Calendar Six Days Before Session. — Defendant was not prejudiced by the fact that the district attorney filed the calendar of cases to be tried six days before the beginning of the session of the court rather than a full week before the session began as required by this section, particularly where he was not tried until a full week after the calendar had been filed. State v. Miller, 42 N.C. App. 342, 256 S.E.2d 512 (1979).

No Defense Subpoenas Until Case Calendared. — Until the prosecutor files his calendar, criminal defendants are unable to subpoena witnesses, for this section requires defense subpoenas to state the date of trial, a detail which, of course, cannot be known until the case is calendared. Shirley v. North Carolina, 528 F.2d 819 (4th Cir. 1975).

Notice of Arraignment Date. — A capital murder defendant's right to due process was not impaired by a lack of notice of his arraignment on a certain date as required by this section, where the defendant was fully aware of the charge against him, entered a plea of not guilty to first-degree murder at the arraignment, and was not prevented from filing pretrial motions as a result of the arraignment being held on that date. State v. Locklear, 349 N.C. 118, 505 S.E.2d 277 (1998), cert. denied, 526 U.S. 1075, 119 S. Ct. 1475, 143 L. Ed. 2d 559 (1999).

Applied in State v. Edwards, 70 N.C. App. 317, 319 S.E.2d 613 (1984).

Cited in State v. Moore, 65 N.C. App. 56, 308 S.E.2d 723 (1983); State v. Fisher, 171 N.C. App. 201, 614 S.E.2d 428, 2005 N.C. App. LEXIS 1214 (2005).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The opinion below was rendered under former G.S. 7A-49.3.*

As to prosecutor's responsibility for calendaring criminal cases, see opinion of Attorney General to Mr. Archie Taylor, Solicitor, Fourth Solicitorial District, 41 N.C.A.G. 37 (1970).

§ 7A-49.5. Statewide electronic filing in courts.

(a) The General Assembly finds that the electronic filing of pleadings and other documents required to be filed with the courts may be a more economical, efficient, and satisfactory procedure to handle the volumes of paperwork routinely filed with, handled by, and disseminated by the courts of this State, and therefore authorizes the use of electronic filing in the courts of this State.

(b) The Supreme Court may adopt rules governing this process and associated costs and may supervise its implementation and operation through the Administrative Office of the Courts. The rules adopted under this section shall address the waiver of electronic fees for indigents.

(c) The Administrative Office of the Courts may contract with a vendor to provide electronic filing in the courts.

(d) Any funds received by the Administrative Office of the Courts from the vendor selected pursuant to subsection (c) of this section, other than applicable statutory court costs, as a result of electronic filing, shall be deposited in the Court Information Technology Fund in accordance with G.S. 7A-343.2. (2006-187, s. 2(c); 2007-323, s. 14.17(c).)

Editor's Note. — Session Laws 2006-187, s. 13, provides in part: "Section 2 of this act is effective when it becomes law [August 3, 2006] and applies to all matters filed with the courts on or after the date that the Supreme Court adopts rules for electronic filing as authorized by that section."

Session Laws 2007-323, s. 14.17(b), expiring June 30, 2009, provides: "The Administrative Office of the Courts may conduct a pilot project in multiple counties to evaluate a system for the electronic filing, case processing, and case management of civil cases and special proceedings filed in the General Court of Justice. The Administrative Office of the Courts may designate the case types that will be subject to mandatory electronic filing, case processing, and case management during the pilot project. No county may be selected without the concurrence of the senior resident superior court judge, the chief district court judge, and the clerk of superior court. Notwithstanding the requirements of Chapters 1A and Chapter 7A of the General Statutes, the North Carolina Supreme Court and the Administrative Office of the Courts shall establish rules, costs, procedures, and specifications for electronic filing, case processing, and case management under the pilot. However, Rule 4 of the Rules of Civil Procedure shall govern service of process of pleadings that are currently required to be served pursuant to Rule 4 of the Rules of Civil Procedure. The terms of any contract entered into for the purpose of implementing the provisions of this subsection shall provide that the State retains the ownership of all electronic data received by the vendor as part of the pilot project."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 14.17(c), effective July 1, 2007, deleted "provided that the costs for the hardware and software are not paid using State funds" following "courts" at the end of subsection (c).

Article 8.

Retirement of Judges of the Superior Court; Retirement Compensation for Superior Court Judges; Recall to Emergency Service of Judges of the District and Superior Court; Disability Retirement for Judges of the Superior Court.

§ 7A-50. Emergency judge defined.

As used in this Article "emergency judge" means any judge of the superior court who has retired subject to recall to active service for temporary duty. (1967, c. 108, s. 2.)

§ 7A-51. Age and service requirements for retirement of judges of the superior court and of the Administrative Officer of the Courts.

(a) Any judge of the superior court, or Administrative Officer of the Courts, who has attained the age of sixty-five years, and who has served for a total of fifteen years, whether consecutive or not, as a judge of the superior court, or as Administrative Officer of the Courts, or as judge of the superior court and as Administrative Officer of the Courts combined, may retire and receive for life compensation equal to two thirds of the total annual compensation, including longevity and additional payment for service as senior resident superior court judge, but excluding any payments in the nature of reimbursement for expenses or subsistence allowances, from time to time received by the occupant of the office from which he retired.

(b) Any judge of the superior court, or Administrative Officer of the Courts, who has served for twelve years, whether consecutive or not, as a judge of the superior court, or as Administrative Officer of the Courts, or as judge of the superior court and as Administrative Officer of the Courts combined may, at age sixty-eight, retire and receive for life compensation equal to two thirds of the total annual compensation, including longevity and additional payment for service as senior resident superior court judge, but excluding any payments in the nature of reimbursement for expenses or subsistence allowances, from time to time received by the occupant of the office from which he retired.

(c) Any person who has served for a total of twenty-four years, whether continuously or not, as a judge of the superior court, or as Administrative Officer of the Courts, or as judge of the superior court and as Administrative Officer of the Courts combined, may retire, regardless of age, and receive for life compensation equal to two thirds of the total annual compensation, including longevity and additional payment for service as senior resident superior court judge, but excluding any payments in the nature of reimbursement for expenses or subsistence allowances, from time to time received by the occupant of the office from which he retired. In determining whether a person meets the requirements of this subsection, time served as district attorney of the superior court prior to January 1, 1971, may be included, so long as the person has served at least eight years as a judge of the superior court, or as Administrative Officer of the Courts, or as judge of the superior court and Administrative Officer of the Courts combined.

(d) Repealed by Session Laws 1971, c. 508, s. 3.

(e) For purposes of this section, the "occupant or occupants of the office from which" the retired judge retired will be deemed to be a superior court judge holding the same office and with the same service as the retired judge had immediately prior to retirement. (1967, c. 108, s. 2; 1971, c. 508, s. 3; 1973, c. 47, s. 2; 1983 (Reg. Sess., 1984), c. 1109, ss. 13.10-13.13.)

Legal Periodicals. — For note, "Gregory v. Ashcroft: The Plain Statement Rule and Judicial Supervision of Federal-State Relations," see 70 N.C.L. Rev. 1563 (1992).

§ 7A-52. Retired district and superior court judges may become emergency judges subject to recall to active service; compensation for emergency judges on recall.

(a) Judges of the district court and judges of the superior court who have not reached the mandatory retirement age specified in G.S. 7A-4.20, but who have retired under the provisions of G.S. 7A-51, or under the Uniform Judicial Retirement Act after having completed five years of creditable service, may apply as provided in G.S. 7A-53 to become emergency judges of the court from which they retired. The Chief Justice of the Supreme Court may order any emergency judge of the district or superior court who, in his opinion, is competent to perform the duties of a judge of the court from which such judge retired, to hold regular or special sessions of such court, as needed. Order of assignment shall be in writing and entered upon the minutes of the court to which such emergency judge is assigned.

(b) In addition to the compensation or retirement allowance the judge would otherwise be entitled to receive by law, each emergency judge of the district or superior court who is assigned to temporary active service by the Chief Justice shall be paid by the State the judge's actual expenses, plus four hundred dollars ($400.00) for each day of active service rendered upon recall. No recalled retired trial judge shall receive from the State total annual compensation for judicial services in excess of that received by an active judge of the bench to which the judge is recalled. (1967, c. 108, s. 2; 1973, c. 640, s. 4; 1977, c. 736, s. 3; 1979, c. 878, s. 2; 1981, c. 455, s. 6; c. 859, s. 47; 1981 (Reg. Sess., 1982), c. 1253, s. 3; 1983, c. 784; 1985, c. 698, s. 9(b); 1987, c. 738, s. 132; 1987 (Reg. Sess., 1988), c. 1086, s. 31(b); 1989, c. 116; 1993, c. 321, s. 200.3; 1998-212, s. 16.27(a); 2007-323, s. 14.26; 2007-345, s. 9.)

Cross References. — For the Consolidated Judicial Retirement Act, see G.S. 135-50 et seq.

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 14.26, as added by Session Laws 2007-345, s. 9, effective July 1, 2007, substituted "four-hundred dollars ($400.00)" for "three-hundred dollars ($300.00)" in subsection (b).

§ 7A-53. Application to the Governor; commission as emergency judge.

No retired judge of the district or superior court may become an emergency judge except upon his written application to the Governor certifying his desire and ability to serve as an emergency judge. If the Governor is satisfied that the applicant qualifies under G.S. 7A-52(a) to become an emergency judge and that he is physically and mentally able to perform the official duties of an emergency judge, he shall issue to such applicant a commission as an emergency judge of the court from which he retired. The commission shall be effective upon the date of its issue and shall terminate when the judge to whom it is issued reaches the maximum age for judicial service under G.S. 7A-4.20(a). (1967, c. 108, s. 2; 1977, c. 736, s. 4; 1979, c. 878, s. 3.)

§ 7A-53.1. Jurisdiction of emergency district court judges.

Emergency district court judges have the same power and authority in all matters whatsoever, in the courts which they are assigned to hold, that regular district court judges holding the same courts would have. An emergency district court judge duly assigned to hold district court in a particular county or district has the same powers in the county or district in open court and in chambers as a resident district court judge or any district court judge regularly assigned to hold district court in that district, but his jurisdiction in chambers extends only until the session is adjourned or the session expires by operation of law, whichever is later. (1981, c. 455, s. 5.)

§ 7A-54. Article applicable to judges retired under prior law.

All judges of the superior court who have heretofore retired and who are receiving retirement compensation under the provisions of any judicial retirement law previously enacted shall be entitled to the benefits of this article. All such judges shall be subject to assignment as emergency judges by the Chief Justice of the Supreme Court, except judges retired for total disability. (1967, c. 108, s. 2.)

CASE NOTES

Cited in Sharp v. Sharp, 124 N.C. App. 357, 477 S.E.2d 258 (1996).

§ 7A-55. Retirement on account of total and permanent disability.

Every judge of the superior court or Administrative Officer of the Courts who has served for eight years or more on the superior court, or as Administrative Officer of the Courts, or on the superior court and as Administrative Officer of the Courts combined, and who while in active service becomes totally and permanently disabled so as to be unable to perform efficiently the duties of his office, and who retires by reason of such disability, shall receive for life compensation equal to two thirds of the annual salary from time to time received by the occupant of the office from which he retired. In determining whether a person meets the requirements for retirement under this section, time served as district solicitor of the superior court prior to January 1, 1971, may be included. Whenever any judge claims retirement benefits under this section on account of total and permanent disability, the Governor and Council of State, acting together, shall, after notice and an opportunity to be heard is given the applicant, by a majority vote of said body, make findings of fact from the evidence offered. Such findings of fact shall be reduced to writing and entered upon the minutes of the Council of State. The findings so made shall be conclusive as to such matters and determine the right of the applicant to retirement benefits under this section. Judges retired under the provisions of this section are not subject to recall as emergency judges. (1967, c. 108, s. 2.)

§ 7A-56. Applicability of §§ 7A-51 and 7A-55.

The provisions of G.S. 7A-51 and 7A-55 shall apply only to judges (and any Administrative Officer of the Courts) who entered office prior to January 1, 1974. The extent of such application is specified in Chapter 135, Article 4 (Uniform Judicial Retirement Act). (1973, c. 640, s. 6; 1975, c. 19, s. 2.)

§ 7A-57. Recall of active and emergency trial judges who have reached mandatory retirement age.

Superior and district court judges retired because they have reached the mandatory retirement age, and emergency superior and district court judges whose commissions have expired because they have reached the mandatory retirement age, may be recalled to preside over regular or special sessions of the court from which retired under the following circumstances:

(1) The judge must consent to the recall.
(2) The Chief Justice is authorized to order the recall.
(3) Prior to ordering recall, the Chief Justice shall satisfy himself that the recalled judge is capable of efficiently and promptly discharging the duties of the office to which recalled.
(4) Jurisdiction of a recalled retired superior court judge is as set forth in G.S. 7A-48, and jurisdiction of a recalled retired district court judge is as set forth in G.S. 7A-53.1.
(5) Orders of recall and assignment shall be in writing and entered upon the minutes of the court to which assigned.
(6) Compensation of recalled retired trial judges is the same as for recalled emergency trial judges under G.S. 7A-52(b). (1981, ch. 455, s. 4.)

§§ 7A-58, 7A-59: Reserved for future codification purposes.

ARTICLE 9.

District Attorneys and Judicial Districts.

§ 7A-60. District attorneys and prosecutorial districts.

(a) The State shall be divided into prosecutorial districts, as shown in subsection (a1) of this section. There shall be a district attorney for each prosecutorial district, as provided in subsections (b) and (c) of this section who shall be a resident of the prosecutorial district for which elected. A vacancy in the office of district attorney shall be filled as provided in Article IV, Sec. 19 of the Constitution.

(a1) **(Effective until January 1, 2009.)** The counties of the State are organized into prosecutorial districts, and each district has the counties and the number of full-time assistant district attorneys set forth in the following table:

G.S. 7A-60(a1) is set out twice. See note.

Prosecutorial District	*Counties*	*No. of Full-Time Asst. District Attorneys*
1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	11
2	Beaufort, Hyde, Martin, Tyrrell, Washington	7
3A	Pitt	11
3B	Carteret, Craven, Pamlico	12
4	Duplin, Jones, Onslow, Sampson	18
5	New Hanover, Pender	17
6A	Halifax	5
6B	Bertie, Hertford, Northampton	6
7	Edgecombe, Nash, Wilson	18
8	Greene, Lenoir, Wayne	14
9	Franklin, Granville, Vance, Warren	12
9A	Person, Caswell	5
10	Wake	39
11	Harnett, Johnston, Lee	17
12	Cumberland	22
13	Bladen, Brunswick, Columbus	13
14	Durham	16
15A	Alamance	10
15B	Orange, Chatham	10
16A	Scotland, Hoke	6
16B	Robeson	13
17A	Rockingham	6
17B	Stokes, Surry	7
18	Guilford	31
19A	Cabarrus	9
19B	Montgomery, Randolph	9
19C	Rowan	7
19D	Moore	5
20A	Anson, Richmond, Stanly	11
20B	Union	9
21	Forsyth	24
22	Alexander, Davidson, Davie, Iredell	20
23	Alleghany, Ashe, Wilkes, Yadkin	8
24	Avery, Madison, Mitchell, Watauga, Yancey	7
25	Burke, Caldwell, Catawba	18
26	Mecklenburg	53

G.S. 7A-60(a1) is set out twice. See note.

Prosecutorial District	*Counties*	*No. of Full-Time Asst. District Attorneys*
27A	Gaston	14
27B	Cleveland, Lincoln	10
28	Buncombe	13
29A	McDowell, Rutherford	7
29B	Henderson, Polk, Transylvania	8
30	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain.	11

(a1) **(Effective January 1, 2009.)** The counties of the State are organized into prosecutorial districts, and each district has the counties and the number of full-time assistant district attorneys set forth in the following table:

Prosecutorial District	*Counties*	*No. of Full-Time Asst. District Attorneys*
1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	11
2	Beaufort, Hyde, Martin, Tyrrell, Washington	7
3A	Pitt	11
3B	Carteret, Craven, Pamlico	12
4	Duplin, Jones, Onslow, Sampson	18
5	New Hanover, Pender	17
6A	Halifax	5
6B	Bertie, Hertford, Northampton	6
7	Edgecombe, Nash, Wilson	18
8	Greene, Lenoir, Wayne	14
9	Franklin, Granville, Vance, Warren	12
9A	Person, Caswell	5
10	Wake	39
11	Harnett, Johnston, Lee	17
12	Cumberland	22
13	Bladen, Brunswick, Columbus	13
14	Durham	16
15A	Alamance	10
15B	Orange, Chatham	10
16A	Scotland, Hoke	6
16B	Robeson	13
17A	Rockingham	6
17B	Stokes, Surry	7
18	Guilford	31

G.S. 7A-60(a1) is set out twice. See note.

Prosecutorial District	*Counties*	*No. of Full-Time Asst. District Attorneys*
19A	Cabarrus	9
19B	Montgomery, Randolph	9
19C	Rowan	7
19D	Moore	5
20A	Anson, Richmond, Stanly	11
20B	Union	9
21	Forsyth	24
22A	Alexander, Iredell	11
22B	Davidson, Davie	11
23	Alleghany, Ashe, Wilkes, Yadkin	8
24	Avery, Madison, Mitchell, Watauga, Yancey	7
25	Burke, Caldwell, Catawba	18
26	Mecklenburg	53
27A	Gaston	14
27B	Cleveland, Lincoln	10
28	Buncombe	13
29A	McDowell, Rutherford	7
29B	Henderson, Polk, Transylvania	8
30	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain.	11

(a2) Upon the convening of each regular session of the General Assembly and its reconvening in the even-numbered year, the Administrative Office of the Courts shall report its recommendations regarding the allocation of assistant district attorneys for the upcoming fiscal biennium and fiscal year to the General Assembly, including any request for additional assistant district attorneys. The report shall include the number of assistant district attorneys that the Administrative Office of the Courts recommends to be allocated to each prosecutorial district and the caseload and criteria on which each recommended allocation is based. Any reports required under this subsection shall be made to the Joint Legislative Commission of Governmental Operations, the House of Representatives and Senate Appropriations Subcommittees on Justice and Public, and the Fiscal Research Division.

(b) Except as provided in subsection (c) of this section, each district attorney for a prosecutorial district as defined in subsection (a1) of this section, other than District 19B, who is in office on December 31, 1988, shall continue in office for that prosecutorial district, for a term expiring December 31, 1990. In the general election of 1990, and every four years thereafter, a district attorney shall be elected for a four-year term for each prosecutorial district other than Districts 16A and 19B, and shall take office on the January 1 following such election. The district attorney for Prosecutorial District 19B, who is elected in the general election of 1988 for a four-year term beginning January 1, 1989, shall serve that term for Prosecutorial District 19B. In the general election of 1992, and every four years thereafter, a district attorney shall be elected for a

G.S. 7A-60(a1) is set out twice. See note.

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four-year term for Prosecutorial Districts 16A and 19B and shall take office on the January 1 following such election.

(c) The office and term of the district attorney for Prosecutorial District 12 formerly consisting of Cumberland and Hoke Counties are allocated to Prosecutorial District 12 as defined by subsection (a1) of this section. The office and the term of the district attorney for former Prosecutorial District 16 consisting of Robeson and Scotland Counties are allocated to Prosecutorial District 16B as defined by subsection (a1) of this section. The initial district attorney for Prosecutorial District 16A as defined in subsection (a1) of this section shall be elected in the general election of November 1988, from nominations made in accordance with G.S. 163-114 as if a vacancy had occurred in nomination, and shall serve an initial term expiring December 31, 1992. In all other respects, subsection (b) of this section shall apply to the district attorneys for Prosecutorial Districts 12, 16A, and 16B to the same extent as all other district attorneys. (1967, c. 1049, s. 1; 1975, c. 956, s. 4; 1977, c. 1130, s. 3; 1977, 2nd Sess., c. 1238, s. 2; 1981, c. 964, ss. 2, 3; 1987, c. 509, ss. 4, 5; c. 738, s. 127(a); 1987 (Reg. Sess., 1988), c. 1056, s. 1; c. 1086, s. 111; 1989, c. 770, ss. 1, 56; c. 795, s. 24(a), (e); 1991, c. 742, s. 13; 1991 (Reg. Sess., 1992), c. 900, s. 120(a), (b); 1993, c. 321, ss. 200.4(*l*), 200.7(a), (b); 1995, c. 507, s. 21.7; 1995 (Reg. Sess., 1996), c. 589, s. 3(a); 1996, 2nd Ex. Sess., c. 18, s. 22(a); 1997-443, s. 18.11(a); 1998-212, s. 16.20(a); 1999-237, s. 17.8(a); 2004-124, s. 14.6(h); 2005-276, s. 14.2(*l*); 2006-66, ss. 14.3(a), 14.19(a); 2007-323, ss. 14.14(a), (b), 14.25(j).)

Subsection (a1) Set Out Twice. — The first version of subsection (a1) set out above is effective until January 1, 2009. The second version of subsection (a1) set out above is effective January 1, 2009.

Preclearance under Section 5 of the Voting Rights Act. — Session Laws 2005-276, s. 14.2(*l*), which amended subsection (a1), is effective January 1, 2007 or the date on which subsection (*l*) is approved under Section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated January 5, 2006.

Editor's Note. — Session Laws 1993, c. 321, s. 200.4(*l*), which amended subsection (a1), was effective November 1, 1993, or the date upon which subsections 200.4(*l*) and (m) were approved under Section 5 of the Voting Rights Act of 1965, whichever was later. Preclearance was received from the U.S. Department of Justice by letter dated February 14, 1994.

Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 5, provides that c. 589, s. 3 becomes effective January 4, 1997, or the date upon which that section is approved under section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated December 16, 1996.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 14.2(q), provides, in part: "With respect to the division of Prosecutorial District 20, subsections (*l*) through (p) of this section become effective January 1, 2007, or the date upon which subsection (*l*) of this section is approved under section 5 of the Voting Rights Act of 1965, whichever is later, but the district attorneys for Prosecutorial Districts 20A and 20B shall be elected in the 2006 general election. With respect to the division of Prosecutorial District 29, subsections (*l*) through (p) of this section become effective January 1, 2007, but the district attorneys for Prosecutorial Districts 29A and 29B shall be elected in the 2006 general election."

Session Laws 2005-276, s. 14.2(m), provides: "The district attorneys established for Districts 20A, 20B, 29A, and 29B by subsection (*l*) of this section shall be elected in the 2006 general election."

Session Laws 2005-276, s. 14.2(n), provides: "The eight assistant district attorney positions for District 20A under subsection (*l*) of this section shall be filled by eight assistant district attorneys currently serving Anson, Richmond, and Stanly Counties in District 20. The seven assistant district attorney positions established for District 20B by subsection (*l*) of this section shall be filled by seven assistant district attorneys currently serving Union County in District 20."

Session Laws 2005-276, s. 14.2(o), provides:

"The five assistant district attorney positions for District 29A under subsection (*l*) of this section shall be filled by five assistant district attorneys currently serving McDowell and Rutherford Counties in current District 29. The six district attorney positions for District 29B under subsection (*l*) of this section shall be filled by six assistant district attorneys currently serving Henderson, Polk, and Transylvania Counties in current District 29."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Editor's Note. — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 14.19(b), provides: "The district attorney position established for District 19B by subsection (a) of this section shall be filled by the district attorney currently serving District 19B who resides in Randolph County. The district attorney position established for District 19D by subsection (a) of this section shall be filled by appointment of the Governor for the remainder of the term expiring January 1, 2009. A district attorney for District 19D shall be elected in 2008 for a four-year term commencing January 1, 2009."

Session Laws 2006-66, s. 14.19(c), provides: "The eight assistant district attorney positions for District 19B under subsection (a) of this section shall be filled by eight assistant district attorneys currently serving Montgomery and Randolph Counties in District 19B. The four assistant district attorney positions for District 19D under subsection (a) of this section shall be filled by four assistant district attorneys currently serving Moore County in District 19B."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-323, s. 14.14(b), provides: "Notwithstanding G.S. 7A-60(a2) as enacted by subsection (a) of this section, for the 2007-2008 fiscal year, the Administrative Office of the Courts shall allocate the 30 additional assistant district attorneys authorized by this act based upon caseload and criteria developed by the Administrative Office of the Courts and shall report by October 1, 2007, to the Joint Legislative Commission of Governmental Operations, the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety, and the Fiscal Research Division regarding the allocation of assistant district attorneys for that year. The report shall include the number of assistant district attorneys allocated to each prosecutorial district and the caseload and criteria on which each allocation was based. The Administrative Office of the Courts shall transmit a copy of the order allocating the positions to the Revisor of Statutes. Upon receipt of such an order, the Revisor of Statutes shall revise the chart in G.S. 7A-60(a1) so that it reflects the changes made by the order." See the Effect of amendment note below for the resulting changes to the chart in subsection (a1).

Session Laws 2007-323, s. 14.15(a), (b), provides: "(a) The Legislative Research Commission may contract for an independent study that assesses the availability of prosecutorial resources to the State's district attorneys and that assesses the use and management of those prosecutorial resources by the district attorneys, their staffs, and the Conference of District Attorneys. The study shall address all of the following:

"(1) Current prosecutorial resources. — Resources to be considered include those available to district attorneys and their legal, administrative, support, and investigative staff, and the Conference of District Attorneys. The study shall also consider supplemental assistance and resources provided to district attorneys and their staffs through the State or other funding sources.

"(2) Services provided by the State's district attorneys and Conference of District Attorneys and the recipients of those services.

"(3) Funding of prosecutorial services, adequacy of supplies, equipment, and working space, and allocation of prosecutorial resources. — Issues to be considered shall include the following:

"a. Funding, supplies, equipment, and space required to support prosecutorial services at an appropriate level.

"b. Distribution of prosecutorial resources and how that distribution is determined.

"c. Equitable allocation of prosecutorial resources among the geographical areas of the State and between urban and rural areas.

"d. The proportion of prosecution personnel and budget that is devoted to criminal prosecution, as opposed to other functions or mandates.

"e. Whether monies from the General Fund should be used to support positions for the Conference of District Attorneys, or positions for any other conferences that provide prosecutorial resources.

"(4) The current role of the Conference of District Attorneys and district attorneys in assessing the needs of the public with regard to prosecutorial services and providing assistance in meeting those needs. The study shall also assess the current role, responsibilities, and interaction of the Conference of District Attorneys with regard to the General Assembly and the executive branch and whether those roles and responsibilities should be modified.

"(5) Automation. — The study shall document which prosecutorial services are currently automated and the ability of those systems to interact with each other. The study shall also address areas in which automation could improve or increase the efficiency of prosecutorial services.

"(6) Cost management practices of district attorneys and their staffs. — Practices to be reviewed and considered shall include how well district attorneys' offices manage costs associated with a prosecution such as forensics costs, expert witnesses, and witness travel expenses.

"(7) Caseload management. — In the assessment of caseload management, the study shall focus particularly on whether current management techniques used by district attorneys recognize the critical need to prosecute serious crimes in a timely manner and to keep jail populations at a low level; the techniques, if any that have been adopted to achieve those objectives; and the effectiveness of those management techniques. Other issues that shall also be considered include the following:

"a. Mechanisms used by the district attorney to manage the incoming caseloads generally.

"b. The screening process, if any, for assessing cases prior to assignment.

"c. Initiatives implemented by a district attorney, if any, to expedite the resolution of certain categories of cases.

"d. The type of statistics, if any, the district attorney's office keeps and for what purposes.

"e. Performance indicators, if any, used by district attorneys. If performance indicators are not being used, then the study shall assess whether implementation of performance indicators would be helpful in achieving management goals and the types of indicators that may assist with caseload management. If there are performance indicators, then the study shall identify the indicators, how they are developed, the effectiveness of the indicators, and whether additional performance indicators or modification of existing performance indicators would be helpful in achieving management objectives.

"(8) How the current management and use of prosecutorial resources affect the following:

"a. Access to justice.

"b. Day-to-day functioning of the prosecution service.

"c. Case management, including the development of case screening mechanisms and protocols for diversion.

"d. Timely resolution of caseloads.

"e. Reduction of any backlogs that exist and the impact that current management and use of prosecutorial resources has on the jail population.

"f. The capacity to handle specialized or complex crimes.

"g. The effectiveness of district attorneys and their staffs in responding to domestic violence and other crimes of violence.

"h. Services and support provided to victims.

"i. Accountability to the public.

"(9) Any other issue deemed relevant by the Legislative Research Commission.

"(b) The findings and recommendations of the study shall be reported to the Chairs of the House of Representatives and Senate Appropriations Committee, Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety, and the Fiscal Research Division by March 15, 2008."

Session Laws 2007-323, s. 14.25(k), (*l*), provides: "(k) The district attorney position established for District 22A by subsection (j) of this section shall be filled by election in the 2008 election for a four-year term expiring December 31, 2012. That district attorney's successor shall be elected in the 2012 election.

"(*l*) The district attorney position established for District 22B by subsection (j) of this section shall be filled by the district attorney currently serving District 22 who resides in Davidson County. That district attorney's term expires December 31, 2010, and a successor shall be elected in the 2010 election."

Session Laws 2007-323, s. 14.25(m), as amended by Session Laws 2007-345, s. 8, provides: "Ten of the 11 assistant district attorney positions established for District 22A by subsection (j) of this section shall be filled by 10 assistant district attorneys currently serving Alexander and Iredell Counties in District 22. Ten of the 11 assistant district attorney positions established for District 22B by subsection (j) of this section shall be filled by 10 assistant district attorneys currently serving Davidson and Davie Counties in District 22."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-276, s. 14.2(*l*), effective January 1, 2007, or the date on which approval is granted under

Section 5 of the Voting Rights Act of 1965, whichever is later, substituted Prosecutorial Districts 20A and 20B for Prosecutorial District 20, and substituted Prosecutorial Districts 29A and 29B for Prosecutorial District 29 in subsection (a1).

Session Laws 2006-66, s. 14.3(a), effective January 1, 2007, rewrote subsection (a1).

Session Laws 2006-66, s. 14.19(a), effective January 15, 2007, in subsection (a1), in the entry for District 19B, deleted "Moore" from the list of counties and changed the number of judges from "12" to "8"; and added the entry for District 19D.

Session Laws 2007-323, s. 14.14(a), effective July 1, 2007, added subsection (a2).

Session Laws 2007-323, s. 14.14(b), effective October 1, 2007, allocated 30 new assistant district attorney positions in subsection (a1), with one position being added to Districts 3B, 5, 6B, 8, 10, 11, 12, 13, 14, 15B, 18, 19A, 19B, 19D, 20A, 20B, 23, 24, 29A, and 29B; two positions were added to District 4; and four positions each were added to Districts 21 and 26.

Session Laws 2007-323, s. 14.25(j), effective January 1, 2009, and applicable to the 2008 election, in subsection (a1), substituted "22A" for "22", in Prosecutorial District 22A, deleted "Davidson, Davie," following "Alexander" and substituted "11" for "20", and added Prosecutorial District 22B.

CASE NOTES

Defendant failed to meet her burden of proving that pretrial publicity tainted her chances of receiving a fair and impartial trial where of 33 articles submitted, at least three contained potentially exculpatory information and only one was potentially inflammatory, as factual news accounts regarding the commission of a crime and the pretrial proceedings do not of themselves warrant a change of venue. State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, 513 U.S. 898, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

Cited in State v. Soyars, 332 N.C. 47, 418 S.E.2d 480 (1992); State v. Farmer, 138 N.C. App. 127, 530 S.E.2d 584, 2000 N.C. App. LEXIS 545 (2000).

§ 7A-61. Duties of district attorney.

The district attorney shall prepare the trial dockets, prosecute in a timely manner in the name of the State all criminal actions and infractions requiring prosecution in the superior and district courts of his prosecutorial district, advise the officers of justice in his district, and perform such duties related to appeals to the Appellate Division from his district as the Attorney General may require. Effective January 1, 1971, the district attorney shall also represent the State in juvenile cases in which the juvenile is represented by an attorney. Each district attorney shall devote his full time to the duties of his office and shall not engage in the private practice of law. (1967, c. 1049, s. 1; 1969, c. 1190, s. 5; 1971, c. 377, s. 5.1; 1973, c. 47, s. 2; 1985, c. 764, s. 7; 1985 (Reg. Sess., 1986), c. 852, s. 17; 1987 (Reg. Sess., 1988), c. 1037, s. 12; 1999-428, s. 3.)

Cross References. — As to interchangeability of terms "solicitor" and "district attorney," see G.S. 7A-66.1.

CASE NOTES

The proper role of the district attorney or privately employed counsel in the prosecution of one charged with a criminal offense is the conviction of the guilty, the acquittal of the innocent and the punishment of the guilty, appropriate to the circumstances, in the interest of the future protection of society. In the discharge of his duties the prosecuting attorney is not required to be, and should not be, neutral. He is not the judge, but the advocate of the State's interest in the matter at hand. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

Responsibility to Prosecute Vested in District Attorneys. — The clear mandate of N.C. Const., Art. IV, § 18 is that the responsibility and authority to prosecute all criminal actions in the superior courts is vested solely in the several district attorneys of the State. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

Delegation of Prosecutorial Function. — The elected district attorney may, in his or her discretion and where otherwise permitted by law, delegate the prosecutorial function to others. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

Prosecution by Special Prosecution Division. — G.S. 114-11.6 authorizes the several elected district attorneys of the State to permit the Special Prosecution Division of the Office of the Attorney General to prosecute individual criminal cases in their prosecutorial districts. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

When Requested by District Attorneys. — When G.S. 114-11.6 is read in pari materia with N.C. Const., Art. IV, § 18, it is apparent that our Constitution and statutes give the district attorneys of the State the exclusive discretion and authority to determine whether to request, and thus permit, the prosecution of any individual case by the Special Prosecution Division. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

This section makes the office of district attorney a full-time job. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

But this Article did not change the role of the district attorney in a criminal case to that of an impartial officer of the court. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

This Article Does Not Prohibit Practice of Employing Private Counsel to Assist District Attorney. — This Article does not prohibit the practice of employing private counsel to assist the district attorney in a criminal case. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

However, the district attorney should not relinquish the duties of his office to privately employed counsel, but should remain in charge of and responsible for the prosecution of criminal actions, and except for the most compelling reasons, the trial judge should not permit the district attorney to abdicate his duties. State v. Page, 22 N.C. App. 435, 206 S.E.2d 771, appeal dismissed, 285 N.C. 763, 209 S.E.2d 287 (1974).

Allowing Special Counsel Is Within Discretion of Trial Court. — It is within the discretion of the trial court to allow special counsel to aid the prosecuting attorney in the prosecution of a case. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

The discretion vested in the trial judge to permit private counsel to appear with the district attorney has existed in our courts from their incipiency. State v. Page, 22 N.C. App. 435, 206 S.E.2d 771, appeal dismissed, 285 N.C. 763, 209 S.E.2d 287 (1974).

Selectivity Required in Preparation of Trial Calendar. — It is the district attorney's statutory duty to prepare the trial docket and prosecute criminal actions in the name of the State. In order to properly perform this duty, he must exercise selectivity in preparing the trial calendar. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), cert. denied, 446 U.S. 941, 100 S. Ct. 2165, 64 L. Ed. 2d 796 (1980).

Holding Delinquency Hearing in Absence of District Attorney. — A contention by a juvenile who was represented by counsel that the trial court erred in proceeding with a delinquency hearing in the absence of the district attorney in that the court was cast in the role of a prosecutor was held without merit where the record showed that someone other than the judge examined witnesses of both the petitioner and the juvenile, and that the questions asked by the court were fair and demonstrated no bias. In re Potts, 14 N.C. App. 387, 188 S.E.2d 643, cert. denied, 281 N.C. 622, 190 S.E.2d 471 (1972).

Disqualification of Prosecutor for Conflict of Interests. — A prosecutor may not be disqualified from prosecuting a criminal action in this State unless and until the trial court determines that an actual conflict of interests exists. In this context, an "actual conflict of interests" is demonstrated where a district attorney or a member of his or her staff has previously represented the defendant with regard to the charges to be prosecuted and, as a result of that former attorney-client relationship, the prosecution has obtained confidential information which may be used to the defendant's detriment at trial. Any order of disqualification ordinarily should be directed only to individual prosecutors who have been exposed to such information. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

Order to Withdraw Held Improper. — The trial court exceeded its authority by ordering that in order to avoid the possibility or impression of any conflict of interest, the district attorney and his entire staff must withdraw from a capital case and have no further participation either directly or indirectly with regard to the case. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

Constitutional Application. — Where there were allegations the district attorney placed a large number of cases on the printed trial calendar knowing that all cases would not be called, thereby providing defendants virtually no notice of which cases were going to be called for trial, the allegations were sufficient to state a claim that the statutes were being applied in an unconstitutional manner in the Fourteenth Prosecutorial District. Simeon v. Hardin, 339 N.C. 358, 451 S.E.2d 858 (1994).

Public Nuisance Actions. — The State Constitution and G.S. 7A-61, 147-89 and 19-2.1

do not prohibit a district attorney from employing private counsel to assist in public nuisance actions. Whitfield v. Gilchrist, 126 N.C. App. 241, 485 S.E.2d 61 (1997), rev'd on other grounds, 348 N.C. 39, 497 S.E.2d 412 (1998).

Applied in State v. Mitchell, 298 N.C. 549, 259 S.E.2d 254 (1979).

Cited in State v. Rimmer, 25 N.C. App. 637, 214 S.E.2d 225 (1975); State ex rel. Jacobs v. Sherard, 36 N.C. App. 60, 243 S.E.2d 184 (1978); State v. Jones, 63 N.C. App. 411, 305 S.E.2d 221 (1983); Robeson Defense Comm. v. Britt, 914 F.2d 505 (4th Cir. 1990); In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997); State v. Summers, 351 N.C. 620, 528 S.E.2d 17, 2000 N.C. LEXIS 351 (2000).

§ 7A-62. Acting district attorney.

When a district attorney becomes for any reason unable to perform his duties, the Governor shall appoint an acting district attorney to serve during the period of disability. An acting district attorney has all the power, authority and duties of the regular district attorney. He shall take the oath of office prescribed for the regular district attorney, and shall receive the same compensation as the regular district attorney. (1967, c. 1049, s. 1; 1973, c. 47, s. 2.)

CASE NOTES

The trial court exceeded its authority and invaded the province of an independent constitutional officer when it ordered the district attorney to request that the Attorney General prosecute defendant in a capital case. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

§ 7A-63. Assistant district attorneys.

Each district attorney shall be entitled to the number of full-time assistant district attorneys set out in this Subchapter, to be appointed by the district attorney, to serve at his pleasure. A vacancy in the office of assistant district attorney shall be filled in the same manner as the initial appointment. An assistant district attorney shall take the same oath of office as the district attorney, and shall perform such duties as may be assigned by the district attorney. He shall devote his full time to the duties of his office and shall not engage in the private practice of law during his term. (1967, c. 1049, s. 1; 1969, c. 1190, s. 6; 1971, c. 377, s. 6; 1973, c. 47, s. 2.)

CASE NOTES

Duties of Assistant District Attorneys. — The legislative intent and the statutory provisions contemplate that an assistant district attorney is fully authorized to carry out such duties of the district attorney as the district attorney may assign to him. State v. Rimmer, 25 N.C. App. 637, 214 S.E.2d 225, cert. denied, 288 N.C. 250, 217 S.E.2d 674 (1975).

Cited in State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

§ 7A-64. Temporary assistance for district attorneys.

(a) A district attorney may apply to the Director of the Administrative Office of the Courts to:

(1) Temporarily assign an assistant district attorney from another district, after consultation with the district attorney thereof, to assist in the prosecution of cases in the requesting district;

(2) Authorize the temporary appointment, by the requesting district attorney, of a qualified attorney to assist the requesting district attorney; or

(3) Enter into contracts with local governments for the provision of services by the State pursuant to G.S. 153A-212.1 or G.S. 160A-289.1.

(b) The Director of the Administrative Office of the Courts may provide this assistance only upon a showing by the requesting district attorney, supported by facts, that:

(1) Criminal cases have accumulated on the dockets of the superior or district courts of the district beyond the capacity of the district attorney and the district attorney's full-time assistants to keep the dockets reasonably current; or

(2) The overwhelming public interest warrants the use of additional resources for the speedy disposition of cases involving drug offenses, domestic violence, or other offenses involving a threat to public safety.

(c) The length of service and compensation of any temporary appointee or the terms of any contract entered into with local governments shall be fixed by Director of the Administrative Office of the Courts in each case. Nothing in this section shall be construed to obligate the General Assembly to make any appropriation to implement the provisions of this section or to obligate the Administrative Office of the Courts to provide the administrative costs of establishing or maintaining the positions or services provided for under this section. Further, nothing in this section shall be construed to obligate the Administrative Office of the Courts to maintain positions or services initially provided for under this section. (1967, c. 1049, s. 1; 1973, c. 47, s. 2; 1999-237, s. 17.17(a); 2000-67, s. 15.4(g).)

Editor's Note. — The subsection designations (a) through (c) have been added to this section at the direction of the Revisor of Statutes.

CASE NOTES

Compensation. — The district attorney has no power to provide for compensation of an attorney appointed under this statute. Whitfield v. Gilchrist, 348 N.C. 39, 497 S.E.2d 412 (1998).

Temporary Assistance When Docket Overcrowded. — Subdivision (2) sets out the mandatory procedure for a district attorney to follow to appoint private counsel to provide temporary assistance when criminal dockets are overcrowded. Whitfield v. Gilchrist, 348 N.C. 39, 497 S.E.2d 412 (1998).

Cited in State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

OPINIONS OF ATTORNEY GENERAL

Office of temporary district attorney is full-time public office as of January 1, 1971. See opinion of Attorney General to Mr. John C.W. Gardner, 41 N.C.A.G. 192 (1970).

§ 7A-65. Compensation and allowances of district attorneys and assistant district attorneys.

(a) The annual salary of:

(1) District attorneys shall be as provided in the Current Operations Appropriations Act.

(2) Full-time assistant district attorneys shall be as provided in the Current Operations Appropriations Act.

When traveling on official business, each district attorney and assistant district attorney is entitled to reimbursement for his subsistence and travel expenses to the same extent as State employees generally.

(b) Repealed by Session Laws 1985, c. 689, s. 2.

(c) In lieu of merit and other increment raises paid to regular State employees, a district attorney shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, and nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, nineteen and two-tenths percent (19.2%) after 20 years of service, and twenty-four percent (24%) after 25 years of service. Service shall mean service in the elective position of a district attorney and shall not include service as a deputy or acting district attorney. Service shall also mean service as a justice or judge of the General Court of Justice, clerk of superior court, assistant district attorney, public defender, appellate defender, or assistant public or appellate defender.

(d) In lieu of merit and other increment raises paid to regular State employees, an assistant district attorney shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, nineteen and two-tenths percent (19.2%) after 20 years of service, and twenty-four percent (24%) after 25 years of service. "Service" means service as an assistant district attorney, district attorney, resource prosecutor, public defender, appellate defender, assistant public or appellate defender, justice or judge of the General Court of Justice, or clerk of superior court. For purposes of this subsection, "resource prosecutor" means a former assistant district attorney who has left the employment of the district attorney's office to serve in a specific, time-limited position with the Conference of District Attorneys. (1967, c. 1049, s. 1; 1973, c. 47, s. 2; 1983, c. 761, ss. 246, 248; 1983 (Reg. Sess., 1984), c. 1034, ss. 92, 165; c. 1109, s. 13.1; 1985, c. 689, s. 2; c. 698, s. 10(b); 1985 (Reg. Sess., 1986), c. 1014, s. 224; 1987, c. 738, s. 33(a); 1995, c. 507, s. 7.4A; 1999-237, s. 28.19(a); 2000-67, s. 26.3A(a); 2003-284, ss. 30.19A(a), 30.19A(b); 2005-276, s. 29.23A; 2007-323, ss. 28.15A, 28.18A(d).)

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, ss. 28.15A and 28.18A(d), effective July 1, 2007, substituted "as provided in the Current Operations Appropriations Act" for "the midpoint amount between the salary of a senior resident superior court judge and the salary of a chief district court judge, as provided by law," in the middle of subdivision (a)(1); and, in the middle of the first sentence of subsections (c) and (d), deleted "and" preceding "nineteen" and added "and twenty-four percent (24%) after 25 years of service" at the end.

§ 7A-66. Removal of district attorneys.

The following are grounds for suspension of a district attorney or for his removal from office:

(1) Mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent;
(2) Willful misconduct in office;
(3) Willful and persistent failure to perform his duties;
(4) Habitual intemperance;
(5) Conviction of a crime involving moral turpitude;
(6) Conduct prejudicial to the administration of justice which brings the office into disrepute; or
(7) Knowingly authorizing or permitting an assistant district attorney to commit any act constituting grounds for removal, as defined in subdivisions (1) through (6) hereof.

A proceeding to suspend or remove a district attorney is commenced by filing with the clerk of superior court of the county where the district attorney resides a sworn affidavit charging the district attorney with one or more grounds for removal. The clerk shall immediately bring the matter to the attention of the senior regular resident superior court judge for the district or set of districts as defined in G.S. 7A-41.1(a) in which the county is located who shall within 30 days either review and act on the charges or refer them for review and action within 30 days to another superior court judge residing in or regularly holding the courts of that district or set of districts. If the superior court judge upon review finds that the charges if true constitute grounds for suspension, and finds probable cause for believing that the charges are true, he may enter an order suspending the district attorney from performing the duties of his office until a final determination of the charges on the merits. During the suspension the salary of the district attorney continues. If the superior court judge finds that the charges if true do not constitute grounds for suspension or finds that no probable cause exists for believing that the charges are true, he shall dismiss the proceeding.

If a hearing, with or without suspension, is ordered, the district attorney should receive immediate written notice of the proceedings and a true copy of the charges, and the matter shall be set for hearing not less than 10 days nor more than 30 days thereafter. The matter shall be set for hearing before the judge who originally examined the charges or before another regular superior court judge resident in or regularly holding the courts of that district or set of districts. The hearing shall be open to the public. All testimony shall be recorded. At the hearing the superior court judge shall hear evidence and make findings of fact and conclusions of law and if he finds that grounds for removal exist, he shall enter an order permanently removing the district attorney from office, and terminating his salary. If he finds that no grounds exist, he shall terminate the suspension, if any.

The district attorney may appeal from an order of removal to the Court of Appeals on the basis of error of law by the superior court judge. Pending decision of the case on appeal, the district attorney shall not perform any of the duties of his office. If, upon final determination, he is ordered reinstated either by the appellate division or by the superior court upon remand his salary shall be restored from the date of the original order of removal. (1967, c. 1049, s. 1; 1973, c. 47, s. 2; c. 148, s. 1; 1977, c. 21, ss. 1, 2; 1987 (Reg. Sess., 1988), c. 1037, s. 13.)

CASE NOTES

Constitutionality. — This section does not violate the Constitution of North Carolina; thus, the superior court had jurisdiction to remove district attorney. In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

Purpose. — This section aims to create a procedure for the removal of district attorneys by the superior court. In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

Authority of General Assembly. — The General Assembly has the authority under the State Constitution to provide by statute for a method of removal of an individual holding the constitutional office of district attorney, although the Constitution does not itself specify any method whatsoever for removal of an individual from that office. In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

Neither Article IV, Section 18 nor any other provision of the Constitution of North Carolina prohibits the General Assembly from enacting a statutory method for the removal of district attorneys from office, so long as district attorneys whose removal from office is sought are accorded due process of law. In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

Use of Racial Epithets Is Conduct Prejudicial to the Administration of Justice Which Brings the Office into Disrepute. — There could be no question that the use of racial epithets against a member of the public by a district attorney in an apparent attempt to provoke an affray in public was conduct prejudicial to the administration of justice which brings the office into disrepute. In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

District attorney's abusive verbal attack on African-American man which gave rise to the inquiry removing him from office was not protected speech under the First Amendment. Instead, when taken in context, his repeated references to victim as a "nigger"presented a classic case of the use of "fighting words" tending to incite an immediate breach of the peace which are not protected by either the Constitution of the United States or the Constitution of North Carolina. In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

Applied in In re Hudson, 165 N.C. App. 894, 600 S.E.2d 25, 2004 N.C. App. LEXIS 1506 (2004), appeal dismissed, cert. denied, 359 N.C. 189, 607 S.E.2d 271 (2004).

§ 7A-66.1. Office of solicitor may be denominated as office of district attorney; "solicitor" and "district attorney" made interchangeable; interchangeable use authorized in proceedings, documents, and quotations.

(a) The constitutional office of solicitor may be denominated as the office of "district attorney" for all purposes, and the terms "solicitor" and "district attorney" shall be identical in meaning and interchangeable in use. All terms derived from or related to the term "solicitor" may embody this denomination.

(b) Repealed by Session Laws 1975, c. 956, s. 5.

(c) The interchangeable use authorized in this section includes use in all forms of oral, written, visual, and other communication including:

(1) Oaths of office;
(2) Other oaths or orations required or permitted in court or official proceedings;
(3) Ballots;
(4) Statutes;
(5) Regulations;
(6) Ordinances;
(7) Judgments and other court orders and records;
(8) Opinions in cases;
(9) Contracts;
(10) Bylaws;
(11) Charters;
(12) Official commissions, orders of appointment, proclamations, executive orders, and other official papers or pronouncements of the Governor or any executive, legislative, or judicial official of the State or any of its subdivisions;
(13) Official and unofficial letterheads;
(14) Campaign advertisements;
(15) Official and unofficial public notices; and
(16) In all other contexts not enumerated.

The interchangeability authorized in this section extends to the privilege of substituting terminology in matter quoted in oral, written, and other modes of communication without making indication of such change, except where such change may result in a substantive misunderstanding. Reprints or certifications of the text of the Constitution of North Carolina made by the Secretary of State, however, must retain the original terminology and indicate in brackets beside the original terminology the appropriate alternative words. (1973, c. 47, s. 1; 1975, c. 956, s. 5.)

§ 7A-67: Repealed by Session Laws 1971, c. 377, s. 32.

§ 7A-68. Administrative assistants.

(a) Each district attorney shall be entitled to one administrative assistant to be appointed by the district attorney and to serve at his pleasure. The assistant need not be an attorney licensed to practice law in the State of North Carolina.

(b) It shall be the duty of the administrative assistant to assist the district attorney in preparing cases for trial and in expediting the criminal court docket, and to assist in such other duties as may be assigned by the district attorney.

(c) When traveling on official business, each administrative assistant is entitled to reimbursement for his subsistence and travel expenses to the same extent as State employees generally. (1973, c. 807.)

CASE NOTES

Cited in Caudill v. Dellinger, 129 N.C. App. 649, 501 S.E.2d 99 (1998), cert. denied, 349 N.C. 353, 517 S.E.2d 888 (1998), aff'd, 350 N.C. 89, 511 S.E.2d 304 (1999).

OPINIONS OF ATTORNEY GENERAL

Oath of Office. — Administrative and investigatorial assistants to the district attorney appointed pursuant to this section and G.S. 7A-69 are not required to take an oath of office as public officials, unless the district attorney assigns such duties the performance of which would involve the exercise of sovereign authority of the State. See opinion of Attorney General to Mr. Herbert F. Pierce, Fifteen-A Prosecutorial District, 50 N.C.A.G. 79 (1981).

§ 7A-69. (Effective until January 1, 2009) Investigatorial assistants.

The district attorney in prosecutorial districts 1, 3B, 4, 5, 7, 8, 11, 12, 13, 14, 15A, 15B, 16A, 18, 19B, 20A, 20B, 21, 22, 24, 25, 26, 27A, 27B, 28, 29A, 29B, and 30 is entitled to one investigatorial assistant, and the district attorney in prosecutorial district 10 is entitled to two investigatorial assistants, to be appointed by the district attorney and to serve at his pleasure.

It shall be the duty of the investigatorial assistant to investigate cases preparatory to trial and to perform such other Duties as may be assigned by the district attorney. The investigatorial assistant is entitled to reimbursement for his subsistence and travel expenses to the same extent as State employees generally. (1975, c. 956, s. 6; 1977, c. 969, s. 1; 1981, c. 964, s. 2; 1993, c. 321, s. 200.7(e); 1997-443, s. 18.16; 1998-212, s. 16.21; 1999-237, s. 17.9; 2004-124, s. 14.7(a); 2005-276, s. 14.2(p).)

Section Set Out Twice. — The section above is effective until January 1, 2009. For the section as amended January 1, 2009, see the following section, also numbered G.S. 7A-69.

Editor's Note. — Session Laws 2005-276, s. 14.2(q), provides, in part: "With respect to the division of Prosecutorial District 20, subsections (*l*) through (p) of this section become effective January 1, 2007, or the date upon which subsection (*l*) of this section [which amended G.S. 7A-60] is approved under section 5 of the Voting Rights Act of 1965, whichever is later, but the district attorneys for Prosecutorial Districts 20A and 20B shall be elected in the 2006 general election. With respect to the division of Prosecutorial District 29, subsections (*l*) through (p) of this section become effective January 1, 2007, but the district attorneys for Prosecutorial Districts 29A and 29B shall be elected in the 2006 general election." Preclearance was received from the U.S. Department of Justice by letter dated January 5, 2006.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to

funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

CASE NOTES

Discharge. — Since an investigatorial assistant's public statements criticizing the district attorney's discretionary decisions and the disruption of his office's working relationship with law enforcement agencies were sufficient reasons, standing alone, to terminate the investigatorial assistant's at will employment, the district attorney's decision to terminate him rested within his lawful and discretionary scope of authority; because the investigatorial assistant's termination was not injurious to the public or against the public good, there was no evidence to establish a genuine issue of material fact to support a claim for wrongful discharge against the district attorney. Hines v. Yates, 171 N.C. App. 150, 614 S.E.2d 385, 2005 N.C. App. LEXIS 1267 (2005).

§ 7A-69. (Effective January 1, 2009) Investigatorial assistants.

The district attorney in prosecutorial districts 1, 3B, 4, 5, 7, 8, 11, 12, 13, 14, 15A, 15B, 16A, 18, 19B, 20A, 20B, 21, 22A, 22B, 24, 25, 26, 27A, 27B, 28, 29A, 29B, and 30 is entitled to one investigatorial assistant, and the district attorney in prosecutorial district 10 is entitled to two investigatorial assistants, to be appointed by the district attorney and to serve at his pleasure.

It shall be the duty of the investigatorial assistant to investigate cases preparatory to trial and to perform such other Duties as may be assigned by the district attorney. The investigatorial assistant is entitled to reimbursement for his subsistence and travel expenses to the same extent as State employees generally. (1975, c. 956, s. 6; 1977, c. 969, s. 1; 1981, c. 964, s. 2; 1993, c. 321, s. 200.7(e); 1997-443, s. 18.16; 1998-212, s. 16.21; 1999-237, s. 17.9; 2004-124, s. 14.7(a); 2005-276, s. 14.2(p); 2007-323, s. 14.25(n).)

Section Set Out Twice. — The section above is effective January 1, 2009. For the section as in effect until January 1, 2009, see the preceding section, also numbered G.S. 7A-69.

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 14.25(n), effective January 1, 2009, and applicable to the 2008 election as provided in the terms of this section, substituted "22A, 22B," for "22," in the middle of the first paragraph.

§ 7A-69.1: Repealed by Session Laws 1985 (Regular Session, 1986), c. 998, s. 3.

Cross References. — For assistants for administrative and victim and witness services, see G.S. 7A-347.

ARTICLE 10.

§§ 7A-70 through 7A-94: Reserved for future codification purposes.

Article 11.

Special Regulations.

§ 7A-95. Reporting of trials.

(a) Court reporting personnel shall be utilized if available, for the reporting of trials in the superior court. If court reporters are not available in any county, electronic or other mechanical devices shall be provided by the Administrative Office of the Courts upon the request of the senior regular resident superior court judge.

(b) The Administrative Office of the Courts shall from time to time investigate the state of the art and techniques of recording testimony, and shall provide such electronic or mechanical devices as are found to be most efficient for this purpose.

(c) If an electronic or other mechanical device is utilized, it shall be the duty of the clerk of the superior court or some person designated by the clerk to operate the device while a trial is in progress, and the clerk shall thereafter preserve the record thus produced, which may be transcribed, as required, by any person designated by the Administrative Office of the Courts. If stenotype, shorthand, or stenomask equipment is used, the original tapes, notes, discs or other records are the property of the State, and the clerk shall keep them in his custody.

(d) Reporting of any trial may be waived by consent of the parties.

(e) Appointment of a reporter or reporters for superior court proceedings in each district or set of districts as defined in G.S. 7A-41.1(a) shall be made by the senior regular resident superior court judge of that district or set of districts. The compensation and allowances of reporters in each such district or set of districts shall be fixed by the senior regular resident superior court judge, within limits determined by the Administrative Officer of the Courts, and paid by the State.

(f) Repealed by Session Laws 1971, c. 377, s. 32. (1965, c. 310, s. 1; 1969, c. 1190, s. 7; 1971, c. 377, s. 32; 1987, c. 384, s. 1.; 1987 (Reg. Sess., 1988), c. 1037, s. 14.)

Editor's Note. — This section was amended by Session Laws 1987 (Reg. Sess., 1988), c. 1037, s. 14, in the coded bill drafting format provided by G.S. 120-20.1. It has been set out in the form above at the direction of the Revisor of Statutes.

CASE NOTES

Applied in State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969).

Cited in North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451 (M.D.N.C. 1976); State v. Wray, 35 N.C. App. 682, 242 S.E.2d 635 (1978).

§ 7A-96. Court adjourned by sheriff when judge not present.

If the judge of a superior court shall not be present to hold any session of court at the time fixed therefor, he may order the sheriff to adjourn the court to any day certain during the session, and on failure to hear from the judge it shall be the duty of the sheriff to adjourn the court from day to day, unless he shall be sooner informed that the judge for any reason cannot hold the session. (Code, s. 926; 1887, c. 13; 1901, c. 269; Rev., s. 1510; C.S., s. 1448; 1969, c. 1190, s. 49.)

Editor's Note. — This section was formerly G.S. 7-76. It was rewritten and transferred to its present position by Session Laws 1969, c. 1190, s. 49.

Legal Periodicals. — For comment on this section, see 21 N.C.L. Rev. 338 (1943).

CASE NOTES

Presumption of Adjournment. — Where the record recited that a regular term of a superior court was opened and held Wednesday, instead of on Monday, of the week fixed by the statutes, it was presumed that the sheriff had duly opened the court and adjourned it from day to day as provided in this section. State v. Weaver, 104 N.C. 758, 10 S.E. 486 (1889).

All Matters Carried Over. — This section by operation of law carries all matters over to the next term, in the same plight and condition. State v. Horton, 123 N.C. 695, 31 S.E. 218 (1898).

Newly Elected Judge. — Where a newly elected judge, as successor to one who was to have held the spring term of a court, ordered the sheriff to adjourn the court from day to day, not exceeding four days, to enable him to take the oath of office and preside, and the sheriff qualified and held the court, his acts were valid either as those of an officer de jure or as those of an officer de facto, and an exception to the validity of a trial of an action on that ground was untenable. State v. Harden, 177 N.C. 580, 98 S.E. 782 (1919).

Duty of Defendant to Attend Special Term. — A defendant bound over to answer a criminal charge at a regular term of the superior court, which term is not held in consequence of the absence of the judge, is required to attend an intervening special term subsequently appointed and held. State v. Horton, 123 N.C. 695, 31 S.E. 218 (1898).

Cited in State v. McGimsey, 80 N.C. 377 (1879).

§ 7A-97. Court's control of argument.

In all trials in the superior courts there shall be allowed two addresses to the jury for the State or plaintiff and two for the defendant, except in capital felonies, when there shall be no limit as to number. The judges of the superior court are authorized to limit the time of argument of counsel to the jury on the trial of actions, civil and criminal as follows: to not less than one hour on each side in misdemeanors and appeals from justices of the peace; to not less than two hours on each side in all other civil actions and in felonies less than capital; in capital felonies, the time of argument of counsel may not be limited otherwise than by consent, except that the court may limit the number of those who may address the jury to three counsel on each side. Where any greater number of addresses or any extension of time are desired, motion shall be made, and it shall be in the discretion of the judge to allow the same or not, as the interests of justice may require. In jury trials the whole case as well of law as of fact may be argued to the jury. (1903, c. 433; Rev., s. 216; C.S., s. 203; 1927, c. 52; 1995, c. 431, s. 7.)

Editor's Note. — This section is former G.S. 84-14, as recodified by Session Laws 1995, c. 431, s. 7. The historical citation from the former section has been added to this section as recodified.

Legal Periodicals. — For survey of 1976 case law on criminal procedure, see 55 N.C.L. Rev. 989 (1977).

For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

For article, "Rummaging Through a Wilderness of Verbiage: The Charge Conference, Jury Argument and Instructions," see 8 Campbell L. Rev. 269 (1986).

CASE NOTES

I. General Consideration.
II. Scope of Argument.
  A. In General.

- B. Punishment.
- C. Appeals, Paroles, etc.

III. Length of Argument.

IV. Number of Arguments.

V. Capital Cases.

VI. Objection.

- A. In General.
- B. Time for Objection.

VII. Opening and Closing Arguments.

I. GENERAL CONSIDERATION.

Editor's Note. — *Most of the cases cited below were decided under G.S. 84-14 before its recodification as this section.*

The language of this section is clear. State v. Feldstein, 21 N.C. App. 446, 204 S.E.2d 551 (1974).

Purpose of Section. — The purpose of this section was not to enlarge the number of addresses but rather to limit the number of counsel and time allowed a defendant's counsel in addressing the jury. State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331, cert. denied, 301 N.C. 101, 273 S.E.2d 306 (1980).

Application to District Court Proceedings. — This section would seem to control district court proceedings, when applicable, by virtue of G.S. 7A-193, despite the fact that there is no specific reference to this section in that section. Roberson v. Roberson, 40 N.C. App. 193, 252 S.E.2d 237 (1979).

Discretion of Court. — The trial judge has a large discretion in controlling and directing the argument of counsel, but, under this section, this does not include the right to deprive a litigant of the benefit of his counsel's argument when it is confined within proper bounds and is addressed to the material facts of the case. Puett v. Caldwell & N.R.R., 141 N.C. 332, 53 S.E. 852 (1906); Irvin v. Southern Ry., 164 N.C. 5, 80 S.E. 78 (1913); In re Will of Farr, 7 N.C. App. 250, 172 S.E.2d 78, rev'd on other grounds, 277 N.C. 86, 175 S.E.2d 578 (1970); Kennedy v. Tarlton, 12 N.C. App. 397, 183 S.E.2d 276 (1971).

Conduct of counsel in presenting their causes to the jury is left largely to the discretion of the trial judge. In re Will of Farr, 7 N.C. App. 250, 172 S.E.2d 78, rev'd on other grounds, 277 N.C. 86, 175 S.E.2d 578 (1970); State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976); State v. Locklear, 291 N.C. 598, 231 S.E.2d 256 (1977); State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986).

The conduct of the arguments of counsel is left to the sound discretion of the trial judge. State v. Britt, 291 N.C. 528, 231 S.E.2d 644 (1977).

Arguments of counsel are largely in the control and discretion of the trial judge who must allow wide latitude in the argument of the law, the facts of the case, as well as to all reasonable inferences to be drawn from the facts. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

The trial judge is allowed discretion in controlling the arguments before the jury and he may restrict comment on facts not material to the case. State v. Moore, 34 N.C. App. 141, 237 S.E.2d 339 (1977).

Duty to Interfere When Remarks Prejudicial or Unwarranted by Evidence. — While it is true that in jury trials the whole case as well as of law as of fact may be argued to the jury, and counsel's freedom of argument should not be impaired without good reason, argument is not without limitation. Thus, when the remarks of counsel are not warranted by either the evidence or the law, or are calculated to mislead or prejudice the jury, it is the duty of the judge to interfere. Watson v. White, 309 N.C. 498, 308 S.E.2d 268 (1983).

Counsel's freedom of argument should not be impaired without good reason, but where both the impropriety and the prejudicial effect are clear, the court should act. Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967).

It is the duty of the judge to interfere when the remarks of counsel are not warranted by the evidence and are calculated to mislead or prejudice the jury. State v. Howley, 220 N.C. 113, 16 S.E.2d 705 (1941).

When the remarks of counsel are not warranted by either the evidence or the law, or are calculated to mislead or prejudice the jury, it is the duty of the judge to interfere. In re Will of Farr, 277 N.C. 86, 175 S.E.2d 578 (1970).

Because this section presents no mandatory requirement that defendant be allowed to argue his version of the law, the trial court properly exercised its discretion in preventing the defendant from showing the jury a copy of G.S. 14-33.2, including its effective date, to support his argument that because two of the offenses named in the indictment occurred prior to the enactment of the habitual misdemeanor assault statute, they should not have been considered in determining the issue of his guilt on this charge. State v. Smith, 139 N.C. App. 209, 533 S.E.2d 518, 2000 N.C. App. LEXIS 887 (2000).

Limits of Judge's Authority. — The only manner in which the trial judge is restrained by law with respect to the control over arguments by counsel is found in this section which applies to jury trials in the superior court. Roberson v. Roberson, 40 N.C. App. 193, 252 S.E.2d 237 (1979).

Instruction to Disregard Argument of Law. — It is the duty of the trial judge to instruct the jury upon the law, and he may correctly tell them to disregard the law as argued to them by counsel. Sears, Roebuck & Co. v. Rouse Banking Co., 191 N.C. 500, 132 S.E. 468 (1926).

A trial judge's violation of the provisions of this section is prejudicial error. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

Failure to charge upon a certain point is reversible error, especially after counsel has argued the whole case "as well of law as of fact" as is permitted by this section. Nichols v. Champion Fibre Co., 190 N.C. 1, 128 S.E. 471 (1925).

Grounds for Review of Judge's Discretion. — Exercise of the trial judge's discretion in controlling jury arguments is not reviewed unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

It is well settled that the control of the jury arguments of counsel must be left largely to the discretion of the trial court and its rulings thereon will not be disturbed in the absence of gross abuse of discretion. State v. Small, 31 N.C. App. 556, 230 S.E.2d 425 (1976), cert. denied, 291 N.C. 715, 232 S.E.2d 207 (1977).

The argument of counsel must ordinarily be left to the sound discretion of the judge who tries the case and the appellate court will not review his discretion unless it is apparent that the impropriety of counsel was gross and well calculated to prejudice the jury. State v. Locklear, 291 N.C. 598, 231 S.E.2d 256 (1977).

In a trial without a jury, argument of counsel is a privilege, not a right, which is subject to the discretion of the presiding judge. Roberson v. Roberson, 40 N.C. App. 193, 252 S.E.2d 237 (1979).

The implication is clear that the legislature's failure to grant counsel the statutory right to argue to the court in non-jury matters left the authority to refuse to hear arguments within the discretion of the presiding judge. Roberson v. Roberson, 40 N.C. App. 193, 252 S.E.2d 237 (1979).

Provision of G.S. 1A-1, Rule 8(a)(2) relating to professional malpractice actions was enacted to reduce the believed impact of pretrial publicity about medical malpractice cases, and for no other purpose. This provision curtails the rights that counsel in this State have long had to argue the facts in evidence and all reasonable inferences drawable therefrom. Biggs v. Cumberland County Hosp. Sys., 69 N.C. App. 547, 317 S.E.2d 421 (1984).

Applied in Jenkins v. Harvey C. Hines Co., 264 N.C. 83, 141 S.E.2d 1 (1965); Wiles v. Mullinax, 270 N.C. 661, 155 S.E.2d 246 (1967); State v. Brown, 13 N.C. App. 261, 185 S.E.2d 471 (1971); State v. Campbell, 14 N.C. App. 596, 188 S.E.2d 558 (1972); State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976); State v. Erby, 56 N.C. App. 358, 289 S.E.2d 86 (1982); State v. Barton, 335 N.C. 696, 441 S.E.2d 295 (1994); State v. Belfield, 144 N.C. App. 320, 548 S.E.2d 549, 2001 N.C. App. LEXIS 425 (2001).

Cited in Teasley v. Burwell, 199 N.C. 18, 153 S.E. 607 (1930); Continental Ins. Co. v. Foard, 9 N.C. App. 630, 177 S.E.2d 431 (1970); State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); State v. Carr, 54 N.C. App. 309, 283 S.E.2d 175 (1981); State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986); State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988); State v. Barber, 93 N.C. App. 42, 376 S.E.2d 497 (1989); In re Golia-Paladin, 327 N.C. 132, 393 S.E.2d 799 (1990); State v. Conner, 335 N.C. 618, 440 S.E.2d 826 (1994), cert. denied, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997); State v. Bishop, 343 N.C. 518, 472 S.E.2d 842 (1996), cert. denied, 519 U.S. 1097, 117 S. Ct. 779, 136 L. Ed. 2d 723 (1997); State v. Wilson, 139 N.C. App. 544, 533 S.E.2d 865, 2000 N.C. App. LEXIS 988 (2000), cert. denied, 353 N.C. 279, 546 S.E.2d 395 (2000); State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001); State v. Chapman, 359 N.C. 328, 611 S.E.2d 794, 2005 N.C. LEXIS 361 (2005).

II. SCOPE OF ARGUMENT.

A. In General.

Wide latitude is given counsel in the exercise of the right to argue to the jury the whole case, as well of law as of fact, but counsel is not entitled to travel outside of the record and argue facts not included in the evidence, and when counsel attempts to do so it is the right and duty of the court to correct the argument, either at the time or in the charge to the jury. State v. Little, 228 N.C. 417, 45 S.E.2d 542 (1947); State v. Graves, 252 N.C. 779, 114 S.E.2d 770 (1960).

Counsel must be allowed wide latitude in the argument of hotly contested cases. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976); State v. Locklear, 291 N.C. 598, 231 S.E.2d 256 (1977).

Counsel is given wide latitude to argue the facts and all reasonable inferences which may be drawn therefrom, together with the relevant law, in presenting the case to the jury. State v. Britt, 291 N.C. 528, 231 S.E.2d 644 (1977).

Counsels have a wide latitude in arguing their cases to the jury, and have the right to argue every phase of the case supported by the evidence, and to argue the law as well as the facts. Weeks v. Holsclaw, 306 N.C. 655, 295 S.E.2d 596, rehearing denied, 307 N.C. 273, 302 S.E.2d 884 (1982).

Because it is the duty of the prosecuting attorney to present the State's case with earnestness and vigor and to use every legitimate means to bring about a just conviction, in the discharge of that duty he should not be so restricted as to discourage a vigorous presentation of the State's case to the jury. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Right to argue the whole case has been expressly conferred by statute. In re Will of Farr, 7 N.C. App. 250, 172 S.E.2d 78, rev'd on other grounds, 277 N.C. 86, 175 S.E.2d 578 (1970).

Under this section counsel's right to argue law generally to the jury has been upheld or expressly recognized. In re Will of Farr, 7 N.C. App. 250, 172 S.E.2d 78, rev'd on other grounds, 277 N.C. 86, 175 S.E.2d 578 (1970).

Counsel May Argue Both Law and Fact. — Counsel have the right to argue the whole case as well of law as of fact. Brown v. Vestal, 231 N.C. 56, 55 S.E.2d 797 (1949); In re Will of Farr, 7 N.C. App. 250, 172 S.E.2d 78, rev'd on other grounds, 277 N.C. 86, 175 S.E.2d 578 (1970).

The right of counsel to state in his argument to the jury what he conceives the law of the case to be has been upheld in numerous decisions. State v. Bovender, 233 N.C. 683, 65 S.E.2d 323 (1951).

Counsel for both sides are entitled to argue to the jury the law and the facts in evidence and all reasonable inferences to be drawn therefrom. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); Property Shop, Inc. v. Mountain City Inv. Co., 56 N.C. App. 644, 290 S.E.2d 222 (1982).

Counsel may argue the facts in evidence and all reasonable inferences to be drawn therefrom, together with the relevant law, so as to present his case. State v. Locklear, 291 N.C. 598, 231 S.E.2d 256 (1977).

It is a basic right of a litigant to have his counsel argue his case to the jury on questions of law and of fact. Board of Transp. v. Wilder, 28 N.C. App. 105, 220 S.E.2d 183 (1975).

The right to argue "the whole case as well of law as of fact" to the jury arises regardless of whether the trial court's jury instructions will also relate the law on the issue. State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986).

But counsel may not argue principles of law not relevant to the case. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

The law which this provision allows to be argued must of course be the law applicable to the facts of the case. The whole corpus juris is not fair game. State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976).

This section does not authorize counsel to argue law which is not applicable to the issues, for such arguments could only lead to confusion in the minds of the jury. In re Will of Farr, 277 N.C. 86, 175 S.E.2d 578 (1970); Fonville v. Dixon, 16 N.C. App. 664, 193 S.E.2d 406 (1972), cert. denied, 282 N.C. 672, 194 S.E.2d 152 (1973).

It is reversible error for the trial judge not to permit attorneys to argue law to the jury and to apply in the argument the decisions of the court as provided by this section. Howard v. Western Union Tel. Co., 170 N.C. 495, 87 S.E. 313 (1915).

Language may be used consistent with the facts in evidence to present each side of the case. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Counsel may not "travel outside the record" in his argument to the jury. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

Counsel may not travel outside the record and place before the jury an incompetent and prejudicial theory of the case grounded wholly on personal beliefs and opinions not supported by the evidence. State v. Britt, 288 N.C. 699, 220 S.E.2d 283 (1975).

The general rule is that counsel may argue all the evidence to the jury, which such inferences as may be drawn therefrom; but he may not "travel outside of the record" and inject into his argument facts of his own knowledge or other facts not included in the evidence. State v. Patton, 45 N.C. App. 676, 263 S.E.2d 796 (1980).

Commenting on Testimony. — The testimony of a witness being competent, material, and relevant, there can be no doubt of the right of counsel to make proper comment upon it in his address to the jury. In re Will of Farr, 7 N.C. App. 250, 172 S.E.2d 78, rev'd on other grounds, 277 N.C. 86, 175 S.E.2d 578 (1970).

Expression of Counsel's Personal Belief. — As a general rule, it is improper for the prosecuting attorney to express his personal opinion or belief in the guilt of the accused, unless it is apparent that such opinion is based solely on the evidence, and not on any reasons or information outside the evidence. State v. Britt, 291 N.C. 528, 231 S.E.2d 644 (1977).

Incompetent and Prejudicial Matters. — Counsel may not place before the jury incompetent and prejudicial matters, and may not "travel outside the record" by injecting into his argument facts of his own knowledge or other facts not included in the evidence. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Counsel may not by his argument place before the jury incompetent and prejudicial matter not admissible into evidence. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

A prosecuting attorney may not place before the jury incompetent and prejudicial matters not admissible in evidence or include in his argument facts not included in the evidence. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Counsel may read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

Under this section, counsel, in his argument to the jury, is entitled to read or state to the jury a relevant statute or other rule of law so as to present his side of the case. State v. Hall, 60 N.C. App. 450, 299 S.E.2d 680 (1983).

But May Not State Law Incorrectly or Read Unconstitutional Statute. — Counsel may not state the law incorrectly or read to the jury a statutory provision which has been declared unconstitutional. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

Reading and Commenting on Reported Cases. — As counsel have the right under this section to argue "the whole case as well of law as of fact," they may read to the jury reported cases and comment thereon; but the facts contained in the cases cannot be read as evidence of their existence in another case. Horah v. Knox, 87 N.C. 483 (1882).

This section permits counsel, in his argument to the jury, to state his view of the law applicable to the case on trial and to read, in support thereof, from the published reports of decisions of the Supreme Court. It is often necessary for counsel to do so in order that the jury may understand the issue to which counsel's argument on the evidence is addressed. Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967), commented on in 47 N.C.L. Rev. 262.; State v. Thomas, 350 N.C. 315, 514 S.E.2d 486, 1999 N.C. App. LEXIS 246 (1999), cert. denied, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999).

In order to make meaningful a statement of a rule of law found in a reported decision, it is sometimes necessary to recount some of the facts which the court had before it when it pronounced the rule in question. For this purpose, counsel, in his argument in a subsequent case, may not only read the rule of law stated in the published opinion in the former case but may also state the facts before the court therein. Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967), commented on in 47 N.C.L. Rev. 262.

It is not permissible argument for counsel to read, or otherwise state, the facts of another case, together with the decision therein, as premises leading to the conclusion that the jury should return a verdict favorable to his client in the case on trial. This is but an application of the rule that, in his argument to the jury, counsel may not go outside the record and inject into his argument facts of his own knowledge, or other facts not included in the evidence. Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967), commented on in 47 N.C.L. Rev. 262.

The ultimate test is whether the reading from the reported case "would reasonably tend to prejudice either party upon the facts" of the case on trial. Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967), commented on in 47 N.C.L. Rev. 262.

This section grants counsel the right to argue the law to the jury, which includes the authority to read and comment on reported cases and statutes. There are, however, limitations on what portions of these cases counsel may relate. State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986).

Counsel's right to argue the law to the jury includes the authority to read and comment on reported cases and statutes. State v. Thomas, 350 N.C. 315, 514 S.E.2d 486, 1999 N.C. App. LEXIS 246 (1999), cert. denied, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999).

Facts of Unrelated Case. — The prosecutor was properly allowed to read the facts of another, unrelated case to the jury during closing arguments, as that portion of the prosecutor's argument not only accurately stated North Carolina law, but also concerned principles of law that were relevant to the issue of burglary in the present case. State v. Thomas, 350 N.C. 315, 514 S.E.2d 486, 1999 N.C. App. LEXIS 246 (1999), cert. denied, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999).

Counsel may only read statements of the law in the case which are relevant to the issues before the jury. State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986).

Reading Facts in Reported Cases. — Counsel may not read the facts contained in a published opinion together with the result to imply that the jury in his case should return a favorable verdict for his client. State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986).

Reading Excerpts from Treatises in Reported Cases. — It would be an improper interpretation of this section to allow counsel to avoid the rule prohibiting counsel from reading from medical books or writings of a scientific nature to the jury except when an expert has given an opinion and cited a treatise as his authority on the basis that he read the material from an appellate reporter rather than from the magazine or book itself, especially where it was contained in an opinion that had been reversed by the Supreme Court. State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986).

Reading Reported Cases Discussing In-

applicable Principles of Law. — Broad and comprehensive as the provisions of this section are, they do not permit counsel to read to the jury decisions discussing principles of law which are irrelevant to the case and have no application to the facts in evidence. State v. Crisp, 244 N.C. 407, 94 S.E.2d 402 (1956).

Counsel May Not Read Mere Dictum or Irrelevant Decisions. — Although counsel may properly read statements of law and their attendant facts found in the original opinion to the jury, counsel may not read matters which are not law but rather constitute mere dictum and therefore are not within the scope of this section, nor may counsel read to the jury decisions discussing principles of law which are irrelevant to the case and have no application to the facts in evidence. State v. Austin, 320 N.C. 276, 357 S.E.2d 641, cert. denied, 484 U.S. 916, 108 S. Ct. 267, 98 L. Ed. 2d 224 (1987).

Reading Dissenting Opinion as Law of Case. — It is not permissible for counsel, in his argument to the jury, to read a dissenting opinion by a Justice of the Supreme Court as the law of the case over the defendant's objection, and where this has been done a new trial will be awarded on the defendant's exception thereto. It is the duty of the trial court, either to direct counsel not to read the dissenting opinion or to plainly and unequivocally instruct that the dissenting opinion has no legal bearing upon the case. Conn v. Seaboard Air Line Ry., 201 N.C. 157, 159 S.E. 331 (1931); State v. Thomas, 350 N.C. 315, 514 S.E.2d 486, 1999 N.C. App. LEXIS 246 (1999), cert. denied, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999).

Counsel may not read from a dissenting opinion in a reported case. State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986).

When Case Law Desired to Be Read Is Excluded. — Defendant bears the burden of proving that the erroneous exclusion of case law which defense counsel sought to read to the jury was prejudicial. State v. Harrison, 90 N.C. App. 629, 369 S.E.2d 624 (1988), overruled on other grounds, 334 N.C. 402, 432 S.E.2d 349 (1993).

Case Law Improperly Excluded at Trial. — Where the statement of law read to the jury by defense counsel specifically addressed the State's use of circumstantial evidence to obtain a conviction, had not been reversed on appeal, and was relevant to the issue of circumstantial evidence before the jury in the present case, the trial court improperly excluded the case law at trial. State v. Harrison, 90 N.C. App. 629, 369 S.E.2d 624 (1988), overruled on other grounds, 334 N.C. 402, 432 S.E.2d 349 (1993).

Consequences of Nonunanimity. — Defense counsel is not entitled to argue that trial court will impose a life sentence if the jury cannot reach a unanimous decision; therefore, the trial court properly refused to permit counsel to argue the consequences of nonunanimity. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Prohibiting the Reading of the Fifth Amendment Held Not Reversible Error. — The trial court did not commit reversible error in prohibiting the reading to the jury of that portion of the Fifth Amendment pertinent to the defendant's election not to testify, where in his general instructions to the jury, the judge gave an accurate and complete statement of the law applicable to defendant's election not to testify. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

Defense counsel was entitled to read to the jury that clause of the Fifth Amendment material to defendant's election not to testify, i.e., "No person ... shall be compelled in any criminal case to be a witness against himself" and to say simply that because of this provision, the jury must not consider defendant's election not to testify adversely to him, or words to this effect. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

Reading Portions of Final Pleadings. — The trial court did not commit prejudicial error by allowing counsel for plaintiff to read portions of the final pleadings upon which the case was tried in his argument to the jury. Kennedy v. Tarlton, 12 N.C. App. 397, 183 S.E.2d 276 (1971).

The defense counsel may read portions of the final pleadings in his argument to the jury at the discretion of the trial judge. Gillespie v. Draughn, 54 N.C. App. 413, 283 S.E.2d 548 (1981), cert. denied, 304 N.C. 726, 288 S.E.2d 805 (1982).

Racially Inflammatory Remarks. — In a prosecution of three black men, the racially inflammatory remarks in the prosecutor's closing argument before an all-white jury were so prejudicial as to make a fair trial impossible. Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978).

Comment Relating to Dismissed Charge Is Not Relevant. — Where the case before the jury at the time of counsel's argument consisted of two assault indictments, and a murder charge had been dismissed, comment relating to a possible sentence under that charge was neither relevant nor material to the remaining assault charges before the jury and was not within the protection of this section. State v. Moore, 34 N.C. App. 141, 237 S.E.2d 339 (1977).

It is proper to argue to jury to compen-

sate at a certain amount per specific time period when there is evidence of continuous pain. Thompson v. Kyles, 48 N.C. App. 422, 269 S.E.2d 231, cert. denied, 301 N.C. 239, 283 S.E.2d 135 (1980).

In a personal injury action, where plaintiff's evidence tended to show that during the period of time between the accident and trial he suffered pain "almost constantly" as a result of injury caused by the accident, counsel's per diem argument based on this period of time was appropriate. Weeks v. Holsclaw, 306 N.C. 655, 295 S.E.2d 596, rehearing denied, 307 N.C. 273, 302 S.E.2d 884 (1982).

Cautionary Instruction Where "Per Diem" Argument Used. — A "per diem" argument that the jury consider a formula by which a monetary value is assigned to a particular unit of time and this value is multiplied by the total number of such units during which the pain persisted is permissible, but when it is used the trial judge should give appropriate cautionary jury instructions. Weeks v. Holsclaw, 306 N.C. 655, 295 S.E.2d 596, rehearing denied, 307 N.C. 273, 302 S.E.2d 884 (1982).

Improper to Comment on Character or Conduct of Opposing Party or Attorney. — Where counsel's remarks are not sustained by the facts it is improper for counsel in argument to make statements reflecting on the character or conduct of the opposite party or his attorney. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

B. Punishment.

Defendant Has Right to Inform Jury of Punishment. — This section, as interpreted by the Supreme Court, gives a defendant the right to inform the jury of the punishment that may be imposed upon conviction of the crime for which he is being tried. State v. Walters, 33 N.C. App. 521, 235 S.E.2d 906 (1977), aff'd, 294 N.C. 311, 240 S.E.2d 628 (1978).

This section secures to counsel the right to inform the jury of the punishment prescribed for the offense for which defendant is being tried. Counsel may exercise this right by reading the punishment provisions of the statute to the jury. State v. Walters, 294 N.C. 311, 240 S.E.2d 628 (1978).

Statements in the defense counsel's jury argument which informed the jury of the consequences of a conviction and stated that, in light of those consequences, the jury should give the matter close attention and its most serious consideration were in all respects proper. State v. Wilson, 293 N.C. 47, 235 S.E.2d 219 (1977).

A criminal defendant has the right to inform the jury of the punishment prescribed for the offense for which he is being tried. State v. Cabe, 131 N.C. App. 310, 506 S.E.2d 749 (1998).

Trial court erred in denying defendant's request to inform the jury during the first phase of the trial that, if convicted, defendant was subject to punishment as a class C felon due to defendant's status as an habitual felon; while defendant had the right under G.S. 7A-97 to inform the jury of the punishment that could be imposed upon conviction of the crime for which defendant was being tried, this did not permit defendant to inform the jury of the maximum sentence as a result of an habitual felon adjudication, and G.S. 14-7.5, providing that an habitual felon trial was to be held separate from the principal felony trial, precluded instruction on the habitual offender penalty. State v. Dammons, 159 N.C. App. 284, 583 S.E.2d 606, 2003 N.C. App. LEXIS 1539 (2003), cert. denied, 357 N.C. 579, 589 S.E.2d 133 (2003), cert. denied, 541 U.S. 951, 124 S. Ct. 1691, 158 L. Ed. 2d 382 (2004).

Trial court did not err when it refused to answer the inquiry of the jury regarding the penalty for second-degree murder, as defendant did not choose the exercise the right to inform the jury of the punishment for possible verdicts and the trial court was not obligated to inform the jury of applicable punishments. State v. Hewson, — N.C. App. —, 642 S.E.2d 459, 2007 N.C. App. LEXIS 581 (2007).

And Is Entitled to New Trial Where Denied This Right. — A defendant deprived of the right to inform the jury of the punishment that might be imposed upon conviction of the crime for which he was being tried was entitled to a new trial. State v. Walters, 33 N.C. App. 521, 235 S.E.2d 906 (1977), aff'd, 294 N.C. 311, 240 S.E.2d 628 (1978).

But Not If the Error Is Harmless. — The trial court's error in denying the defendant the right to advise the jury of the possible sentences he could receive if convicted, as allowed by this section, was harmless. State v. Peoples, 141 N.C. App. 115, 539 S.E.2d 25, 2000 N.C. App. LEXIS 1290 (2000).

Defendant May Not Attack Validity of Punishment. — Counsel may not argue the question of punishment in the sense of attacking the validity, constitutionality, or propriety of the prescribed punishment. Nor may counsel argue to the jury that the law ought to be otherwise, that the punishment provided thereby is too severe and, therefore, the jury should find the defendant not guilty of the offense charged but should find him guilty of a lesser offense or acquit him entirely. State v. Walters, 294 N.C. 311, 240 S.E.2d 628 (1978).

Or Its Severity. — Where the defense counsel implied in his jury argument that identification of the defendant was based on a fleeting view and that, while such a view may be sufficient to convict in some situations, it was inadequate to convict in the immediate case because the punishment was so severe, thus asking the jury to consider the punishment as part of its substantive deliberations, the trial judge correctly excluded that portion of defendant's jury argument. State v. Wilson, 293 N.C. 47, 235 S.E.2d 219 (1977).

Counsel may not argue to the jury that the law ought to be otherwise, that the punishment provided thereby is too severe and, therefore, that the jury should find the defendant not guilty of the offense charged but should find him guilty of a lesser offense or acquit him entirely. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

Quotation by the prosecutor from an overruled capital punishment decision during the penalty phase of a trial for first-degree murder, where the portion quoted did not form the rationale of the overruled decision, did not require action by the trial judge or a new sentencing hearing, in light of the assessment of the reviewing court and defense counsel that the prosecutor's motive for quoting on the decision was to argue the deterrent value of the death penalty. State v. Boyd, 311 N.C. 408, 319 S.E.2d 189 (1984).

C. Appeals, Paroles, etc.

The State or the defendant should not be allowed to speculate upon the outcome of possible appeals, paroles, executive commutations or pardons. State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976).

III. LENGTH OF ARGUMENT.

Defense counsel in a felony case is entitled to at least two hours for jury argument. State v. Feldstein, 21 N.C. App. 446, 204 S.E.2d 551 (1974).

IV. NUMBER OF ARGUMENTS.

In trials in the superior courts involving other than capital felonies, the State and the defendant are entitled to two addresses to the jury. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

The trial court's refusal to permit both counsels to address the jury during defendant's final arguments constituted prejudicial error per se in both the guilt-innocence and sentencing phases. State v. Campbell, 332 N.C. 116, 418 S.E.2d 476 (1992).

In a capital case as many as three counsel on each side may argue for as long as they wish, and each may address the jury as many times as he desires. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

When, in a capital case, a defendant does not offer evidence and is entitled to both open and close the argument to the jury, his attorneys may each address the jury as many times as they desire during the closing phase of the argument. The only limit to this right is the provision of this section allowing the trial judge to limit to three the number of counsel on each side who may address the jury. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

Discretion of Court. — This section gives the court the discretion to allow a greater number of addresses. State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331, cert. denied, 301 N.C. 101, 273 S.E.2d 306 (1980).

V. CAPITAL CASES.

This section places two restraints on a trial court's ability to limit jury arguments in capital felonies. First, the statute prohibits the trial court from limiting the number of addresses which can be made to the jury. Second, although the court may limit the number of attorneys who may address the jury to not less than three on each side, the statute prevents the trial court from imposing a limit on the length of the arguments. State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

Argument as to Jury's Role in Sentencing Phase of Capital Trial. — In the sentencing phase of a bifurcated trial, a reference to any statutory provision, which would have the effect of minimizing in the jurors' minds their role in recommending the sentence to be imposed, is precluded. The matters which a jury may consider in the sentencing phase of a bifurcated trial are clearly set forth in G.S. 15A-2000(e) and (f). State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

Argument as to Review by Supreme Court in Capital Cases. — During the sentencing phase of a bifurcated prosecution for murder, it was error for the district attorney to read to the jury G.S. 15A-2000(d), relating to the review of judgment and sentence by the Supreme Court. A reference to appellate review has no relevance with regard to the jury's task of weighing any aggravating and mitigating circumstances for the purpose of recommending a sentence. More importantly, such reference will, in all likelihood, result in the jury's reliance on the Supreme Court for the ultimate determination of sentence. State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

The rule precluding any argument which suggests to the jurors that they can depend on judicial or executive review to correct an erroneous verdict and thereby lessen the jurors' responsibility applies with equal force to a sentence recommendation in a bifurcated trial. State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

Reference to Parole Statute. — In a prosecution for murder, during the sentencing phase of a bifurcated trial, the district attorney's reference to the parole statute was erroneous. Neither the State nor the defendant should be allowed to speculate upon the outcome of possible appeals, paroles, executive commutations or pardons. The jury's sentence recommendation should be based solely on their balancing of the aggravating and mitigating factors before them. State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

Where the word "parole" was never used, and there was no specific mention of the possibility that a life sentence could mean release in 20 years, the district attorney's arguments did not suggest the possibility of parole in so direct a manner as to amount to a gross impropriety requiring ex mero motu intervention by the trial court. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), overruled in part State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

In defendant's trial on charges of first-degree murder and robbery with a firearm, the trial court properly advised the jury that life imprisonment meant a sentence of life without the possibility of parole, and the state supreme court rejected the argument that G.S. 84-14 (recodified as this section) gave defendant the right to inform the jury of the punishment that could be imposed if defendant was convicted. State v. Haselden, 357 N.C. 1, 577 S.E.2d 594, 2003 N.C. LEXIS 318 (2003).

Final Closing Argument Where Defendant Presents Evidence. — This section means that although the trial court in a capital case may limit to three the number of counsel on each side who may address the jury, those three (or however many actually argue) may argue for as long as they wish, and each may address the jury as many times as he desires. However, if defendant presents evidence, all such addresses must be made prior to the prosecution's closing argument. State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

Where defendant in a capital case presented evidence, the State had the right to give the final closing argument pursuant to Rule 10 of the General Rules of Practice for the Superior and District Courts. This section did not give defendant the right to respond to the State's argument. State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

Quotations from the Bible. — District attorney's closing remarks at the penalty phase, in which he read quotations from the Bible, were not so improper as to require intervention by the trial court ex mero motu. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), overruled in part State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

Evidence supported district attorney's reference to defendant as a "professional assassin" in attorney's argument at the guilt phase, and defendant failed to object to the statement; therefore, the trial court did not err in failing to intervene ex mero motu to correct this remark. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), overruled in part State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

Refusal to Allow Both Defense Counsel to Argue Was Prejudicial Error. — At the conclusion of the sentencing proceeding in capital murder case, the trial court erred in refusing to permit both counsel for defendant to address the jury during defendant's final argument. This deprived the defendant of a substantial right and amounted to prejudicial error. State v. Simpson, 320 N.C. 313, 357 S.E.2d 332 (1987), cert. denied, 485 U.S. 963, 108 S. Ct. 1230, 99 L. Ed. 2d 430 (1988).

Trial court's refusal in a capital case to permit both counsel to address the jury during defendant's final arguments constituted prejudicial error per se in both the guilt-innocence and sentencing phases, entitling defendant to a new trial. State v. Mitchell, 321 N.C. 650, 365 S.E.2d 554 (1988).

The failure of trial court to permit defense counsel to make three arguments during closing arguments of the guilt phase, an opening argument by one defense attorney before the State's closing arguments and two final arguments, one by each of his attorneys, after the State's closing arguments, where defendant was being tried for multiple capital felonies and did not present evidence during the guilt-innocence phase, and where counsel made a clear request, constituted prejudicial error per se and entitled the defendant to a new trial as to both capital and noncapital charges. State v. Barrow, 350 N.C. 640, 517 S.E.2d 374 (1999).

How Often and How Long Defense Attorneys May Address Jury. — In capital cases this section allows the trial court to limit defendant to three counsel, but at each point at which defendant has the right to present an argument to the jury those three, or however many actually argue, may argue for as long as they wish, and each may address the jury as many times as he desires. Thus, for example, if one defense attorney grows weary of arguing, he may allow another defense attorney to address the jury, and may, upon being refreshed, rise again to make another address during defendant's time for argument. State v. Mitchell, 321 N.C. 650, 365 S.E.2d 554 (1988).

When a defendant is entitled to the final or last jury argument, during the closing arguments in a capital case, his attorneys may each address the jury as many times as they desire during the closing phase of the arguments. The only limit to this right is the provision of this section allowing the trial judge to limit to three the number of counsel on each side who may address the jury. State v. Mitchell, 321 N.C. 650, 365 S.E.2d 554 (1988).

In cases in which a capital felony has been joined for trial with noncapital charges, the failure of the trial judge to allow both of defendant's counsel to make the closing argument is prejudicial error in the noncapital as well as the capital charges. State v. Mitchell, 321 N.C. 650, 365 S.E.2d 554 (1988).

VI. OBJECTION.

A. In General.

Duty of Court to Censor Remarks. — The trial court has a duty, upon objection, to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. Britt, 288 N.C. 699, 220 S.E.2d 283 (1975); State v. Locklear, 291 N.C. 598, 231 S.E.2d 256 (1977).

The trial court is required, upon objection, to censor remarks either not warranted by the law or facts or made only to prejudice or mislead the jury. State v. Britt, 291 N.C. 528, 231 S.E.2d 644 (1977); State v. Ford, 323 N.C. 466, 373 S.E.2d 420 (1988).

The trial court has a duty, upon objection, to censure remarks which are not warranted by the law or evidence or are calculated to mislead or prejudice the jury, and, if the impropriety is gross, it is proper for the trial judge, even in the absence of objection, to correct the abuse ex mero motu. Watson v. White, 309 N.C. 498, 308 S.E.2d 268 (1983).

If the impropriety in counsel's closing arguments is gross, it is proper for the court even in the absence of objection, to correct the abuse ex mero motu. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. Britt, 288 N.C. 699, 220 S.E.2d 283 (1975); State v. Locklear, 291 N.C. 598, 231 S.E.2d 256 (1977).

Failure to Sustain Objection to Remark with No Basis in Law or Fact. — A trial court errs as a matter of law in failing to sustain plaintiff's objection to the remarks of defendant's counsel, which remarks had no basis in law or fact, but rather injected extraneous considerations concerning defendants' financial situation so far as their capacity to respond to damages was concerned. Watson v. White, 309 N.C. 498, 308 S.E.2d 268 (1983).

B. Time for Objection.

An objection to argument of counsel must be made at the time of the argument, so as to give the court an opportunity to correct the transgression, if any. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

Or Before Verdict. — Exception to improper remarks of counsel during argument must be taken before verdict. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

Ordinarily, an objection to the arguments by counsel must be made before verdict, since only when the impropriety is gross is the trial court required to correct the abuse ex mero motu. State v. Britt, 291 N.C. 528, 231 S.E.2d 644 (1977).

Or Else Waived. — Objection to an impropriety in counsel's argument to the jury is waived by waiting until after the verdict to enter the objection. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

After verdict, an objection to an impropriety in the argument comes too late. State v. Locklear, 291 N.C. 598, 231 S.E.2d 256 (1977).

Capital Case Exception. — An exception to the general rule that objections to counsel's argument to the jury must be made before verdict is recognized in capital cases where the improper argument was so prejudicial in nature that, in the opinion of the court, no instruction by the trial court could have removed it from the minds of the jury had the objection been seasonably made. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

Under the capital case exception the first attention of the reviewing court is to consider if the challenged argument was improper and, if so, whether it was improper to the extent that doubt remains as to whether a curative instruction would remove its prejudicial effect. If a convicted defendant was so prejudiced, the failure to object is no bar and his claim may be decided on the merits. If, on the other hand, it can be said that the argument was not prejudicial or that a curative instruction would have removed any prejudice, his failure to object to the argument is treated as a bar to appellate relief. Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978).

If argument of counsel in a capital case is so grossly improper that removal of its prejudicial effect, after a curative instruction, remains in doubt, the general rule requiring objection before verdict does not apply. Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978).

Application of the capital case exception entails an inquiry by the reviewing court into the merits of the claim; waiver is not automatic. Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978).

VII. OPENING AND CLOSING ARGUMENTS.

The right to closing argument is a substantial legal right of which a defendant may not be deprived by the exercise of a judge's discretion. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

If, in a non-capital case, defendant elects to present evidence, he is entitled to open the argument to the jury before the prosecution argues, and two of his counsel may address the jury within the time limits prescribed by this section. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

If defendant in a non-capital case does not present evidence, he is entitled to both open and close the argument to the jury. In such case he may have one lawyer make the opening argument and one the closing, or he may waive one argument and have both lawyers address the jury during the remaining argument. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

Where defendant by stipulation waived her opening argument, the failure of the trial judge to allow both of defendant's counsel to make the closing argument was prejudicial error in the non-capital as well as the capital charges against her. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

§§ 7A-98, 7A-99: Reserved for future codification purposes.

ARTICLE 12.

Clerk of Superior Court.

§ 7A-100. Election; term of office; oath; vacancy; office and office hours; appointment of acting clerk.

(a) A clerk of the superior court for each county shall be elected by the qualified voters thereof, to hold office for a term of four years, in the manner prescribed by Chapter 163 of the General Statutes. The clerk, before entering on the duties of his office, shall take the oath of office prescribed by law. If the office of clerk of superior court becomes vacant otherwise than by the expiration of the term, or if the people fail to elect a clerk, the senior regular resident superior court judge for the county shall fill the vacancy by appointment until an election can be regularly held. In cases of death or resignation of the clerk, the senior regular resident superior court judge, pending appointment of a successor clerk, may appoint an acting clerk of superior court for a period of not longer than 30 days.

(b) The county commissioners shall provide an office for the clerk in the courthouse or other suitable place in the county seat. The clerk shall observe such office hours and holidays as may be directed by the Administrative Officer of the Courts. (Const., art. 4, ss. 16, 17, 29; C.C.P., ss. 139-141; 1871-72, c. 136; Code, ss. 74, 76, 78, 80, 114, 115; 1903, c. 467; Rev., ss. 890-893, 895, 909, 910; C.S., ss. 926, 930, 931, 945, 946; 1935, c. 348; 1939, c. 82; 1941, c. 329; 1949, c. 122, ss. 1, 2; 1971, c. 363, s. 1; 1973, c. 240.)

Local Modification. — Brunswick: 1955, c. 1259; Currituck: 1939, ch. 82, s. 3; Gates: 1959, c. 254; Moore, Richmond: 1939, c. 82, s. 3; Wake: 1955, c. 1168.

Cross References. — As to oath, see G.S. 11-7, 11-11. As to wilfully failing to discharge duties as ground for removal, see G.S. 14-230. As to bonding requirements, see G.S. 58-72-35, 58-72-40.

Editor's Note. — This section combines former G.S. 2-2, 2-5, 2-6, 2-24, and 2-25. The former sections were revised, combined and transferred to their present position by Session Laws 1971, c. 363, s. 1, effective Oct. 1, 1971.

CASE NOTES

Editor's Note. — *The cases cited in the following annotation were decided under former statutory provisions.*

Commissioners' Duty. — A failure on the part of the clerk to give bond must be ascertained by the commissioners before the judge is authorized to declare a vacancy. And in accepting or rejecting the bond tendered, the court cannot interfere in the exercise of their discretion. Buckman v. Commissioners of Beaufort, 80 N.C. 121 (1879).

Conflicting Claimants for Vacant Office. — Where there are conflicting claimants for a vacant office, a court must act upon the prima facie evidence of right and admit the one possessing it, leaving the other to pursue the proper legal remedy for the recovery of possession. Clark v. Carpenter, 81 N.C. 309 (1879).

Term of Appointee. — When there is a vacancy and the judge appoints one to fill that vacancy, such appointee holds office only until the next election at which members of the General Assembly are chosen. Rodwell v. Rowland, 137 N.C. 617, 50 S.E. 319 (1905).

§ 7A-101. Compensation.

(a) The clerk of superior court is a full-time employee of the State and shall receive an annual salary, payable in equal monthly installments, based on the population of the county as determined in subsection (a1) of this section, according to the following schedule:

Population	*Annual Salary*
Less than 100,000	$ 80,196
100,000 to 149,999	89,993
150,000 to 249,999	99,792
250,000 and above	109,593.

When a county changes from one population group to another, the salary of the clerk shall be changed, on July 1 of the fiscal year for which the change is reported, to the salary appropriate for the new population group, except that the salary of an incumbent clerk shall not be decreased by any change in population group during his continuance in office.

(a1) For purposes of subsection (a) of this section, the population of a county for any fiscal year shall be the population for the beginning of that fiscal year as reported by the Office of State Budget and Management to the Administrative Office of the Courts prior to the beginning of that fiscal year.

(b) The clerk shall receive no fees or commission by virtue of his office. The salary set forth in this section is the clerk's sole official compensation, but if, on June 30, 1975, the salary of a particular clerk, by reason of previous but no longer authorized merit increments, is higher than that set forth in the table, that higher salary shall not be reduced during his continuance in office.

(c) In lieu of merit and other increment raises paid to regular State employees, a clerk of superior court shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the clerk's annual salary payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, nineteen and two-tenths percent (19.2%) after 20 years of service, and twenty-four percent (24%) after 25 years of service. Service shall mean service in the elective position of clerk of superior court, as an assistant clerk of court and as a supervisor of clerks of superior court with the Administrative Office of the Courts and shall not include service as a deputy or acting clerk. Service shall also mean service as a justice, judge, or magistrate of the General Court of Justice or as a district attorney. (1965, c. 310, s. 1; 1967, c. 691, s. 5; 1969, c. 1186, s. 3; 1971, c. 877, ss. 1, 2; 1973, c. 571, ss. 1, 2; 1975, c. 956, s. 7; 1975, 2nd Sess., c. 983, s. 11; 1977, c. 802, s. 42; 1977, 2nd Sess., c. 1136, s. 13; 1979, c. 838, s. 85; 1979, 2nd Sess., c. 1137, s. 12; 1981, c. 964, s. 14; c. 1127, s. 12; 1983, c. 761, ss. 200, 247, 249; 1983 (Reg. Sess., 1984), c. 1034, ss. 86, 87; c. 1109, s. 13.1; 1985, c. 479, s. 211; c. 689, s. 3; c. 698, s. 10(c); 1985 (Reg. Sess., 1986), c. 1014, s. 34; 1987, c. 738, s. 20; 1987 (Reg. Sess., 1988), c. 1086, s. 14; c. 1100, ss. 16(a), 17; 1989, c. 752, s. 31; c. 799, s. 27(a); 1991 (Reg. Sess., 1992), c. 900, s. 40; c. 1039, s. 21; 1993, c. 321, s. 57(a); 1993 (Reg. Sess., 1994), c. 769, s. 7.10(a); 1996, 2nd Ex. Sess., c. 18, s. 28.4; 1997-443, s. 33.9; 1998-153, s. 7; 1999-237, s. 28.4; 2000-67, s. 26.4; 2000-140, s. 93.1(b); 2001-424, ss. 12.2(b), 32.5; 2004-124, s. 31.5(b); 2005-276, ss. 29.5, 29.23B; 2006-66, s. 22.5; 2007-323, ss. 28.5, 28.18A(e).)

Editor's Note. — Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 30.5, as amended by Session Laws 2004-124, s. 31.5(a), provides: "For the 2003-2004 fiscal year, the compensation of clerks of superior court shall remain as set forth in G.S. 7A-101(a)."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5, contains a severability clause.

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 22.5, effective July 1, 2006, updated the Annual Salaries in the first paragraph of subsection (a).

Session Laws 2007-323, ss. 28.5 and 28.18A(e), effective July 1, 2007, in subsection (a), increased the annual salaries of the clerks and deleted the former second paragraph which described the percentage of the clerk salaries to the salary of a chief district court judge; in the first sentence of subsection (c), deleted "and" preceding "nineteen" and added "and twenty-four percent (24%) after 25 years of service" at the end.

§ 7A-102. Assistant and deputy clerks; appointment; number; salaries; duties.

(a) The numbers and salaries of assistant clerks, deputy clerks, and other employees in the office of each clerk of superior court shall be determined by the Administrative Officer of the Courts after consultation with the clerk concerned. All personnel in the clerk's office are employees of the State. The clerk appoints the assistants, deputies, and other employees in the clerk's office to serve at his or her pleasure. Assistant and deputy clerks shall take the oath of office prescribed for clerks of superior court, conformed to the office of assistant or deputy clerk, as the case may be. Except as provided by subsection (c2) of this section, the job classifications and related salaries of each employee within the office of each superior court clerk shall be subject to the approval of the Administrative Officer of the Courts after consultation with each clerk concerned and shall be subject to the availability of funds appropriated for that purpose by the General Assembly.

(b) An assistant clerk is authorized to perform all the duties and functions of the office of clerk of superior court, and any act of an assistant clerk is entitled to the same faith and credit as that of the clerk. A deputy clerk is authorized to certify the existence and correctness of any record in the clerk's office, to take the proofs and examinations of the witnesses touching the execution of a will as required by G.S. 31-17, and to perform any other ministerial act which the clerk may be authorized and empowered to do, in his own name and without reciting the name of his principal. The clerk is responsible for the acts of his assistants and deputies. With the consent of the clerk of superior court of each county and the consent of the presiding judge in any proceeding, an assistant or deputy clerk is authorized to perform all the duties and functions of the office of the clerk of superior court in another county in any proceeding in the district or superior court that has been transferred to that county from the county in which the assistant or deputy clerk is employed.

(c) Notwithstanding the provisions of subsection (a), the Administrative Officer of the Courts shall establish an incremental salary plan for assistant clerks and for deputy clerks based on a series of salary steps corresponding to the steps contained in the Salary Plan for State Employees adopted by the Office of State Personnel, subject to a minimum and a maximum annual salary as set forth below. On and after July 1, 1985, each assistant clerk and each deputy clerk shall be eligible for an annual step increase in his salary plan based on satisfactory job performance as determined by each clerk. Notwithstanding the foregoing, if an assistant or deputy clerk's years of service in the office of superior court clerk would warrant an annual salary greater than the salary first established under this section, that assistant or deputy clerk shall be eligible on and after July 1, 1984, for an annual step increase in his salary plan. Furthermore, on and after July 1, 1985, that assistant or deputy clerk shall be eligible for an increase of two steps in his salary plan, and shall remain eligible for a two-step increase each year as recommended by each clerk until that assistant or deputy clerk's annual salary corresponds to his number of years of service. Any person covered by this subsection who would not receive a step increase in fiscal year 1995-96 because that person is at the top of the salary range as it existed for fiscal year 1994-95 shall receive a salary increase to the maximum annual salary provided by subsection (c1) of this section.

(c1) A full-time assistant clerk or a full-time deputy clerk, and up to one full-time deputy clerk serving as head bookkeeper per county, shall be paid an annual salary subject to the following minimum and maximum rates:

Assistant Clerks and Head Bookkeeper	*Annual Salary*
Minimum	$31,122
Maximum	53,301
Deputy Clerks	*Annual Salary*
Minimum	$26,788
Maximum	41,456.

(c2) The clerk of superior court may appoint assistant clerks, deputy clerks, and a head bookkeeper and set their salaries above the minimum rate established for the positions by subsection (c1) of this section if, in the clerk's discretion, (i) the needs of the clerk's office would be best served by an appointment above the minimum rate, (ii) the appointee's skills and experience support the higher rate, and (iii) the Administrative Office of the Courts certifies that there are sufficient funds available.

(d) Full-time assistant clerks, licensed to practice law in North Carolina, who are employed in the office of superior court clerk on and after July 1, 1984, and full-time assistant clerks possessing a masters degree in business administration, public administration, accounting, or other similar discipline from an accredited college or university who are employed in the office of superior court clerk on and after July 1, 1997, are authorized an annual salary of not less than three-fourths of the maximum annual salary established for assistant clerks; the clerk of superior court, with the approval of the Administrative Office of the Courts, may establish a higher annual salary but that salary shall not be higher than the maximum annual salary established for assistant clerks. Full-time assistant clerks, holding a law degree from an accredited law school, who are employed in the office of superior court clerk on and after July 1, 1984, are authorized an annual salary of not less than two-thirds of the maximum annual salary established for assistant clerks; the clerk of superior court, with the approval of the Administrative Office of the Courts, may establish a higher annual salary, but the entry-level salary may not be more than three-fourths of the maximum annual salary established for assistant clerks, and in no event may be higher than the maximum annual salary established for assistant clerks. Except as provided by subsection (c2) of this section, the entry-level annual salary for all other assistant and deputy clerks employed on and after July 1, 1984, shall be at the minimum rates as herein established.

(e) A clerk of superior court may apply to the Director of the Administrative Office of the Courts to enter into contracts with local governments for the provision by the State of services of assistant clerks, deputy clerks, and other employees in the office of each clerk of superior court pursuant to G.S. 153A-212.1 or G.S. 160A-289.1.

(f) The Director of the Administrative Office of the Courts may provide assistance requested pursuant to subsection (e) of this section only upon a showing by the senior resident superior court judge, supported by facts, that the overwhelming public interest warrants the use of additional resources for the speedy disposition of cases involving drug offenses, domestic violence, or other offenses involving a threat to public safety.

(g) The terms of any contract entered into with local governments pursuant to subsection (e) of this section shall be fixed by the Director of the Administrative Office of the Courts in each case. Nothing in this section shall be construed to obligate the General Assembly to make any appropriation to implement the provisions of this section or to obligate the Administrative Office of the Courts to provide the administrative costs of establishing or maintaining the positions or services provided for under this section. Further, nothing in this section shall be construed to obligate the Administrative Office of the Courts to maintain positions or services initially provided for under this section. (1777, c. 115, s. 86; P.R.; R.C., c. 19, s. 15; Code, s. 75; 1899, c. 235, ss. 2, 3; Rev., ss. 898-900; 1921, c. 32, ss. 1-3; C.S., ss. 934(a)-934(c), 935-937; 1951, c. 159, ss. 1, 2; 1959, c. 1297; 1963, c. 1187; 1965, c. 264; c. 310, s. 1; 1971, c. 363, s. 2; 1973, c. 678; 1983 (Reg. Sess., 1984), c. 1034, ss. 88, 89; 1985, c. 479, s. 212; c. 757, s. 190; 1985 (Reg. Sess., 1986), c. 1014, s. 35; 1987, c. 738, s. 21(a); 1987 (Reg. Sess., 1988), c. 1086, s 15; 1989, c. 445; c. 752, s. 32; 1991 (Reg. Sess., 1992), c. 900, ss. 42, 119; 1993, c. 321, ss. 58, 59; 1993 (Reg. Sess., 1994), c. 769, ss. 7.11, 7.12; 1995, c. 507, s. 7.6(a), (b); 1996, 2nd Ex. Sess., c. 18, s. 28.5; 1997-443, ss. 33.12, 33.10(b); 1998-153, s. 8(b); 1999-237, s. 28.5; 2000-67, ss. 15.4(b), 26.5; 2001-424, s. 32.6; 2003-284, s. 30.14B; 2004-124, s. 31.6(b); 2005-276, s. 29.6; 2006-66, s. 22.6; 2007-323, s. 28.6.)

Editor's Note. — This section combines former G.S. 2-10, 2-12, 2-13, 2-15 and 7A-102. Sections 2-10, 2-12, 2-13 and 2-15 were revised, transferred and combined with G.S. 7A-102, which was also revised, by Session Laws 1971, c. 363, s. 2, effective Oct. 1, 1971.

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 30.6, as amended by Session Laws 2004-124, s. 31.6(a), provides: "For the 2003-2004 fiscal year, the compensation of assistant and deputy clerks of superior court shall remain as set forth in G.S. 7A-102(c1), except that there shall be awarded to each clerk not receiving a statutory step increase a compensation bonus for the 2003-2004 fiscal year as authorized in this Part [Part XXX of Session Laws 2003-284]."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5, contains a severability clause.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2005-144, s. 3, effective July 1, 2005, and expires 11:59 p.m., August 11, 2005, provides: "State employees subject to G.S. 7A-102(c), 7A-171.1, or 20-187.3 shall not move up on salary schedules or receive automatic increases, including automatic step increases, until authorized by the General Assembly.

"Public school employees paid on the teacher salary schedule or the school-based administrator salary schedule shall not move up on salary schedules or receive automatic step increases until authorized by the General Assembly."

Session Laws 2005-144, s. 10, effective July 1, 2005, as amended by Session Laws 2005-201, s. 1, as amended by Session Laws 2005-246, s. 1, provides for Session Laws 2005-144, s. 3 to expire at 11:59 P.M. on August 11, 2005.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 22.6, effective July 1, 2006, updated the annual salaries of Assistant Clerks, Head Bookkeeper, and Deputy Clerks in subsection (c1).

Session Laws 2007-323, s. 28.6, effective July 1, 2007, increased the annual salaries in subsection (c1).

CASE NOTES

Cited in Ridge Community Investors, Inc. v. Berry, 32 N.C. App. 642, 234 S.E.2d 6 (1977); Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 239 S.E.2d 566 (1977); Carter v. Marion, — N.C. App. —, 645 S.E.2d 129, 2007 N.C. App. LEXIS 1089 (2007).

§ 7A-102.1. Transfer of sick leave earned as county or municipal employees by certain employees in offices of clerks of superior court.

(a) All assistant clerks, deputy clerks and other employees of the clerks of the superior court of this State, secretaries to superior court judges and district attorneys, and court reporters of the superior courts, who have heretofore been, or shall hereafter be, changed in status from county employees to State employees by reason of the enactment of Chapter 7A of the General Statutes, shall be entitled to transfer sick leave accumulated as a county employee pursuant to any county system and standing to the credit of such employee at the time of such change of status to State employee, without any maximum limitation thereof. Such earned sick leave credit shall be certified to the Administrative Office of the Courts by the official or employee responsible for keeping sick leave records for the county, and the Administrative Office of the Courts shall accord such transferred sick leave credit the same status as if it had been earned as a State employee.

(b) All clerks, assistant clerks, deputy clerks and other employees of any court inferior to the superior court which has been or may be abolished by reason of the enactment of Chapter 7A of the General Statutes, who shall thereafter become a State employee by employment in the Judicial Department, shall be entitled to transfer sick leave earned as a municipal or county employee pursuant to any municipal or county system in effect on the date said court was abolished, without any maximum limitation thereof. Such earned sick leave credit shall be certified to the Administrative Office of the Courts by the official or employee responsible for keeping sick leave records for the municipality or county, and the Administrative Office of the Courts shall accord such transferred sick leave credit the same status as if it had been earned as a State employee.

(c) Any employee covered by this section who retires on or after May 22, 1973, shall be given credit for all sick leave accumulated on May 22, 1973. (1967, c. 1187, ss. 1, 2; 1969, c. 1190, s. 8; 1973, c. 47, s. 2; c. 795, ss. 1-3.)

§ 7A-103. Authority of clerk of superior court.

The clerk of superior court is authorized to:

(1) Issue subpoenas to compel the attendance of any witness residing or being in the State, or to compel the production of any document or paper, material to any inquiry in his court.

(2) Administer oaths, and to take acknowledgment and proof of the execution of all instruments or writings.

(3) Issue commissions to take the testimony of any witness within or without the State.

(4) Issue citations and orders to show cause to parties in all matters cognizable in his court, and to compel the appearance of such parties.

(5) Enforce all lawful orders and decrees, by execution or otherwise, against those who fail to comply therewith or to execute lawful process. Process may be issued by the clerk, to be executed in any county of the State, and to be returned before him.

(6) Certify and exemplify, under seal of his court, all documents, papers or records therein, which shall be received in evidence in all the courts of the State.

(7) Preserve order in this court, punish criminal contempts, and hold persons in civil contempt; subject to the limitations contained in Chapter 5A of the General Statutes of North Carolina.

(8) Adjourn any proceeding pending before him from time to time.

(9) Open, vacate, modify, set aside, or enter as of a former time, decrees or orders of his court.

(10) Enter default or judgment in any action or proceeding pending in his court as authorized by law.

(11) Award costs and disbursements as prescribed by law, to be paid personally, or out of the estate or fund, in any proceeding before him.

(12) Compel an accounting by magistrates and compel the return to the clerk of superior court by the person having possession thereof, of all money, records, papers, dockets and books held by such magistrate by virtue or color of his office.

(13) Grant and revoke letters testamentary, letters of administration, and letters of trusteeship.

(14) Appoint and remove guardians and trustees, as provided by law.

(15) Audit the accounts of fiduciaries, as required by law.

(16) Exercise jurisdiction conferred on him in every other case prescribed by law. (C.C.P., ss. 417, 418, 442; Code, ss. 103, 108; 1901, c. 614, s. 2; Rev., s. 901; 1919, c. 140; C.S., s. 938; 1949, c. 57, s. 1; 1951, c. 28, s. 1; 1961, c. 341, s. 2; 1971, c. 363, s. 3; 1979, 2nd Sess., c. 1080, s. 5.)

Cross References. — As to accounts of executors, etc., see G.S. 1-406, 28A-20-1 through 28A-21-5. As to use of copies of court papers in evidence, see G.S. 8-34. As to depositions, see G.S. 8-74 through 8-83. As to clerks acting as notaries, see G.S. 10A-14. As to duty of clerk to name successor to trustee in a deed of assignment for benefit of creditors, see G.S.

23-4. As to revocation of letters testamentary and of administration, see G.S. 28A-8-4, 28A-9-1 through 28A-9-7. As to probate, see G.S. 31-11 through 31-24, 47-1, 47-3, 47-7. As to guardians, see G.S. 35A-1 et seq. As to fixing compensation of commissioners for division of lands, see G.S. 46-7.1.

Editor's Note. — This section was formerly G.S. 2-16. It was revised and transferred to its present position by Session Laws 1971, c. 363, s. 3. Former G.S. 7A-103, relating to accounting for fees and other receipts, and annual audit, was renumbered G.S. 7A-108 by section 10 of the same 1971 act.

Legal Periodicals. — For survey of 1980 law on civil procedure developments generally, see 59 N.C.L. Rev. 1067 (1981).

CASE NOTES

Legislature May Take Away or Modify Powers of Clerks. — The powers and duties of clerks enumerated in this section are given and fixed by legislative enactment, and there is no constitutional barrier to the legislature's taking away, adding to, or modifying them, or authorizing them to be exercised and performed by another. In re Barker, 210 N.C. 617, 188 S.E. 205 (1936).

The clerk of the superior court is a court of very limited jurisdiction. Russ v. Woodard, 232 N.C. 36, 59 S.E.2d 351 (1950).

Such court has only such jurisdiction as is given by statute. It has no common-law or equitable jurisdiction. McCauley v. McCauley, 122 N.C. 288, 30 S.E. 344 (1898).

Powers of Clerk Within His Jurisdiction. — Within his jurisdiction the clerk of the superior court has the same power as courts of general jurisdiction to open, vacate, modify, set aside or enter as of a former time, decrees or orders of his court, and to fix time for hearings. Russ v. Woodard, 232 N.C. 36, 59 S.E.2d 351 (1950).

The clerk has the jurisdiction to correct a mistake in a partition proceeding. Wahab v. Smith, 82 N.C. 229 (1880); Little v. Duncan, 149 N.C. 84, 62 S.E. 770 (1908).

Power to Set Aside Sale. — In a proceeding to subject real estate to sale for assets, after a report of the sale is returned and confirmed, the clerk has the right to set aside the sale and order a resale by showing proper cause. Lovinier v. Pearce, 70 N.C. 167 (1874).

Correction of Omissions. — The power of a court upon a proper showing to correct its records and supply an inadvertent omission cannot be doubted. Philbrick v. Young, 255 N.C. 737, 122 S.E.2d 725 (1961).

Clerk May Correct Orders Entered Erroneously. — The broad grant of power to the clerk in this section includes the power to correct orders entered erroneously, whenever the clerk's attention is directed to the error by motion or by other means. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

The clerk of the superior court is authorized to correct, nunc pro tunc, orders entered on erroneous misapprehension of the facts. In re Watson, 70 N.C. App. 120, 318 S.E.2d 544 (1984), cert. denied, 313 N.C. 330, 327 S.E.2d 900 (1985).

Removal of Administrators. — The clerk has the power, for good and sufficient cause, to remove an administrator, or for like cause, as necessarily equivalent, to permit him to resign his trust. Murrill v. Sandlin, 86 N.C. 54 (1882); Tulburt v. Hollar, 102 N.C. 406, 9 S.E. 430 (1889).

Appointment and Replacement of Trustees. — Action filed by a trust beneficiary and a settlor's siblings, pursuant to G.S. 36A-125.4, seeking an order modifying a trust, was really an action seeking replacement of the trustee for exercising discretion in managing the trust and the trial court's judgment dismissing the action for lack of subject matter jurisdiction was upheld. In re Testamentary Trust of Charnock, 158 N.C. App. 35, 579 S.E.2d 887, 2003 N.C. App. LEXIS 938 (2003), aff'd, 358 N.C. 523, 597 S.E.2d 706 (2004).

Appointment of Guardian Ad Litem. — Where the clerk, upon his own motion, sought to have the administratrix of the estate removed, and the minor heirs clearly had a vested interest and the right of appeal from the clerk's determination, the clerk took the appropriate and proper step of appointing a guardian ad litem to protect their interests and the clerk could compel the payment of the necessary expenses from the estate to which the heirs would potentially benefit, including the costs of the guardian ad litem's attorneys' fees, to the estate. In re Estate of Sturman, 93 N.C. App. 473, 378 S.E.2d 204 (1989).

Examination of Accounts. — The jurisdiction for auditing accounts of executors, administrators, etc., conferred upon the clerk is an ex parte jurisdiction of examining the accounts and vouchers of such persons, allowing them commissions, etc., as formerly practiced, and does not conclude legatees, etc., or affect suits inter partes upon the same matters. Heilig v. Foard, 64 N.C. 710 (1870).

Clerk Had Jurisdiction to Deny Accounting. — The clerk had jurisdiction to grant or deny plaintiffs' Motion to Compel an Accounting, because this section grants the clerk of superior court jurisdiction to audit the accounts of fiduciaries, as required by law, and by implication, to deny a request to audit such accounts as well. Wilson v. Watson, 136 N.C. App. 500, 524 S.E.2d 812, 2000 N.C. App. LEXIS 51 (2000).

Probate of Wills. — This section confers upon the clerk of the superior court exclusive and original jurisdiction of proceedings for the probate of wills. Brissie v. Craig, 232 N.C. 701, 62 S.E.2d 330 (1950); Morris v. Morris, 245 N.C. 30, 95 S.E.2d 110 (1956).

The clerk had authority to rehear a petition to reopen an estate and to reverse her prior order that the estate be reopened. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

Acts of Heirs Would Not Affect Clerk's Determination. — The clerk of court was not bound, in making a discretionary determination of whether "proper cause" existed for reopening an estate, by any estoppel theory based upon acts of the heirs. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

Refusal to Reopen Estate Upheld. — In light of the public policy in favor of the expedited administration of estates, as evidenced by the six-month statute of limitations and other provisions of Chapter 28A, petitioner, who alleged that the deceased had promised to devise a life estate to her, had a heavy burden of justifying her failure to bring her suit within the six-month period provided for that purpose, or at the very least, within the greater than two-year period that the estate actually remained open. There was no error in the clerk's determination that this burden was not met. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

The purpose of the subpoena duces tecum is to require the production of specific items patently material to the inquiry. Therefore, it must specify with as much precision as fair and feasible the particular items desired. State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

Issuance of Subpoena Duces Tecum. — It is the long-established practice of clerks of court to issue subpoenas duces tecum as a matter of course upon the oral request of counsel. The issuance of the subpoena is treated merely as a ministerial act which initiates proceedings to have the documents or other items described in the subpoena brought before the court. At the trial, the court will pass upon the competency of the evidence unless the subpoena has been quashed prior thereto. Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

Customary Use of Subpoena Duces Tecum. — Attorneys have customarily used the subpoena duces tecum only for the purpose for which it was intended, i.e., to require the production of a specific document or items patently material to the inquiry, or as a notice to produce the original of a document. Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

Discovery is not a proper purpose for a subpoena duces tecum. State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

What Documents Are Subject to Subpoena Duces Tecum. — Documents not subject to the criminal discovery statute, G.S. 15A-903, may still be subject to a subpoena duces tecum. State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

A motion to quash a subpoena duces tecum is addressed to the sound discretion of the trial judge, and is not subject to review absent a showing of abuse of discretion. State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

Trial court did not abuse its discretion in quashing subpoena duces tecum which called for all files and records of children's home relating to the victim and another witness in a prosecution for taking indecent liberties with a child. State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

A reasonable fee for legal advice and assistance in the management of a trust estate is allowable as a necessary expense of the trust estate. Tripp v. Tripp, 17 N.C. App. 64, 193 S.E.2d 366 (1972).

Partial Payment Allocated to Principal First. — When payment is made on a debt which has accumulated interest but the payment is not high enough to satisfy the principal and interest, in order to encourage debtors to pay the entire amount due and in the interest of fairness, when payments are made on a judgment debt, the clerk should first allocate the payment to the interest due, and the remainder of the payment should be allocated to the principal. Morley v. Morley, 102 N.C. App. 713, 403 S.E.2d 574 (1991).

Appeals. — In appeals from the clerk, in that class of cases of which he has jurisdiction in his capacity as clerk, as given under this section, it is not necessary that he should prepare and transmit to the judge any statement of the case on appeal. Ex parte Spencer, 95 N.C. 271 (1886).

Applied in Braddy v. Pfaff, 210 N.C. 248, 186 S.E. 340 (1936); In re Will of Wood, 240 N.C. 134, 81 S.E.2d 127 (1954); Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966); Little v. Bennington, 109 N.C. App. 482, 427 S.E.2d 887 (1993).

Cited in Edwards v. McLawhorn, 218 N.C. 543, 11 S.E.2d 562 (1940).

§ 7A-104. Disqualification; waiver; removal; when judge acts.

(a) The clerk shall not exercise any judicial powers in relation to any estate, proceeding, or civil action:

(1) If he has, or claims to have, an interest by distribution, by will, or as creditor or otherwise;

(2) If he is so related to any person having or claiming such an interest that he would, by reason of such relationship, be disqualified as a juror, but the disqualification on this ground ceases unless the objection is made at the first hearing of the matter before him;

(3) If clerk or the clerk's spouse is a party or a subscribing witness to any deed of conveyance, testamentary paper or nuncupative will, but this disqualification ceases when such deed, testamentary paper, or will has been finally admitted to probate by another clerk, or before the judge of the superior court;

(4) If clerk or the clerk's spouse is named as executor or trustee in any testamentary or other paper, but this disqualification ceases when the will or other paper is finally admitted to probate by another clerk, or before the judge of the superior court. The clerk may renounce the executorship and endorse the renunciation on the will or on some paper attached thereto, before it is propounded for probate, in which case the renunciation must be recorded with the will if it is admitted to probate.

(a1) The clerk may disqualify himself in a proceeding in circumstances justifying disqualification or recusement by a judge.

(a2) The parties may waive the disqualification specified in this section, and upon the filing of such written waiver, the clerk shall act as in other cases.

(b) When any of the disqualifications specified in this section exist, and there is no waiver thereof, or when there is no renunciation under subdivision (a)(4) of this section, any party in interest may apply to a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in that county, for an order to remove the proceedings to the clerk of superior court of an adjoining county in the district or set of districts; or he may apply to the judge to make either in vacation or during a session of court all necessary orders and judgments in any proceeding in which the clerk is disqualified, and the judge in such cases is hereby authorized to make any and all necessary orders and judgments as if he had the same original jurisdiction as the clerk over such proceedings.

(c) In any case in which the clerk of the superior court is executor, administrator, collector, or guardian of an estate at the time of his election or appointment to office, in order to enable him to settle such estate, a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in that county may make such orders as may be necessary in the settlement of the estate; and he may audit the accounts or appoint a commissioner to audit the accounts of such executor or administrator, and report to him for his approval, and when the accounts are so approved, the judge shall order the proper records to be made by the clerk. (C.C.P., ss. 419-421; 1871-72, cc. 196, 197; Code, ss. 104-107; Rev., ss. 902-905; 1913, c. 70, s. 1; C.S., ss. 939-942; 1935, c. 110, s. 1; 1971, c. 363, s. 4; 1977, c. 546; 1987 (Reg. Sess., 1988), c. 1037, s. 15; 1989, c. 493, s. 1.)

Cross References. — As to order of registration by interested clerk, see G.S. 47-61.

Editor's Note. — This section combines former G.S. 2-17, 2-19, 2-20 and 2-21. The former sections were revised, combined and transferred to their present position by Session

Laws 1971, c. 363, s. 4. Former G.S. 7A-104 was renumbered G.S. 7A-105 by s. 10 of the same 1971 act.

CASE NOTES

The proper practice, in a proceeding against an administrator who at the time was elected clerk, seems to be to make the summons returnable before him, and then transfer the whole proceeding before the district judge, who will make the necessary orders in the premises. Wilson v. Abrams, 70 N.C. 324 (1874).

Disqualification of Interested Clerk. — The clerk is disqualified, both by common-law rules and by this section, to act in any cause wherein he is interested. Gregory v. Ellis, 82 N.C. 225 (1880); White v. Connelly, 105 N.C. 65, 11 S.E. 177 (1890); Scranton & N.C. Land & Lumber Co. v. Jennett, 128 N.C. 3, 37 S.E. 954 (1901).

And where he is personally interested in the commissions to be allowed the executors, the clerk is excluded from jurisdiction. Barlow v. Norfleet, 72 N.C. 535 (1875).

The probate of a deed by a clerk interested therein is a nullity. Scranton & N.C. Land & Lumber Co. v. Jennett, 128 N.C. 3, 37 S.E. 954 (1901).

And when the probate of a deed is a nullity because the clerk was disqualified to act the defect is not cured by the approval of the final decree, under which it is made, by the judge of the superior court. Scranton & N.C. Land & Lumber Co. v. Jennett, 128 N.C. 3, 37 S.E. 954 (1901).

The act of "admitting to probate" is a judicial act, and a clerk is prohibited from acting on a deed or deed of trust in which he is grantor or grantee. White v. Connelly, 105 N.C. 65, 11 S.E. 177 (1890); Freeman v. Person, 106 N.C. 251, 10 S.E. 1037 (1890); Piland v. Taylor, 113 N.C. 1, 18 S.E. 70 (1893); Norman v. Ausbon, 193 N.C. 791, 138 S.E. 162 (1927).

Performance of Ministerial Acts. — The issuing of a warrant in attachment, or an order for seizure of property in claim and delivery, are ministerial acts, and can be performed by a deputy, or even by the clerk, in a case to which he is a party. Evans v. Etheridge, 96 N.C. 42, 1 S.E. 633 (1887); White v. Connelly, 105 N.C. 65, 11 S.E. 177 (1890).

Issuance of Process. — It has been the practice in this State for clerks to issue process either for or against themselves. Evans v. Etheridge, 96 N.C. 42, 1 S.E. 633 (1887).

A clerk cannot take proof of a deed of which he is the subscribing witness, because he cannot administer an oath to himself. Trenwith v. Smallwood, 111 N.C. 132, 15 S.E. 1030 (1892).

Relationship of Clerk to Party. — A clerk is prohibited from acting as such in relation to any estate or proceeding if he is so related to any person having, or claiming to have, such interest that he would by reason of such relationship be disqualified as a juror. Scranton & N.C. Land & Lumber Co. v. Jennett, 128 N.C. 3, 37 S.E. 954 (1901).

But probate and private examination taken before an officer are not invalid simply because the clerk is related to the parties. McAllister v. Purcell, 124 N.C. 262, 32 S.E. 715 (1899).

Trial Court's Removal of Trustee Proper. — Where beneficiaries' filings only requested an order removing the trustee of trusts, the trial court did not err by exercising jurisdiction or entering orders regarding the trustee's removal after the clerk recused himself from the case; the trial court provided the parties with due process, and its conclusions removing the trustee were supported by its findings of fact. In re Estate of Newton, 173 N.C. App. 530, 619 S.E.2d 571, 2005 N.C. App. LEXIS 2120 (2005), cert. denied, — N.C. —, 625 S.E.2d 786 (2005).

Written Waiver of Clerk's Disqualification. — The waiver must be in writing and made when the opposing parties are present and capable of objecting. White v. Connelly, 105 N.C. 65, 11 S.E. 177 (1890).

Cited in In re Estate of Smith, 226 N.C. 169, 37 S.E.2d 127 (1946).

§ 7A-105. Suspension, removal, and reinstatement of clerk.

A clerk of superior court may be suspended or removed from office for willful misconduct or mental or physical incapacity, and reinstated, under the same procedures as are applicable to a superior court district attorney, except that the procedure shall be initiated by the filing of a sworn affidavit with the chief district judge of the district in which the clerk resides, and the hearing shall be conducted by the senior regular resident superior court judge serving the county of the clerk's residence. If suspension is ordered, the judge shall appoint some qualified person to act as clerk during the period of the suspension. (1967, c. 691, s. 6; 1971, c. 363, s. 10; 1973, c. 47, s. 2; c. 148, s. 2.)

Editor's Note. — The above section was formerly numbered G.S. 7A-104. It was renumbered G.S. 7A-105 by Session Laws 1971, c. 363, s. 10. Former G.S. 7A-105 was renumbered G.S. 7A-107 by the same 1971 act.

§ 7A-106. Custody of records and property of office.

(a) It is the duty of the clerk of superior court, upon going out of office for any reason, to deliver to his successor, or such person as the senior regular resident superior court judge may designate, all records, books, papers, moneys, and property belonging to his office, and obtain receipts therefor.

(b) Any clerk going out of office or such other person having custody of the records, books, papers, moneys, and property of the office who fails to transfer and deliver them as directed shall forfeit and pay the State one thousand dollars ($1,000), which shall be sued for by the district attorney. (R.C., c. 19, s. 14; C.C.P., s. 142; Code, ss. 81, 124; Rev., ss. 906, 907; C.S., s. 943; 1971, c. 363, s. 5; 1973, c. 47, s. 2.)

Cross References. — As to failure to deliver as a misdemeanor, see G.S. 14-231.

Editor's Note. — This section was formerly G.S. 2-22. It was revised and transferred to its present position by Session Laws 1971, c. 363, s. 5.

CASE NOTES

Necessity of Order and Demand on Predecessor. — A person duly elected clerk of the superior court by the people needs no order from any person or authority to demand from his predecessor the property of all kinds belonging to the office, nor is it necessary for a retiring superior court clerk to be ordered to pay over to his successor, whether elected or appointed, the funds, etc., of the officer. But where the judge places some person temporarily in charge of the office until the regular appointment is made, it is then necessary for the new clerk to have an order from the judge directing the person temporarily in charge to deliver the possession of his office to such clerk. Peebles v. Boone, 116 N.C. 57, 21 S.E. 187 (1895).

Ground for Right of Action. — The right of clerk of a superior court to bring an action against his predecessor on the latter's official bond to recover the records, money, etc., in his hands does not rest on any injury done to the plaintiff, but on the ground that the law requires that each successive clerk shall receive from his predecessor all the records, money and property of his office. Peebles v. Boone, 116 N.C. 57, 21 S.E. 187 (1895).

Two Distinct Remedies Provided. — Our statutes provide two separate and distinct remedies — one in behalf of the injured individual for a specific fund to which he is entitled or on account of a particular wrong committed against him by the clerk, as provided for in G.S. 58-76-5, and one in behalf of the clerk against his predecessor in office to recover possession of records, books, papers, and money in the hands of the outgoing clerk by virtue or under color of his office, as provided for in this section. State ex rel. Underwood v. Watson, 223 N.C. 437, 27 S.E.2d 144 (1943); State ex rel. Underwood v. Watson, 224 N.C. 502, 31 S.E.2d 465 (1944).

Successor's Remedy. — When an outgoing clerk fails to deliver the property of his office, as herein provided, the successor's remedy is by attachment and suit for the penalty. O'Leary v. Harrison, 51 N.C. 338 (1859).

Affirmative Allegations Improperly Stricken. — In an action by the clerk of the superior court against his predecessor in office for possession of records, books and funds under this section, where defendant denied the allegations of the complaint that plaintiff was duly appointed clerk to fill a vacancy caused by the removal of defendant and qualified as such, and also made further affirmative allegations to like effect, there was error in allowing a motion to strike such affirmative allegations. State ex rel. Underwood v. Watson, 223 N.C. 437, 27 S.E.2d 144 (1943).

When Liability Ceases. — When a former clerk delivers to his successors all the proceeds, etc., of his office, his official duties, powers, and liabilities cease. Gregory v. Morisey, 79 N.C. 559 (1878).

§ 7A-107. Bonds of clerks, assistant and deputy clerks, and employees of office.

The Administrative Officer of the Courts shall require, or purchase, in such amounts as he deems proper, individual or blanket bonds for any and all clerks of superior court, assistant clerks, deputy clerks, and other persons employed in the offices of the various clerks of superior court, or one blanket bond covering all such clerks and other persons, such bond or bonds to be conditioned upon faithful performance of duty, and made payable to the State. The premiums shall be paid by the State. (1965, c. 310, s. 1; 1967, c. 691, s. 7; 1971, c. 363, ss. 10, 11.1; c. 518, s. 2.)

Editor's Note. — The above section was formerly numbered G.S. 7A-105. It was renumbered G.S. 7A-107 by Session Laws 1971, c. 363, s. 10.

CASE NOTES

Cited in Carter v. Marion, — N.C. App. —, 645 S.E.2d 129, 2007 N.C. App. LEXIS 1089 (2007).

§ 7A-108. Accounting for fees and other receipts; annual audit.

The Administrative Office of the Courts, subject to the approval of the State Auditor, shall establish procedures for the receipt, deposit, protection, investment, and disbursement of all funds coming into the hands of the clerk of superior court. The fees to be remitted to counties and municipalities shall be paid to them monthly by the clerk of superior court.

The operations of the Administrative Office of the Courts and the Clerks of Superior Court shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. (1965, c. 310, s. 1; 1969, c. 1190, s. 9; 1971, c. 363, s. 10; 1983, c. 913, s. 5.)

Editor's Note. — The above section was formerly numbered G.S. 7A-103. It was renumbered G.S. 7A-108 by Session Laws 1971, c. 363, s. 10.

§ 7A-109. Record-keeping procedures.

(a) Each clerk shall maintain such records, files, dockets and indexes as are prescribed by rules of the Director of the Administrative Office of the Courts. Except as prohibited by law, these records shall be open to the inspection of the public during regular office hours, and shall include civil actions, special proceedings, estates, criminal actions, juvenile actions, minutes of the court, judgments, liens, lis pendens, and all other records required by law to be maintained. The rules prescribed by the Director shall be designed to accomplish the following purposes:

(1) To provide an accurate record of every determinative legal action, proceeding, or event which may affect the person or property of any individual, firm, corporation, or association;

(2) To provide a record during the pendency of a case that allows for the efficient handling of the matter by the court from its initiation to conclusion and also affords information as to the progress of the case;

(3) To provide security against the loss or destruction of original documents during their useful life and a permanent record for historical uses;

(4) To provide a system of indexing that will afford adequate access to all records maintained by the clerk;

(5) To provide, to the extent possible, for the maintenance of records affecting the same action or proceeding in one rather than several units; and

(6) To provide a reservoir of information useful to those interested in measuring the effectiveness of the laws and the efficiency of the courts in administering them.

(b) The rules shall provide for indexing according to the minimum criteria set out below:

(1) Civil actions. — the names of all parties;

(2) Special proceedings. — the names of all parties;

(3) Administration of estates. — the name of the estate and in the case of testacy the name of each devisee;

(4) Criminal actions. — the names of all defendants;

(5) Juvenile actions. — the names of all juveniles;

(6) Judgments, liens, lis pendens, etc. — the names of all parties against whom a lien has been created by the docketing of a judgment, notice of lien, transcript, certificate, or similar document and the names of all parties in those cases in which a notice of lis pendens has been filed with the clerk and abstracted on the judgment docket.

(c) The rules shall require that all documents received for docketing shall be immediately indexed either on a permanent or temporary index. The rules may prescribe any technological process deemed appropriate for the economical and efficient indexing, storage and retrieval of information.

(d) In order to facilitate public access to court records, except where public access is prohibited by law, the Director may enter into one or more nonexclusive contracts under reasonable cost recovery terms with third parties to provide remote electronic access to the records by the public. Costs recovered pursuant to this subsection shall be remitted to the State Treasurer to be held in the Court Information Technology Fund established in G.S. 7A-343.2.

(e) If any contracts entered into under G.S. 7A-109(d) [subsection (d) of this section] are in effect during any calendar year, the Director of the Administrative Office of the Courts shall submit to the Joint Legislative Commission on Governmental Operations not later than February 1 of the following year a report on all those contracts. (Code, ss. 83, 95, 96, 97, 112, 1789; 1887, c. 178, s. 2; 1889, c. 181, s. 4; 1893, c. 52; 1899, c. 1, s. 17; cc. 82, 110; 1901, c. 2, s. 9; c. 89, s. 13; c. 550, s. 3; 1903, c. 51; c. 359, s. 6; 1905, c. 360, s. 2; Rev., s. 915; 1919, c. 78, s. 7; c. 152; c. 197, s. 4; c. 314; C.S., s. 952; 1937, c. 93; 1953, c. 259; c. 973, s. 3; 1959, c. 1073, s. 3; c. 1163, s. 3; 1961, c. 341, ss. 3, 4; c. 960; 1965, c. 489; 1967, c. 691, s. 39; c. 823, s. 2; 1971, c. 192; c. 363, s. 6; 1997-199, ss. 1, 2; 1999-237, s. 17.15(c).)

Local Modification. — Caldwell: Pub. Loc. 1927, c. 43; Durham: 1929, c. 88; Forsyth: 1949, c. 963, s. 4.

Cross References. — As to the duty of the clerk of superior court to maintain a record of juvenile cases, see now G.S. 7B-2901, 7B-3000, 7B-3001, and 7B-3100.

Editor's Note. — This section was formerly G.S. 2-42. It was revised and transferred to its present position by Session Laws 1971, c. 363, s. 6.

Under Session Laws 1995, c. 487, which amended G.S. 14-403, 14-404, and 14-415.1 and repealed G.S. 14-409.1 to 14-409.9, relating to sales of weapons, to conform to the requirements of the Brady Handgun Violence Prevention Act, the clerk will no longer issue weapon permits.

Session Laws 1997-199, s. 2, effective June 19, 1997, was codified as subsection (e) at the direction of the Revisor of Statutes.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 375.

CASE NOTES

***Editor's Note.** — Most of the cases cited in the following annotation were decided under former statutory provisions.*

Section Held Inapplicable to Prevent Introduction of Parole Evidence. — In an action to remove the executor of an estate, this section would not apply to prevent defendant from introducing parole evidence to prove that the court clerk gave oral approval of executor's actions and authorized commissions to be paid executor. Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988), aff'd, 324 N.C. 541, 379 S.E.2d 857 (1989).

Purpose of Recordkeeping. — The clerk's proceedings are summary in their nature, and should always be put in such shape as to present all that he does in the course of a proceeding, including his orders and judgments, intelligently, and so that the same may be distinctly seen and understood. To this end, the clerk is required to keep certain permanent records of proceedings before him. Edwards v. Cobb, 95 N.C. 4 (1886).

Judgment Docket Serves as Notice. — The law prescribes what shall be recorded on the judgment docket, and everybody has notice that he may find there whatever ought to be there recorded, if indeed it exists. He is not required to look elsewhere for such matters. But he is required and bound to take notice in proper connections of what is there. The law charges him with such notice. Holman v. Miller, 103 N.C. 118, 9 S.E. 429 (1889); Dewey v. Sugg, 109 N.C. 328, 13 S.E. 923 (1891).

Documents filed as exhibits attached to plaintiff's complaint entered the public domain for purposes of the Public Records Act, G.S. 132-1, and public's right to inspect court records under this section, and became "public records" once the complaint was filed with the clerk of the court, although these exhibits would otherwise have been shielded by G.S.131E-95(b) of the Hospital Licensure Act. Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 515 S.E.2d 675, 1999 N.C. App. LEXIS 432 (1999), cert. denied, 529 U.S. 1033, 120 S. Ct. 1452, 146 L. Ed. 2d 337 (2000).

Civil Issue Docket. — Not only issues of fact joined upon the pleadings, but also all other matters for hearing before the judge at a regular term of the court are to be put upon the civil issue docket. Brown v. Rhinehart, 112 N.C. 772, 16 S.E. 840 (1893). See Brittain v. Mull, 91 N.C. 498 (1884); Walton v. Pearson, 101 N.C. 428, 7 S.E. 566 (1888).

Minute Docket. — The minute docket is intended to and should contain a record of all the proceedings of the court, and such other entries as the judge may direct to be therein made. Walton v. Pearson, 101 N.C. 428, 7 S.E. 566 (1888); Guilford v. Board of Comm'rs, 120 N.C. 23, 27 S.E. 94 (1897).

When Minute Docket Prevails. — While in the absence of entries on the minute docket those made on the civil issue docket should not be disregarded, yet where there is a conflict between them, nothing else appearing, those on the former must prevail. Walton v. Pearson, 101 N.C. 428, 7 S.E. 566 (1888).

Record of Fiats. — Clerks are required to record in general order books copies of all fiats made by them. Perry v. Bragg, 111 N.C. 159, 16 S.E. 10 (1892).

Record of Appointments. — The record of appointments is admissible as evidence to show a guardian's appointment. Topping v. Windley, 99 N.C. 4, 5 S.E. 14 (1888).

Sufficient Notice of Lien. — A notice of a lien filed on the lien docket should go into details sufficiently so as to give reasonable notice to all persons of the character of the claim and the property upon which the lien is attached. Fulp & Linville v. Kernersville Light & Power Co., 157 N.C. 157, 72 S.E. 867 (1911). See Cook v. Cobb, 101 N.C. 68, 7 S.E. 700 (1888); Cameron v. Consolidated Lumber Co., 118 N.C. 266, 24 S.E. 7 (1896).

Former G.S. 2-42 did not require cross-indexing of liens filed in the clerk's office and was not to be confused with the requirements for registering liens, deeds, etc., in the office of the register of deeds as provided by G.S. 161-22, which does require cross-indexing. Saunders v. Woodhouse, 243 N.C. 608, 91 S.E.2d 701 (1956).

A lien for material and labor was properly filed where the clerk after delivery attached it in its original form to specified page in a book labeled "Lien Docket," where the book without question was the book intended as the lien docket contemplated by former G.S. 2-42, though the book was also used for the filing of liens for old age assistance, since former G.S. 108-30.1 provided that such liens should be filed in the regular lien docket. Saunders v. Woodhouse, 243 N.C. 608, 91 S.E.2d 701 (1956).

The failure of the clerk to comply with the statute by neglecting to record all or a part of the proceeding does not render the proceeding void. Any interested party may, by motion, require the proceeding to be recorded, and when a part of the papers has been lost without being recorded, the proceeding does not, because of that fact, lose its vitality or cease to give the protection which the complete record would afford. State Trust Co. v. Toms, 244 N.C. 645, 94 S.E.2d 806 (1956).

The defendant county clerk was not required to comply with G.S. 1-116, 1-117, and 7A-109(b)(6) where the plaintiff was not entitled to have her notice of lis pendens cross-indexed by him on the public record. George v. Administrative Office of Courts, 142 N.C. App. 479, 542 S.E.2d 699, 2001 N.C. App. LEXIS 139 (2001).

Treasurer's Report as Evidence. — The record of the county treasurer's report is competent evidence against the sureties upon the official bond of such officer, and is prima facie evidence of the correctness of statements therein made. Davenport v. McKee, 98 N.C. 500, 4 S.E. 545 (1887).

Recording of Verified Report Purports Verity. — Plaintiff, purchaser of the real property at execution sale of a judgment against the devisee, offered in evidence, as proof of payment and that title had vested in the devisee, a special report, duly verified, filed by the executrix, stating that the devisee had paid the estate the amount stipulated by the will. This special, verified report of the executrix was a document authorized and required to be recorded, was relevant to the issue, and was competent in evidence, its recording purporting verity, and objection to its admission on the ground of hearsay in that it contained a declaration of a person not a party to the action was untenable, the recorded, verified report being more than a mere declaration by the executrix. Braddy v. Pfaff, 210 N.C. 248, 186 S.E. 340 (1936).

Cited in State ex rel. Unemployment Comp. Comm'n v. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941); Shaver v. Shaver, 248 N.C. 113, 102 S.E.2d 791 (1958); McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964); Wolfe v. Hewes, 41 N.C. App. 88, 254 S.E.2d 204 (1979); In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991); WSOC Television, Inc. v. State ex rel. Att'y Gen., 107 N.C. App. 448, 420 S.E.2d 682 (1992).

§ 7A-109.1. List of prisoners furnished to judges.

(a) The clerk of superior court must furnish to each judge presiding over a criminal court a report listing the name, reason for confinement, period of confinement, and, when appropriate, charge or charges, amount of bail and conditions of release, and next scheduled court appearance of each person listed on the most recent report filed under the provisions of G.S. 153A-229.

(b) The clerk must file the report with superior court judges presiding over mixed or criminal sessions at the beginning of each session and must file the report with district court judges at each session or weekly, whichever is the less frequent. (1973, c. 1286, s. 5; 1975, c. 166, s. 22.)

Cross References. — As to jailers' reports of jailed defendants, see G.S. 153A-229.

§ 7A-109.2. (Contingent effective date — see notes) Records of dispositions in criminal cases.

Each clerk of superior court shall ensure that all records of dispositions in criminal cases, including those records filed electronically, contain all the essential information about the case, including the identity of the presiding judge and the attorneys representing the State and the defendant. (1998-208, s. 2.)

Section Set Out Twice. — The section above is effective until the meeting of a contingency described in the Editor's note, below. For this section as effective upon the meeting of that contingency, see the following section, also numbered G.S. 7A-109.2. See Editor's note.

Editor's Note. — Session Laws 2006-253, s. 33, provides in part: "Sections 20.1, 20.2, and the requirement that the Administrative Office of the Courts electronically record certain data contained in subsection (c) of G.S. 20-138.4, as amended by Section 19 of this act, become effective after the next rewrite of the superior court clerks system by the Administrative Office of the Courts."

§ 7A-109.2. (Contingent effective date — see notes) Records of dispositions in criminal cases; impaired driving integrated data system.

(a) Each clerk of superior court shall ensure that all records of dispositions in criminal cases, including those records filed electronically, contain all the essential information about the case, including the the name of the presiding judge and the attorneys representing the State and the defendant.

(b) In addition to the information required by subsection (a) of this section for all offenses involving impaired driving as defined by G.S. 20-4.01, all charges of driving while license revoked for an impaired driving license revocation as defined by G.S. 20-28.2, and any other violation of the motor vehicle code involving the operation of a vehicle and the possession, consumption, use, or transportation of alcoholic beverages, the clerk shall include in the electronic records the following information:

(1) The reasons for any pretrial dismissal by the court.

(2) The alcohol concentration reported by the charging officer or chemical analyst, if any.

(3) The reasons for any suppression of evidence. (1998-208, s. 2; 2006-253, s. 20.1.)

Section Set Out Twice. — The section above is effective upon the meeting of a contingency described in the Editor's note, below. For this section as effective until the meeting of that contingency, see the preceding section, also numbered G.S. 7A-109.2. See Editor's note.

Editor's Note. — Session Laws 2006-253, s. 1, provides: "This act shall be known as "The Motor Vehicle Driver Protection Act of 2006'."

Session Laws 2006-253, s. 20.1, substituted "the name" for "identity" and failed to delete the preceding "the" in subsection (a). Subsection (a) has been set out at the direction of the Revisor of Statutes.

Session Laws 2006-253, s. 33, provides in part: "Sections 20.1, 20.2, and the requirement that the Administrative Office of the Courts electronically record certain data contained in subsection (c) of G.S. 20-138.4, as amended by Section 19 of this act, become effective after the next rewrite of the superior court clerks system by the Administrative Office of the Courts."

Effect of Amendments. — Session Laws 2006-253, s. 20.1, effective December 1, 2006, added "impaired driving integrated data system" in the section heading; inserted the subsection (a) designation and substituted "the name" for "identity" in subsection (a); and added subsection (b).

§ 7A-109.3. Delivery of commitment order.

(a) Whenever the district court sentences a person to imprisonment and commitment to the custody of the Department of Correction pursuant to G.S. 15A-1352, the clerk of superior court shall furnish the sheriff with the signed order of commitment within 48 hours of the issuance of the sentence.

(b) Whenever the superior court sentences a person to imprisonment and commitment to the custody of the Department of Correction pursuant to G.S. 15A-1352, the clerk of superior court shall furnish the sheriff with the signed order of commitment within 72 hours of the issuance of the sentence. (1999-237, s. 18.10(c).)

§ 7A-109.4. Records of offenses involving impaired driving.

The clerk of superior court shall maintain all records relating to an offense involving impaired driving as defined in G.S. 20-4.01(24a) for a minimum of 10 years from the date of conviction. Prior to destroying the record, the clerk shall record the name of the defendant, the judge, the prosecutor, and the attorney or whether there was a waiver of attorney, the alcohol concentration or the fact of refusal, the sentence imposed, and whether the case was appealed to superior court and its disposition. (2006-253, s. 24.)

Editor's Note. — Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006'."

Session Laws 2006-253, s. 33, made this section effective December 1, 2006, and applicable to offenses committed on or after that date.

§ 7A-110. List of attorneys furnished to Secretary of Revenue.

On or before the first of May each year the clerk of superior court shall certify to the Secretary of Revenue the names and addresses of all attorneys-at-law located within the clerk's county who are engaged in the practice of law. (1931, c. 290; 1971, c. 363, s. 7; 1973, c. 476, s. 193.)

Editor's Note. — This section was formerly G.S. 2-45. It was revised and transferred to its present position by Session Laws 1971, c. 363, s. 7.

§ 7A-111. Receipt and disbursement of insurance and other moneys for minors and incapacitated adults.

(a) When a minor under 18 years of age is named beneficiary in a policy or policies of insurance, and the insured dies prior to the majority of such minor, and the proceeds of each individual policy do not exceed twenty-five thousand dollars ($25,000) such proceeds may be paid to and, if paid, shall be received by the public guardian or clerk of the superior court of the county wherein the beneficiary is domiciled. The receipt of the public guardian or clerk shall be a full and complete discharge of the insurer issuing the policy or policies to the extent of the amount paid to such public guardian or clerk.

Any person having in his possession twenty-five thousand dollars ($25,000) or less for any minor under 18 years of age for whom there is no guardian, may pay such moneys into the office of the public guardian, if any, or the office of the clerk of superior court of the county of the recipient's domicile. The receipt of the public guardian or clerk shall constitute a valid release of the payor's obligation to the extent of the sum delivered to the clerk.

The clerk is authorized under this section to receive, to administer and to disburse the monies held in such sum or sums and at such time or times as in his judgment is in the best interest of the child, except that the clerk must first determine that the parents or other persons responsible for the child's support and maintenance are financially unable to provide the necessities for such child, and also that the child is in need of maintenance and support or other necessities, including, when appropriate, education. The clerk shall require receipts or paid vouchers showing that the monies disbursed under this section were used for the exclusive use and benefit of the child.

(b) When an adult who is mentally incapable on account of sickness, old age, disease or other infirmity to manage his own affairs is named beneficiary in a policy or policies of insurance, and the insured dies during the incapacity of such adult, and the proceeds of each individual policy do not exceed five thousand dollars ($5,000) such proceeds may be paid to and, if paid, shall be received by the public guardian or clerk of the superior court of the county wherein the beneficiary is domiciled. A certificate of mental incapacity, signed by a physician or reputable person who has had an opportunity to observe the mental condition of an adult beneficiary, filed with the clerk, is prima facie evidence of the mental incapacity of such adult, and authorizes the clerk to receive and administer funds under this section. The receipt of the public guardian or clerk shall be a full and complete discharge of the insurer issuing the policy or policies to the extent of the amount paid to such public guardian or clerk.

Any person having in his possession five thousand dollars ($5,000) or less for any incapacitated adult for whom there is no guardian, may pay such monies into the office of the public guardian, if any, or the office of the clerk of superior court of the county of the recipient's domicile. The clerk's receipt shall constitute a valid release of the payor's obligation to the extent of the sum delivered to the clerk.

The clerk is authorized to receive, to administer and, upon a finding of fact that it is in the best interest of the incapacitated adult, to disburse funds directly to a creditor, a relative or to some discreet and solvent neighbor or friend for the purpose of handling the property and affairs of the incapacitated adult. The clerk shall require receipts or paid vouchers showing that the monies disbursed under this section were used for the exclusive use and benefit of the incapacitated adult.

(c) Any monies paid to the clerk of the superior court under subsection (a) of this section shall also include the name, last known address, social security number or taxpayer identification number of the beneficiary or payee, and the name and address of the nearest relative of the beneficiary or payee.

(d) The determination of incapacity authorized in subsection (b) of this section is separate and distinct from the procedure for the determination of incompetency provided in Chapter 35A. (1899, c. 82; Rev., s. 924; 1911, c. 29, s. 1; 1919, c. 91; C.S., s. 962; Ex. Sess., 1924, c. 1, s. 1; 1927, c. 76; 1929, c. 15; 1933, c. 363; 1937, c. 201; 1945, c. 160, ss. 1, 2; 1949, c. 188; 1953, c. 101; 1959, c. 794, ss. 1, 2; 1961, c. 377; 1971, c. 363, s. 8; c. 1231, s. 1; 1983, c. 65, s. 3; 1987, c. 29; c. 550, s. 14.)

Local Modification. — Cumberland: 1957, c. 1143; Wake: 1961, c. 613.

Editor's Note. — This section combines former G.S. 2-52 and 2-53. The former sections were revised, combined and transferred to their present position by Session Laws 1971, c. 363, s. 8.

CASE NOTES

As to the authority of the clerk to receive payment and satisfy a judgment rendered in favor of an infant, see Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Cited in McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964).

§ 7A-112. Investment of funds in clerk's hands.

(a) The clerk of the superior court may in his discretion invest moneys secured by virtue or color of the clerk's office or as receiver in any of the following securities:

(1) Obligations of the United States or obligations fully guaranteed both as to principal and interest by the United States;

(2) Obligations of the State of North Carolina;

(3) Obligations of North Carolina cities or counties approved by the Local Government Commission; and

(4) Shares of any building and loan association organized under the laws of this State, or of any federal savings and loan association having its principal office in this State, and certificates of deposit for time deposits or savings accounts in any bank or trust company authorized to do business in North Carolina, to the extent in each instance that such shares or deposits are insured by the State or federal government or any agency thereof or by any mutual deposit guaranty

association authorized by the Commissioner of Banks of North Carolina to do business in North Carolina pursuant to Article 7A of Chapter 54 of the General Statutes. If the clerk desires to deposit in a bank, saving and loan, or trust company funds entrusted to the clerk by virtue or color of the clerk's office, beyond the extent that such deposits are insured by the State or federal government or an agency thereof or by any mutual deposit guaranty association authorized by the Commissioner of Banks of North Carolina to do business in North Carolina pursuant to Article 7A of Chapter 54 of the General Statutes, the clerk shall require such depository to furnish a corporate surety bond or obligations of the United States or obligations fully guaranteed both as to principal and interest by the United States or obligations of the State of North Carolina, or of counties and municipalities of North Carolina whose obligations have been approved by the Local Government Commission.

(b) When money in a single account in excess of two thousand dollars ($2,000) is received by the clerk by virtue or color of his office and it can reasonably be expected that the money will remain on deposit with the clerk in excess of six months from date of receipt, the money exceeding two thousand dollars ($2,000) shall be invested by the clerk within 60 days of receipt in investments authorized by this section. The first two thousand dollars ($2,000) of these accounts and money in a single account totaling less than two thousand dollars ($2,000), received by the clerk by virtue or color of his office, shall be invested, or administered, or invested and administered, by the clerk in accordance with regulations promulgated by the Administrative Officer of the Courts. This subsection shall not apply to cash bonds or to money received by the clerk to be disbursed to governmental units.

(c) The State Auditor is hereby authorized and empowered to inspect the records of the clerk to insure compliance with this section, and he shall report noncompliance with the provisions of this section to the Administrative Officer of the Courts.

(d) It shall be unlawful for the clerk of the superior court of any county receiving any money by virtue or color of his office to apply or invest any of it except as authorized under this section. Any clerk violating the provisions of this section shall be guilty of a Class 1 misdemeanor. (1931, c. 281, ss. 1-3, 5; 1937, c. 188; 1939, cc. 86, 110; 1943, c. 543; 1971, c. 363, s. 9; c. 956, s. 1; 1973, c. 1446, s. 4; 1975, c. 496, ss. 1, 2; 1989, c. 76, s. 13; 1993, c. 539, s. 4; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 656, s. 1; 2001-193, s. 16.)

Local Modification. — Cleveland: 1933, c. 110; Forsyth: 1945, c. 876, s. 4.

Cross References. — As to investment of funds in different types of investments, see G.S. 36A-2. As to investments in bonds issued or guaranteed by the United States government, see G.S. 53-44.

Editor's Note. — This section combines former G.S. 2-54, 2-55, 2-56 and 2-60. The provisions of the former sections were rewritten, combined and transferred to their present position by Session Laws 1971, c. 363, s. 9.

Article 7A of c. 54, referred to in subdivision (a)(4) of this section, was repealed by Session Laws 1981, c. 282, s. 1. See now Chapter 54B, Article 12, G.S. 54B-236 et seq.

Legal Periodicals. — See 9 N.C.L. Rev. 399 (1931).

CASE NOTES

Cited in State ex rel. Page v. Sawyer, 223 N.C. 102, 25 S.E.2d 443 (1943); In re Estate of Nixon, 2 N.C. App. 422, 163 S.E.2d 274 (1968); In re Castillian Apts., Inc., 281 N.C. 709, 190 S.E.2d 161 (1972).

§ 7A-112.1. Deposit of money held by clerks.

The clerk of superior court shall deposit any funds that he receives by virtue of his office, except funds invested pursuant to G.S. 7A-112, in an interest-bearing checking account or accounts in a bank, savings and loan, or trust company licensed to do business in North Carolina, at the maximum feasible interest rate available taking into consideration prevailing interest rates and the checking account services provided to the clerk's office by the bank, savings and loan, or trust company. The funds deposited in such checking accounts shall be guaranteed to the same extent and in the same manner as funds invested pursuant to G.S. 7A-112. (1985, c. 475, s. 1.)

§ 7A-113. Bookkeeping and accounting systems equipment.

Notwithstanding the provisions of G.S. 147-64.6(10), proposed changes in the kinds of bookkeeping and accounting systems equipment employed by the clerk of superior court shall be subject to review and approval by the Office of State Budget and Management. The Administrative Officer of the Courts shall, prior to implementing any change in the kinds of equipment, file with the Office of State Budget and Management a request for approval of the change, along with supporting information. If within 30 days of the filing of the request the Office of State Budget and Management has not disapproved the request, the request shall be deemed to be approved. (1983 (Reg. Sess., 1984), c. 1109, s. 9; 2000-140, s. 93.1(a); 2001-424, s. 12.2(b).)

Editor's Note. — The reference in this section to G.S. 147-64.6(10) was apparently intended to be a reference to G.S. 147-64.6(c)(10).

§ 7A-114. Where practical, provision of secure area for domestic violence victims waiting for hearing.

Where practical, upon request of a domestic violence victim, the clerk of Superior Court of any county shall coordinate with the county Sheriff to make available to the victim a secure area, segregated from the general population of the courtroom, to await hearing of their court case. The Clerk shall notify the presiding judge on the date of the hearing that the victim is present in a segregated location. (2007-15, s. 2.)

Editor's Note. — The first paragraph of Session Laws 2007-15, s. 2, was codified as this section at the direction of the Revisor of Statutes.

The second paragraph of Session Laws 2007-15, s. 2, provides: "The Administrative Office of the Courts shall report to the Joint Legislative Committee on Domestic Violence no later than May 1, 2008, on the progress of providing the space in each courthouse."

Session Laws 2007-15, s. 3, made this section effective April 12, 2007.

§§ 7A-115 through 7A-129: Reserved for future codification purposes.

SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

Article 13.

Creation and Organization of the District Court Division.

§ 7A-130. Creation of district court division and district court districts; seats of court.

The district court division of the General Court of Justice is hereby created. It consists of various district courts organized in territorial districts. The numbers and boundaries of the districts are as provided by G.S. 7A-133. The district court shall sit in the county seat of each county, and at such additional places in each county as the General Assembly may authorize, except that sessions of court are not required at an additional seat of court unless the chief district judge and the Administrative Officer of the Courts concur in a finding that the facilities are adequate. (1965, c. 310, s. 1; 1987, c. 509, s. 14; c. 738, s. 124.)

Editor's Note. — Session Laws 2004-186, s. 20.1, provides: "The North Carolina Supreme Court is respectfully requested to adopt rules establishing minimum standards of education and training for district court judges in handling civil and criminal domestic violence cases."

CASE NOTES

Cited in In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969); State v. T.D.R., 347 N.C. App. 489, 495 S.E.2d 700 (1998).

§ 7A-131. Establishment of district courts.

District courts are established, within districts, in accordance with the following schedule:

(1) On the first Monday in December, 1966, the first, the twelfth, the fourteenth, the sixteenth, the twenty-fifth, and the thirtieth districts;

(2) On the first Monday in December, 1968, the second, the third, the fourth, the fifth, the sixth, the seventh, the eighth, the ninth, the tenth, the eleventh, the thirteenth, the fifteenth, the eighteenth, the twentieth, the twenty-first, the twenty-fourth, the twenty-sixth, the twenty-seventh, and the twenty-ninth districts;

(3) On the first Monday in December, 1970, the seventeenth, the nineteenth, the twenty-second, the twenty-third, and the twenty-eighth districts. (1965, c. 310, s. 1.)

Legal Periodicals. — For article, "Some Aspects of the Criminal Court Process in North Carolina," see 49 N.C.L. Rev. 469 (1971).

CASE NOTES

Issuance of Warrants. — Only officials authorized to issue warrants by statutes in force on November 6, 1962, may continue to issue warrants until district courts are established in the district. State v. Matthews, 270 N.C. 35, 153 S.E.2d 791 (1967).

Cited in In re Holt, 1 N.C. App. 108, 160 S.E.2d 90 (1968); In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969); Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969); Kinney v. Goley, 4 N.C. App. 325, 167 S.E.2d 97 (1969); State v. Stilley, 4 N.C. App. 638, 167 S.E.2d 529 (1969); Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970); Kelly v. Davenport, 7 N.C. App. 670, 173 S.E.2d 600 (1970); State v. Barker, 8 N.C. App. 311, 174 S.E.2d 88 (1970); Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 438 (1971); Ford Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971); State v. Stafford, 11 N.C. App. 520, 181 S.E.2d 741 (1971); In re Hopper, 11 N.C. App. 611, 182 S.E.2d 228 (1971); State v. Elledge, 13 N.C. App. 462, 186 S.E.2d 192 (1972); In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

§ 7A-132. Judges, district attorneys, full-time assistant district attorneys and magistrates for district court districts.

Each district court district shall have one or more judges and one district attorney. Each county within each district shall have at least one magistrate.

For each district the General Assembly shall prescribe the numbers of district judges, and the numbers of full-time assistant district attorneys. For each county within each district the General Assembly shall prescribe a minimum number of magistrates. (1965, c. 310, s. 1; 1967, c. 1049, s. 5; 1973, c. 47, s. 2; 2006-187, s. 7(b).)

Effect of Amendments. — Session Laws 2006-187, s. 7(b), effective July 1, 2006, deleted "and a maximum" preceding "number of magistrates" at the end of the second paragraph.

§ 7A-133. Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties.

(a) (**Contingently effective January 1, 2008, until January 1, 2009; see Editor's note for contingency regarding Districts 11, 12, and 18**) Each district court district shall have the numbers of judges as set forth in the following table:

District	Judges	County
1	5	Camden
		Chowan
		Currituck
		Dare
		Gates
		Pasquotank
		Perquimans
2	4	Martin
		Beaufort
		Tyrrell
		Hyde
		Washington
3A	5	Pitt
3B	6	Craven
		Pamlico
		Carteret
4	8	Sampson
		Duplin

G.S. 7A-133(a) is set out three times. See notes.

District	Judges	County
		Jones
		Onslow
5	8	New Hanover
		Pender
6A	3	Halifax
6B	3	Northampton
		Bertie
		Hertford
7	7	Nash
		Edgecombe
		Wilson
8	6	Wayne
		Greene
		Lenoir
9	4	Granville
		(part of Vance see subsection (b))
		Franklin
9A	2	Person
		Caswell
9B	2	Warren
		(part of Vance see subsection (b))
10	17	Wake
11	10	Harnett
		Johnston
		Lee
12	10	Cumberland
13	6	Bladen
		Brunswick
		Columbus
14	7	Durham
15A	4	Alamance
15B	5	Orange
		Chatham
16A	3	Scotland
		Hoke
16B	5	Robeson
17A	3	Rockingham
17B	4	Stokes
		Surry
18	14	Guilford
19A	4	Cabarrus
19B	7	Montgomery
		Moore
		Randolph
19C	5	Rowan

G.S. 7A-133(a) is set out three times. See notes.

District	Judges	County
20A	4	Stanly Anson Richmond
20B	1	(part of Union see subsection (b))
20C	2	(part of Union see subsection (b))
20D	1	Union
21	10	Forsyth
22	9	Alexander Davidson Davie Iredell
23	4	Alleghany Ashe Wilkes Yadkin
24	4	Avery Madison Mitchell Watauga Yancey
25	9	Burke Caldwell Catawba
26	19	Mecklenburg
27A	7	Gaston
27B	5	Cleveland Lincoln
28	7	Buncombe
29A	3	McDowell Rutherford
29B	4	Henderson Polk Transylvania
30	6	Cherokee Clay Graham Haywood Jackson Macon Swain.

(a) (**Effective January 1, 2009, until January 15, 2009**) Each district court district shall have the numbers of judges as set forth in the following table:

G.S. 7A-133(a) is set out three times. See notes.

District	Judges	County
1	5	Camden Chowan Currituck Dare Gates Pasquotank Perquimans
2	4	Martin Beaufort Tyrrell Hyde Washington
3A	5	Pitt
3B	6	Craven Pamlico Carteret
4	8	Sampson Duplin Jones Onslow
5	8	New Hanover Pender
6A	3	Halifax
6B	3	Northampton Bertie Hertford
7	7	Nash Edgecombe Wilson
8	6	Wayne Greene Lenoir
9	4	Granville (part of Vance see subsection (b)) Franklin
9A	2	Person Caswell
9B	2	Warren (part of Vance see subsection (b))
10	17	Wake
11	10	Harnett Johnston Lee
12	10	Cumberland
13	6	Bladen

G.S. 7A-133(a) is set out three times. See notes.

District	Judges	County
		Brunswick
		Columbus
14	7	Durham
15A	4	Alamance
15B	5	Orange
		Chatham
16A	3	Scotland
		Hoke
16B	5	Robeson
17A	3	Rockingham
17B	4	Stokes
		Surry
18	14	Guilford
19A	4	Cabarrus
19B	7	Montgomery
		Moore
		Randolph
19C	5	Rowan
20A	4	Stanly
		Anson
		Richmond
20B	1	(part of Union see subsection (b))
20C	2	(part of Union see subsection (b))
20D	1	Union
21	10	Forsyth
22A	5	Alexander
		Iredell
22B	6	Davidson
		Davie
23	4	Alleghany
		Ashe
		Wilkes
		Yadkin
24	4	Avery
		Madison
		Mitchell
		Watauga
		Yancey
25	9	Burke
		Caldwell
		Catawba
26	19	Mecklenburg
27A	7	Gaston
27B	5	Cleveland
		Lincoln

G.S. 7A-133(a) is set out three times. See notes.

District	Judges	County
28	7	Buncombe
29A	3	McDowell
		Rutherford
29B	4	Henderson
		Polk
		Transylvania
30	6	Cherokee
		Clay
		Graham
		Haywood
		Jackson
		Macon
		Swain.

(a) (**Effective January 15, 2009**) Each district court district shall have the numbers of judges as set forth in the following table:

District	Judges	County
1	5	Camden
		Chowan
		Currituck
		Dare
		Gates
		Pasquotank
		Perquimans
2	4	Martin
		Beaufort
		Tyrrell
		Hyde
		Washington
3A	5	Pitt
3B	6	Craven
		Pamlico
		Carteret
4	8	Sampson
		Duplin
		Jones
		Onslow
5	9	New Hanover
		Pender
6A	3	Halifax
6B	3	Northampton
		Bertie
		Hertford
7	7	Nash

G.S. 7A-133(a) is set out three times. See notes.

District	Judges	County
		Edgecombe
		Wilson
8	6	Wayne
		Greene
		Lenoir
9	4	Granville
		(part of Vance
		see subsection (b))
		Franklin
9A	2	Person
		Caswell
9B	2	Warren
		(part of Vance
		see subsection (b))
10	18	Wake
11	10	Harnett
		Johnston
		Lee
12	10	Cumberland
13	6	Bladen
		Brunswick
		Columbus
14	7	Durham
15A	4	Alamance
15B	5	Orange
		Chatham
16A	3	Scotland
		Hoke
16B	5	Robeson
17A	3	Rockingham
17B	4	Stokes
		Surry
18	14	Guilford
19A	4	Cabarrus
19B	7	Montgomery
		Moore
		Randolph
19C	5	Rowan
20A	4	Stanly
		Anson
		Richmond
20B	1	(part of Union
		see subsection (b))
20C	2	(part of Union
		see subsection (b))
20D	1	Union
21	10	Forsyth

G.S. 7A-133(a) is set out three times. See notes.

District	Judges	County
22A	5	Alexander Iredell
22B	6	Davidson Davie
23	4	Alleghany Ashe Wilkes Yadkin
24	4	Avery Madison Mitchell Watauga Yancey
25	9	Burke Caldwell Catawba
26	20	Mecklenburg
27A	7	Gaston
27B	5	Cleveland Lincoln
28	7	Buncombe
29A	3	McDowell Rutherford
29B	4	Henderson Polk Transylvania
30	6	Cherokee Clay Graham Haywood Jackson Macon Swain.

(b) For district court districts of less than a whole county, or with part or all of one county with part of another, the composition of the district is as follows:

(1) District Court District 9 consists of Franklin and Granville Counties and the remainder of Vance County not in District Court District 9B.

(2) District Court District 9B consists of Warren County and East Henderson I, North Henderson I, North Henderson II, Middleburg, Townsville, and Williamsboro Precincts of Vance County.

(3) District Court District 20C consists of the remainder of Union County not in District Court District 20B.

(4) District Court District 20B consists of Precinct 01: Tract 204.01: Block Group 2: Block 2040, Block 2057, Block 2058, Block 2060, Block 2061, Block 2062, Block 2064, Block 2065; Tract 204.02: Block Group 2: Block 2001, Block 2002, Block 2003, Block 2004, Block 2005, Block 2006, Block 2007, Block 2008, Block 2009, Block 2010, Block 2011,

G.S. 7A-133(a) is set out three times. See notes.

Block 2012, Block 2013, Block 2014, Block 2015, Block 2016, Block 2017, Block 2018, Block 2023, Block 2024, Block 2025, Block 2026, Block 2027, Block 2028, Block 2029, Block 2030, Block 2031, Block 2032, Block 2033, Block 2034; Block Group 3: Block 3000, Block 3003, Block 3004, Block 3005, Block 3006, Block 3007, Block 3008, Block 3009, Block 3010, Block 3011, Block 3012, Block 3013, Block 3014, Block 3015, Block 3016, Block 3017, Block 3018, Block 3019, Block 3020, Block 3021, Block 3022, Block 3023, Block 3024, Block 3025, Block 3026, Block 3027, Block 3028, Block 3029, Block 3030, Block 3031, Block 3032, Block 3033, Block 3034, Block 3035, Block 3036, Block 3037, Block 3038, Block 3039, Block 3040, Block 3041, Block 3042, Block 3043, Block 3044, Block 3045, Block 3046, Block 3047; Block Group 4: Block 4035, Block 4054, Block 4055; Precinct 02: Tract 205: Block Group 1: Block 1000, Block 1001, Block 1002, Block 1003, Block 1004, Block 1005, Block 1006, Block 1007, Block 1009, Block 1010, Block 1011, Block 1012, Block 1013, Block 1014, Block 1015, Block 1016, Block 1017, Block 1018, Block 1019, Block 1020, Block 1021, Block 1022, Block 1023, Block 1037, Block 1038; Block Group 2: Block 2081, Block 2082, Block 2092, Block 2099, Block 2100, Block 2101, Block 2102; Tract 206: Block Group 3: Block 3036, Block 3038, Block 3039, Block 3040, Block 3048; Block Group 4: Block 4053; Precinct 03, Precinct 04, Precinct 06: Tract 202.02: Block Group 1: Block 1012, Block 1013, Block 1014, Block 1015, Block 1017, Block 1018, Block 1021, Block 1022, Block 1023; Tract 204.01: Block Group 2: Block 2000, Block 2001, Block 2002, Block 2003, Block 2004, Block 2005, Block 2033, Block 2034, Block 2035, Block 2036, Block 2041, Block 2042, Block 2043, Block 2044, Block 2045, Block 2056, Block 2063, Block 2999; Precinct 08, Precinct 09, Precinct 10, Precinct 13, Precinct 23: Tract 206: Block Group 4: Block 4051; Precinct 25: Tract 206: Block Group 4: Block 4036; Precinct 34, Precinct 36, Precinct 43 of Union County.

Precinct boundaries as used in this section for Vance County are those shown on maps on file with the Legislative Services Office on May 1, 1991, for Union County, are those shown on the Legislative Services Office's redistricting computer database on January 1, 2005; and for other counties are those reported by the United States Bureau of the Census under Public Law 94-171 for the 1990 Census in the IVTD Version of the TIGER files.

(b1) The qualified voters of District Court District 11 shall elect all eight judges established for the District in subsection (a) of this section, but only persons who reside in Johnston County may be candidates for five of the judgeships, only persons who reside in Harnett County may be candidates for two of the judgeships, and only persons who reside in Lee County may be candidates for the remaining judgeship.

(b2) The qualified voters of District Court District 13 shall elect all six judges established for the District in subsection (a) of this section, but only persons who reside in Bladen County may be candidates for one of those judgeships, only persons who reside in Columbus County may be candidates for one of those judgeships, and only persons who reside in Brunswick County may be candidates for two of those judgeships. The district court judgeship established for residents of Bladen County by this subsection shall be the judgeship currently held by Judge Phillips, who resides in Bladen County. The district court judgeship established for residents of Columbus County by this subsection shall be the judgeship currently held by Judge Jolly, who resides in Columbus County. The district court judgeships established for residents of

G.S. 7A-133(a) is set out three times. See notes.

Brunswick County by this subsection shall be the judgeships currently held by Judge Barefoot and Judge Warren, who reside in Brunswick County. Those judges' successors shall be elected for four-year terms in the 2008 general election. Candidates for the remaining judgeships in District 13 may be residents of any county within the district.

(b3) (**Effective January 1, 2009**) The qualified voters of District Court District 22A shall elect all five judges established for the District in subsection (a) of this section, but only persons who reside in Alexander County may be candidates for two of the judgeships, and only persons who reside in Iredell County may be candidates for three of the judgeships.

(b4) (**Effective January 1, 2009**) The qualified voters of District Court District 22B shall elect all six judges established for the District in subsection (a) of this section, but only persons who reside in Davie County may be candidates for two of the judgeships, and only persons who reside in Davidson County may be candidates for four of the judgeships.

(c) Each county shall have the numbers of magistrates and additional seats of district court, as set forth in the following table:

County	Magistrates Min.	Additional Seats of Court
Camden	3	
Chowan	3	
Currituck	4	
Dare	6	
Gates	2	
Pasquotank	5	
Perquimans	3	
Martin	4	
Beaufort	5.05	
Tyrrell	3	
Hyde	3.5	
Washington	4	
Pitt	10.5	Farmville Ayden
Craven	10	Havelock
Pamlico	3	
Carteret	9	
Sampson	7	
Duplin	8	
Jones	2	
Onslow	11	
New Hanover	11	
Pender	4.8	
Halifax	12	Roanoke Rapids, Scotland Neck
Northampton	5.25	
Bertie	5	
Hertford	6	
Nash	9	Rocky Mount

G.S. 7A-133(a) is set out three times. See notes.

County	Magistrates Min.	Additional Seats of Court
Edgecombe	7	Rocky Mount
Wilson	7	
Wayne	9	Mount Olive
Greene	4	
Lenoir	7	La Grange
Granville	7	
Vance	6	
Warren	3.5	
Franklin	7	
Person	4	
Caswell	4	
Wake	18.5	Apex, Wendell, Fuquay-Varina, Wake Forest
Harnett	10	Dunn
Johnston	11	Benson, Clayton, Selma
Lee	5.5	
Cumberland	19	
Bladen	5	
Brunswick	9	
Columbus	9.5	Tabor City
Durham	13	
Alamance	12	Burlington
Orange	9	Chapel Hill
Chatham	6	Siler City
Scotland	5	
Hoke	5	
Robeson	15	Fairmont, Maxton, Pembroke, Red Springs, Rowland, St. Pauls
Rockingham	9	Reidsville, Eden, Madison
Stokes	5	
Surry	9	Mt. Airy
Guilford	24.4	High Point
Cabarrus	9	Kannapolis
Montgomery	5	

G.S. 7A-133(a) is set out three times. See notes.

County	Magistrates Min.	Additional Seats of Court
Randolph	10	Liberty
Rowan	9	
Stanly	6	
Union	7	
Anson	5	
Richmond	6	Hamlet
Moore	6.5	Southern Pines
Forsyth	15	Kernersville
Alexander	4	
Davidson	10	Thomasville
Davie	4	
Iredell	9	Mooresville
Alleghany	2	
Ashe	4	
Wilkes	6	
Yadkin	4	
Avery	4	
Madison	4	
Mitchell	4	
Watauga	5	
Yancey	3	
Burke	6.75	
Caldwell	7	
Catawba	10	Hickory
Mecklenburg	26.50	
Gaston	17	
Cleveland	8	
Lincoln	6	
Buncombe	15	
Henderson	6.5	
McDowell	4.5	
Polk	4	
Rutherford	7	
Transylvania	4	
Cherokee	4	
Clay	2	
Graham	2	
Haywood	6.75	Canton
Jackson	5	
Macon	3.5	
Swain	3.75	

(1965, c. 310, s. 1; 1967, c. 691, s. 8; 1969, c. 1190, s. 10; c. 1254; 1971, c. 377, s. 7; cc. 727, 840, 841, 842, 843, 865, 866, 898; 1973, cc. 132, 373, 483; c. 838,

G.S. 7A-133(a) is set out three times. See notes.

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s. 1; c. 1376; 1975, c. 956, ss. 8, 10; 1977, cc. 121, 122; c. 678, s. 2; c. 947, s. 1; c. 1130, ss. 4, 5; 1977, 2nd Sess., c. 1238, s. 3; c. 1243, ss. 3, 6; 1979, c. 465; c. 838, ss. 117, 118; c. 1072, ss. 2, 3; 1979, 2nd Sess., c. 1221, s. 2; 1981, c. 964, s. 4; 1983, c. 881, s. 5; 1983 (Reg. Sess., 1984), c. 1109, s. 5; 1985, c. 698, ss. 7(a), 12; 1985 (Reg. Sess., 1986), c. 1014, s. 222; 1987, c. 738, ss. 126(a), 130(a); 1987 (Reg. Sess., 1988), c. 1056, s. 4; c. 1075; c. 1100, s. 17.2(a); 1989, c. 795, s. 23(a), (d), (h); 1991, c. 742, ss. 11, 12(a); 1993, c. 321, ss. 200.4(e), 200.6(a), (d); 1993 (Reg. Sess., 1994), c. 769, s. 24.9; 1995, c. 507, s. 21.1(c); 1995 (Reg. Sess., 1996), c. 589, s. 2(a); 1996, 2nd Ex. Sess., c. 18, ss. 22.4, 22.7(a); 1997-443, ss. 18.12(a), 18.13; 1998-212, ss. 16.11, 16.16(a); 1998-217, s. 67.3(a); 1999-237, ss. 17.4, 17.6(a); 2000-67, ss. 15.2, 15.3(a); 2001-400, s. 1; 2001-424, ss. 22.16, 22.17(a); 2003-284, s. 13.8; 2004-124, ss. 14.1(a), 14.6(e); 2005-276, s. 14.2(f), (f1); 2005-345, s. 27(a), (b); 2006-66, ss. 14.4(a), 14.5; 2006-96, s. 1; 2006-187, s. 7(a); 2006-221, s. 14(a); 2006-264, s. 93(a); 2007-323, ss. 14.13(a), (d), 14.25(e), (f); 2007-484, s. 25(a), 36.)

Subsection (a) Set Out Three Times. — The first version of subsection (a) set out above is effective January 1, 2008, but see Editor's note regarding contingency for Districts 11, 12 and 18. The second version of subsection (a) set out above is effective January 1, 2009, until January 15, 2009. The third version of subsection (a) set out above is effective January 15, 2009.

Additional judgeship — Union County. — Section 14.4(a) of Session Laws 2006-66 substituted "4" for "3" as the number of district court judges in District Court District 20B (Union County) in subsection (a) of this section. Section 14.4(a), however, fails to take into account the earlier amendment by Session Laws 2006-276, s. 14.2(f1), as added by Session Laws 2005-345, s. 27(a), which divided District Court District 20B (Union County) into District Court Districts 20B, with one district court judge, and 20C, with two district court judges. At the time Session Laws 2006-66 was enacted, District Court District 20B had only one district court judge, not three, and Union County had two district court districts, not one. The amendment by s. 14.4(a) as it applies to Union County cannot be effectively codified. The Revisor of Statutes has directed that subsection (a) be set out in the form above and that the amendment by s. 14.4 as it applies to Union County be described in this editor's note.

Session Laws 2007-484, s. 25(b), provides: "The additional district court judgeship created for District Court District 20B in Section 14.4(a) of S.L. 2006-66 is reassigned to District Court District 20D, as established in subsection (a) of this section."

Preclearance Under § 5 of the Voting Rights Act. — For information on receipt of preclearance, please refer to the *North Carolina Register* (website at http://www.oah.state.nc.us/rules/register) or the Administrative Office of the Courts (website at http://www.nccourts.org) as described in Chapter 120, Article 6A, G.S. 120-30.9A et seq.

Session Laws 1995, c. 507, s. 21.1(h), provides in part that c. 507, s. 21.1(c) and (d) become effective January 1, 1996, or 15 days after the date upon which those subsections are approved under section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated November 8, 1995.

Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 5, provides that c. 589, s. 2 becomes effective January 1, 1997, or the date upon which that section is approved under section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated December 16, 1996.

Session Laws 1996, Second Extra Session, c. 18, s. 22.7(c), provides that the amendment by Session Laws 1996, Second Extra Session, c. 18, s. 22.7, becomes effective December 15, 1996, as to any district court district where no county is subject to section 5 of the Voting Rights Act of 1965. As to any district court district where any county is subject to section 5 of the Voting Rights Act of 1965, the amendment becomes effective December 15, 1996, or 15 days after the date upon which it is approved under Section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated November 25, 1996.

Session Laws 1997-443, s. 18.12(a), which amended subsection (a), provides in s. 18.12(c): "Subsection (a) of this section becomes effective December 1, 1997, as to any district where no county is subject to Section 5 of the Voting Rights Act of 1965. As to any district where any county is subject to Section 5 of the Voting Rights Act of 1965, subsection (a) of this section becomes effective December 1, 1997, or 15 days after the date upon which that subsection is approved under Section 5 of the Voting Rights Act." Preclearance was received from the U.S. Department of Justice by letter dated December 8, 1997.

Session Laws 1998-212, s. 16.16(c), provides that subsection (a) of that section becomes effective December 15, 1998, as to any district where no county is subject to section 5 of the Voting Rights Act of 1965 and, as to any district where any county is subject to section 5 of the Voting Rights Act of 1965, subsection (a) becomes effective December 15, 1998, or 15 days after the date upon which the subsection is approved under section 5 of the Voting Rights Act. Preclearance was received from the U.S. Department of Justice.

Session Laws 1999-237, s. 17.6(c), provides that subsection (a) of this section becomes effective January 1, 2000, as to any district in which no county is subject to section 5 of the Voting Rights Act of 1965. As to any district in which any county is subject to section 5 of the Voting Rights Act of 1965, subsection (a) becomes effective January 1, 2000, or 15 days after the date upon which that subsection is approved under section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated September 27, 1999.

Session Laws 2000-67, s. 15.3(c), made subsection (a) of this section effective December 15, 2000, as to any district in which no county is subject to section 5 of the Voting Rights Act of 1965 (Act) and, as to any district in which any county is subject to section 5 of the Act, December 15, 2000, or 15 days after the date upon which that subsection is approved under section 5 of the Act, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated October 26, 2000.

Session Laws 2001-400, s. 5, provided that c. 400 becomes effective July 1, 2002, or the date upon which c. 400 is approved under section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated June 21, 2002.

Session Laws 2001-424, s. 22.17(c), provides: "This section becomes effective January 1, 2002, except that the elimination of the vacant judgeship in District Court District 17A is effective the later of January 1, 2002, or the date upon which it is approved under section 5 of the Voting Rights Act of 1965."

Session Laws 2005-276, s. 14.2(q), provides, in part: "With respect to the division of District Court District 20, subsections (f) through (k) of this section become effective December 1, 2005, or the date upon which subsection (f) of this section is approved under section 5 of the Voting Rights Act of 1965, whichever is later. With respect to the division of District Court District 29, subsections (f) through (k) of this section become effective December 1, 2005." Preclearance was received from the U.S. Department of Justice by letter dated January 5, 2006.

Session Laws 2006-66, s. 14.4(c), provides: "This section becomes effective January 15, 2007, as to any district court district not subject to section 5 of the Voting Rights Act of 1965. As to any district court district subject to section 5 of the Voting Rights Act of 1965, it becomes effective January 15, 2007, or the date upon which the additional judge added for that district by subsection (a) of this section is approved under section 5 of the Voting Rights Act of 1965, whichever is later."

Session Laws 2006-96, s. 5, provides in part: "Section 1 of this act, which added subsection (b2), becomes effective October 1, 2006, or the date upon which Section 1 of this act is approved under section 5 of the Voting Rights Act of 1965, whichever is later." Preclearance was received by letter dated December 21, 2006.

Session Laws 2007-323, s. 14.13(c), provides: "As to Districts 11, 12, and 18, subsection (a) of this section becomes effective January 1, 2008, or 15 days after preclearance under section 5 of the Voting Rights Act of 1965, whichever is later. All other portions of subsection (a) and subsection (b) of this section become effective January 1, 2008."

Filling Vacancies in Additional District Court Judgeships. — Session Laws 2000-67, s. 15.3(b), provides that, notwithstanding the provisions of G.S. 7A-142, the Governor shall appoint additional district court judges for District Court Districts 1, 4, 9B, 10, 11, 17A, 22, 26, and 28, as authorized by subsection (a). Those judges' successors shall be elected in the 2004 election for four year terms commencing on the first Monday in December 2004.

Session Laws 2001-400, ss. 2 to 4, provide: "Section 2. The district court judgeships established for residents of Harnett County by Section 1 of this act shall be filled by the district court judges serving District 11 who reside in Harnett County on October 1, 2002. Those judges' successors shall be elected for four-year terms in the 2004 election.

"Section 3. The district court judgeship established for residents of Lee County by Section 1 of this act shall be filled by the district court judge serving District 11 who resides in Lee County on October 1, 2002. That judge's successor shall be elected for a four-year term in the 2004 election.

"Section 4. The district court judgeships established for residents of Johnston County by Section 1 of this act shall be filled by the district court judges who reside in Johnston County on October 1, 2002. The terms of office of two of the judges residing in Johnston County expire on the first Monday in December 2002. Those judges' successors shall be elected for four-year terms in the 2002 election. The successors to the remaining judges residing in Johnston County shall be elected for four-year terms in the 2004 election."

Session Laws 2001-424, s. 22.17(b), provides: "(b) The Governor shall appoint the additional district court judge for District Court District 10 authorized by subsection (a) of this section [s. 22.17(a) of Session Laws 2001-424]. The judge's successor shall be elected in the 2004 election for a four-year term commencing on the first Monday in December 2004.

Session Laws 2004-124, s. 14.6(f), as amended by Session Laws 2005-276, s. 14.2(j), provides: "(f) The Governor shall appoint the additional district court judges for Districts 5, 21, and 29A authorized by subsection (e) of this section, and those judges' successors shall be elected in the 2006 general election for four-year terms commencing on the first Monday in December 2006.

"The district court judge for the additional judgeship in District 17B, as authorized by subsection (e) of this section, shall be elected in the 2004 general election in the same manner as provided for in G.S. 163-329 to serve a four-year term beginning the first Monday in December 2004, and no vacancy exists before that date."

Session Laws 2005-276, s. 14.2(g), provides: "The four district court judgeships for District 20A under subsection (f) of this section shall be filled by the district court judges from current District 20 who reside in Anson, Stanly, and Richmond Counties. The term of the judge living in Anson County expires the first Monday in December 2008. That judge's successor shall be elected in the 2008 election. The term of the judge living in Stanly County expires the first Monday in December 2006. That judge's successor shall be elected in the 2006 election. The term of one of the judges living in Richmond County expires the first Monday in December 2006. That judge's successor shall be elected in the 2006 election. The term of the other judge living in Richmond County expires the first Monday in December 2008. That judge's successor shall be elected in the 2008 election."

Session Laws 2005-276, s. 14.2(h), as amended by Session Laws 2005-345, s. 27(c), provides: "The district court judgeship for District 20B under subsection (f) of this section shall be filled by the district court judge from current District 20 who resides in that portion of Union County included in District 20B. The term of that judge expires the first Monday in December 2008. That judge's successor shall be elected in the 2008 general election. The two district court judgeships for District 20C under subsection (f) of this section shall be filled by the other two district court judges from current District 20 who reside in Union County. The terms of those judges expire the first Monday in December 2008. Those judges' successors shall be elected in the 2008 general election."

Session Laws 2005-276, s. 14.2(i), provides: "The three district court judgeships for District 29A under subsection (f) of this section shall be filled by the district court judges from current District 29 who reside in McDowell and Rutherford Counties and by the judge established for District 29 to be appointed by the Governor pursuant to Section 14.6 of S.L. 2004-124, as amended by subsection (j) of this section. The term of the judge living in Rutherford County expires the first Monday in December 2006. That judge's successor shall be elected in the 2006 general election. The term of the judge living in McDowell County expires the first Monday in December 2006. That judge's successor shall be elected in the 2006 election."

Session Laws 2005-276, s. 14.2(k), provides: "The four district court judgeships for District 29B under subsection (f) of this section shall be filled by the district court judges from current District 29 who reside in Henderson and Transylvania Counties. The term of the three judges living in Henderson County expires the first Monday in December 2008. Those judges' successors shall be elected in the 2008 general election. The term of the judge living in Transylvania County expires the first Monday in December 2008. That judge's successor shall be elected in the 2008 general election."

Editor's Note. — Session Laws 1995, c. 507, s. 21.1(g), provides that notwithstanding any other provision of law, any person who has previously served as a magistrate is eligible to be appointed as a magistrate.

Session Laws 1995, c. 507, s. 28.9, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1995-97 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1995-97 biennium."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5, contains a severability clause.

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2002-126, ss. 14.6(a) and (b), provides: "(a) Notwithstanding the provisions of G.S. 7A-133(c) establishing minimum numbers of magistrate provisions in each county, the Administrative Office of the Courts shall identify and eliminate five magistrate positions across the State in a manner that minimizes the impact on access to court resources. Positions may be eliminated only in counties that currently have at least five magistrate positions, and no more than one position per judicial district may be eliminated.

"In identifying the five positions, the Administrative Office of the Courts shall:

"(1) Identify counties with a disproportionate number of magistrate positions, based upon caseload;

"(2) Consider more cost-effective methods of providing access to magistrates in rural areas;

"(3) Determine the optimal mix of part-time and full-time magistrate positions; and

"(4) Consider ongoing discussions before the Courts Commission and the Judicial Counsel on magistrate staffing and jurisdiction.

"(b) The Administrative Office of the Courts shall report by December 1, 2002, to the Chairs of the Senate and House of Representatives Appropriations Committees and the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety on the positions to be eliminated and the methodology used to identify those positions."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6, contains a severability clause.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 14.1(b), effective July 1, 2004, provides: "The Administrative Office of the Courts shall evaluate the need for magistrates across the State and shall reexamine the caseload formula it uses to assign priority to that need, considering county population, warrant workload, and automation levels. The Administrative Office of the Courts shall report its findings to the General Assembly by March 15, 2005."

Session Laws 2004-124, s. 14.6(g), provides: "Subsection (e) of this section is effective when it becomes law, except that the terms of the judges appointed by the Governor pursuant to subsection (f) of this section begin on December 15, 2004."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 14.4(b), provides: "The Governor shall appoint the additional district court judges for Districts 3B, 6A, 10, 11, 14, 15B, 17A, 18, 19B, 19C, 20B, 25, 26, 27A, 27B, 28, and 30 authorized by this act, and those judges' successors shall be elected in the 2008 election for four-year terms commencing on January 1, 2009."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-264, s. 93(b), provides: "(b) This section becomes effective December 1, 2005, or the date upon which Section 14.2(f) of S.L. 2005-276 is approved under section 5 of the Voting Rights Act of 1965, whichever is later."

Session Laws 2006-264, s. 93(c), repealed Session Laws 2006-264, s. 93, if House Bill 198, 2005 Regular Session, became law, which it did not. Session Laws 2007-484, s. 36, repealed Session Laws 2006-264, s. 93(c).

Session Laws 2007-323, s. 14.13(b), provides: "The Governor shall appoint the additional district court judges authorized by subsection (a) of this section. Those judges' successors shall be elected in the 2008 general election for four-year terms commencing January 1, 2009."

Session Laws 2007-323, s. 14.13(e), provides:

"The Governor shall appoint the additional district court judges authorized by subsection (d) of this section. Those judges' successors shall be elected in the 2010 general election for four-year terms commencing January 1, 2011."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-276, ss. 14.2(f) and 14.2(f1) as added by Session Laws 2005-345, s. 27(a), effective December 1, 2005, or the date on which approval is granted under § 5 of the Voting Rights Act of 1965, whichever is later, substituted Districts 20A through 20C for District 20, and Districts 29A and 29B for District 29.

Session Laws 2006-66, s. 14.4(a), effective January 15, 2007, rewrote subsection (a). For contingency, see Editor's note. For Districts 20B and 20C, see Editor's note.

Session Laws 2006-66, s. 14.4(a), as amended by Session Laws 2006-221, s. 14(a), effective January 15, 2007, substituted "7" for "6" under "Judges" in Districts 27A and 28.

Session Laws 2006-66, s. 14.5, as amended by Session Laws 2006-187, s. 7(a), effective July 1, 2006, adjusted the number of magistrates in subsection (c).

Session Laws 2006-96, s. 1, effective October 1, 2006, or the date upon which Section 1 of the act is approved under Section 5 of the Voting Rights Act of 1965, whichever is later, added subsection (b2).

Session Laws 2006-264, s. 93(a), effective December 1, 2005, or the date upon which Section 14.2(f) of S.L. 2005-276 is approved under section 5 of the Voting Rights Act of 1965, whichever is later, in subdivision (b)(3), substituted "District 20C" for "District 20B", and "District 20B" for "District 20C"; and in subdivision (b)(4), substituted "District 20B" for "District 20C". S.L. 2005-276, s. 14.2(f) became effective January 5, 2006.

Session Laws 2007-323, s. 14.13(a), effective January 1, 2008, in subsection (a), substituted "17" for "16" in District 10, substituted "10" for "9" in District 21, and substituted "19" for "18" in District 26; and effective January 1, 2008, or 15 days after preclearance under section 5 of the Voting Rights Act, whichever is later, substituted "10" for "9" in Districts 11 and 12, and substituted "14" for "13" in District 18.

Session Laws 2007-323, s. 14.13(d), effective January 15, 2009, in subsection (a), substituted "9" for "8" in District 5, substituted "18" for "17" in District 10, and substituted "20" for "19" in District 26.

Session Laws 2007-323, s. 14.25(e), effective January 1, 2009, in subsection (a), substituted Districts 22A and 22B for District 22, which had 9 judges total.

Session Laws 2007-323, s. 14.25(f), effective January 1, 2009, but applicable to the 2008 election as provided in the terms of this section, added subsections (b3) and (b4).

Session Laws 2007-484, s. 25(a), effective August 30, 2007, added "20D" and the corresponding number of judges and county to the list of district court districts in subsection (a).

CASE NOTES

Preclearance of Acts Pursuant to Voting Rights Act. — Where superior court judges were elected pursuant to Session Laws 1965, c. 262, Session Laws 1967, c. 997, Session Laws 1977, cc. 1119, 1130 and 1238, and Session Laws 1983, c. 1109, and such legislative acts had not been precleared by the Attorney General as required by section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, the federal district court would enjoin such elections retroactively in those counties subject to section 5 of the Voting Rights Act; the fact that an election law deals with the election of members of the judiciary does not remove it from the ambit of section 5 of the Voting Rights Act. Haith v. Martin, 618 F. Supp. 410 (E.D.N.C. 1985), aff'd, 477 U.S. 901, 106 S. Ct. 3268, 91 L. Ed. 2d 559 (1986).

§ 7A-134: Repealed by Session Laws 1973, c. 1339, s. 2.

§ 7A-135. Transfer of pending cases when present inferior courts replaced by district courts.

On the date that the district court is established in any county, cases pending in the inferior court or courts of that county shall be transferred to the appropriate division of the General Court of Justice, and all records of these courts shall be transferred to the office of clerk of superior court in that county pursuant to rule of Supreme Court. (1965, c. 310, s. 1.)

CASE NOTES

Applied in State v. Caudle, 276 N.C. 550, 173 S.E.2d 778 (1970).

Cited in In re Bowen, 7 N.C. App. 236, 172 S.E.2d 62 (1970); Ford Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971).

§§ 7A-136 through 7A-139: Reserved for future codification purposes.

ARTICLE 14.

District Judges.

§ 7A-140. Number; election; term; qualification; oath.

There shall be at least one district judge for each district. Each district judge shall be elected by the qualified voters of the district court district in which he or she is to serve at the time of the election for members of the General Assembly. The number of judges for each district shall be determined by the General Assembly. Each judge shall be a resident of the district for which elected, and shall serve a term of four years, beginning on the first day in January next after election.

Each district judge shall devote his or her full time to the duties of the office. He or she shall not practice law during the term, nor shall he or she during such term be the partner or associate of any person engaged in the practice of law.

Before entering upon his or her duties, each district judge, in addition to other oaths prescribed by law, shall take the oath of office prescribed for a judge of the General Court of Justice. (1965, c. 310, s. 1; 1969, c. 1190, s. 11; 2005-425, s. 3.1.)

Editor's Note. — An amendment to this section by Session Laws 1981, c. 504, s. 6, was made effective upon certification of approval of the constitutional amendments proposed by ss. 1-3 of the act. The constitutional amendments were submitted to the people at an election held June 29, 1982, and were defeated. The 1981 amendment to this section therefore never went into effect.

CASE NOTES

Cited in Bradshaw v. Administrative Office of Courts, 83 N.C. App. 237, 349 S.E.2d 621 (1986); Republican Party v. Martin, 980 F.2d 943 (4th Cir. 1992), rehearing denied, 991 F.2d 1202 (4th Cir.), cert. denied, 510 U.S. 828, 114 S. Ct. 93, 126 L. Ed. 2d 60 (1993).

§ 7A-141. Designation of chief judge; assignment of judge to another district for temporary or specialized duty.

When more than one judge is authorized in a district, the Chief Justice of the Supreme Court shall designate one of the judges as chief district judge to serve in such capacity at the pleasure of the Chief Justice. In a single judge district, the judge is the chief district judge.

The Chief Justice may transfer a district judge from one district to another for temporary or specialized duty. (1965, c. 310, s. 1.)

§ 7A-142. Vacancies in office.

A vacancy in the office of district judge shall be filled for the unexpired term by appointment of the Governor from nominations submitted by the bar of the judicial district as defined in G.S. 84-19, except that in judicial District 9, when vacancies occur in District Court District 9 or 9B, only those members who reside in the district court district shall participate in the selection of the nominees. If the district court district is comprised of counties in more than one judicial district, the nominees shall be submitted jointly by the bars of those judicial districts, but only those members who reside in the district court district shall participate in the selection of the nominees. If the district court judge was elected as the nominee of a political party, then the district bar shall submit to the Governor the names of three persons who are residents of the district court district who are duly authorized to practice law in the district and who are members of the same political party as the vacating judge; provided that if there are not three persons who are available, the bar shall submit the names of two persons who meet the qualifications of this sentence. If the district court judge was not elected as the nominee of a political party, then the district bar shall submit to the Governor the names of three persons who are residents of the district court district and who are duly authorized to practice law in the district; provided that if there are not three persons who are available, the bar shall submit the names of two persons who meet the qualifications of this sentence. Within 60 days after the district bar submits nominations for a vacancy, the Governor shall appoint to fill the vacancy. If the Governor fails to appoint a district bar nominee within 60 days, then the district bar nominee who received the highest number of votes from the district bar shall fill the vacancy. If the district bar fails to submit nominations within 30 days from the date the vacancy occurs, the Governor may appoint to fill the vacancy without waiting for nominations. (1965, c. 310, s. 1; 1975, c. 441; 1981, c. 763, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 1006, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 16; c. 1056, s. 7; c. 1086, s. 112(b); 1991, c. 742, s. 16; 1999-237, s. 17.10; 2001-403, s. 2(a); 2002-159, s. 58.)

Editor's Note. — Session Laws 1999-237, s. 1.1, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999'."

Session Laws 1999-237, s. 17.6(b), provides that the provisions of G.S. 7A-142 notwithstanding, the Governor shall appoint additional district court judges for District Court Districts 2, 5, 13, 15A, 18, 19A, 26, 27A, and 30 as authorized by subsection (a) of this section. Those judges' successors shall be elected in the 2002 election for four-year terms commencing on the first Monday in December 2002.

Session Laws 1999-237, s. 30.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 30.4, contains a severability clause.

Session Laws 2000-67, s. 15.3(b), provides that, notwithstanding the provisions of G.S. 7A-142, the Governor shall appoint additional district court judges for District Court Districts 1, 4, 9B, 10, 11, 17A, 22, 26, and 28, as authorized by subsection (a). Those judges' successors shall be elected in the 2004 election for four-year terms commencing on the first Monday in December 2004.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Session Laws 2002-159, s. 58, effective October 11, 2002, repealed Session Laws 2001-403, s. 2(b), which would have deleted, effective December 2, 2002, the former third sentence, which read: "If the district court judge was elected as the nominee of a political party, then the district bar shall submit to the Governor the names of three persons who are residents of the district court district who are duly authorized to practice law in the district and who are members of the same political party as the vacating judge; provided that if there are not three persons who are available, the bar shall submit the names of two persons who meet the qualifications of this sentence."

Legal Periodicals. — For note, "Baker v. Martin and the Constitutionality of Partisan Qualifications for Appointment to District Courts," see 70 N.C.L. Rev. 1916 (1992).

CASE NOTES

Constitutionality. — This section, which provides that candidates for a vacancy in the office of a district judge shall be members of the same political party as the vacating judge, does not violate the Constitution of North Carolina. Baker v. Martin, 330 N.C. 331, 410 S.E.2d 887 (1991).

There is no constitutional impediment to the North Carolina General Assembly's decision to fill judicial vacancies only with nominees of the same political affiliation as the vacating judge. Davis v. Martin, 807 F. Supp. 385 (W.D.N.C. 1992).

There is no constitutional impediment to the North Carolina General Assembly's decision to fill judicial vacancies only with nominees of the same political affiliation as the vacating judge. Davis v. Martin, 807 F. Supp. 385 (W.D.N.C. 1992).

Challenge Held Moot. — Complaint filed on August 29, 1986, by individual who wished to be considered in selection process for district court judge, but who was ineligible by virtue of this section, seeking to have the requirement that the persons nominated by the Bar to fill a vacancy for district court judge be members of the same political party as the vacating judge declared unconstitutional only for the purpose of permitting him to be included in the selection process, where the Bar meeting that he sought to participate in had been held on August 25, 1986, was moot when it was filed and would be dismissed. Pearson v. Martin, 319 N.C. 449, 355 S.E.2d 496, cert. denied, 319 N.C. 678, 356 S.E.2d 789 (1987).

Preference Given in Interim Appointment Permitted. — The General Assembly may require that in the interim appointment of a district court judge, preference must be given to a member of the same political party as the vacating judge. Baker v. Martin, 330 N.C. 331, 410 S.E.2d 887 (1991).

§ 7A-143: Repealed by Session Laws 1973, c. 148, s. 6.

§ 7A-144. Compensation.

(a) Each judge shall receive the annual salary provided in the Current Operations Appropriations Act, and reimbursement on the same basis as State employees generally, for his necessary travel and subsistence expenses.

(b) Notwithstanding merit, longevity and other increment raises paid to regular State employees, a judge of the district court shall receive as longevity pay an annual amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, nineteen and two-tenths percent (19.2%) after 20 years of service, and twenty-four percent (24%) after 25 years of service. "Service" means service as a justice or judge of the General Court of Justice or as a member of the Utilities Commission or as director or assistant director of the Administrative Office of the Courts. Service shall also mean service as a district attorney or as a clerk of superior court. (1965, c. 310, s. 1; 1967, c. 691, s. 10; 1983, c. 761, s. 245; 1983 (Reg. Sess., 1984), c. 1034, s. 165; c. 1109, ss. 11, 13.1; 1985, c. 698, s. 10(a); 1987 (Reg. Sess., 1988), c. 1100, s. 15(d); 1989, c. 770, s. 5; 2007-323, s. 28.18A(f).)

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.18A(f), effective July 1, 2007, in the first sentence of subsection (b), deleted "and" preceding "nineteen" and added "and twenty-four percent (24%) after 25 years of service" at the end.

§ 7A-145: Repealed by Session Laws 1971, c. 377, s. 32.

§ 7A-146. Administrative authority and duties of chief district judge.

The chief district judge, subject to the general supervision of the Chief Justice of the Supreme Court, has administrative supervision and authority over the operation of the district courts and magistrates in his district. These powers and duties include, but are not limited to, the following:

(1) Arranging schedules and assigning district judges for sessions of district courts;

(2) Arranging or supervising the calendaring of noncriminal matters for trial or hearing;

(3) Supervising the clerk of superior court in the discharge of the clerical functions of the district court;

(4) Assigning matters to magistrates, and consistent with the salaries set by the Administrative Officer of the Courts, prescribing times and places at which magistrates shall be available for the performance of their duties; however, the chief district judge may in writing delegate his authority to prescribe times and places at which magistrates in a particular county shall be available for the performance of their duties to another district court judge or the clerk of the superior court, and the person to whom such authority is delegated shall make monthly reports to the chief district judge of the times and places actually served by each magistrate; and

(5) Making arrangements with proper authorities for the drawing of civil court jury panels and determining which sessions of district court shall be jury sessions;

(6) Arranging for the reporting of civil cases by court reporters or other authorized means;

(7) Arranging sessions, to the extent practicable for the trial of specialized cases, including traffic, domestic relations, and other types of cases, and assigning district judges to preside over these sessions so as to permit maximum practicable specialization by individual judges;

(8) Repealed by Session Laws 1991 (Regular Session, 1992), c. 900, s. 118(b), effective July 15, 1992.

(9) Assigning magistrates during an emergency to temporary duty outside the county of their residence but within that district; and, upon the request of a chief district judge of an adjoining district and upon the approval of the Administrative Officer of the Courts, to temporary duty in the district of the requesting chief district judge; and

(10) Designating another district judge of his district as acting chief district judge, to act during the absence or disability of the chief district judge. (1965, c. 310, s. 1; 1971, c. 377, s. 8; 1977, c. 945, s. 1; 1983, c. 586, s. 1; 1983 (Reg. Sess., 1984), c. 1034, s. 85; 1985, c. 425, s. 2; c. 764, s. 8; 1985 (Reg. Sess., 1986), c. 852, s. 17; 1991 (Reg. Sess., 1992), c. 900, s. 118(b).)

Legal Periodicals. — For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Purpose of Section. — Legislative anticipation of the procedural quagmires and "judge shopping" that could result from multi-judge districts was a factor prompting the enactment of this section. Johnson v. Johnson, 7 N.C. App. 310, 172 S.E.2d 264 (1970).

Authority of Judge Other Than Chief District Judge to Hear Motions and Enter Interlocutory Orders. — Under the provisions of the first portion of G.S. 7A-192, before a district court judge, other than the chief district judge, may hear motions and enter interlocutory orders at any session of district court in cases calendared for trial or hearing at such session, he must be first assigned by the chief district judge under the provisions of subdivision (1) of this section to preside at such session. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

In order to have authority to act on any motion, a district judge, other than the chief district judge, must be properly authorized under this section and G.S. 7A-192 to hold a session of court at which the matter is properly before him or under G.S. 7A-192 to hear the matter in chambers. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

District judge assigned to preside at the session in question by the chief district judge of the Thirtieth Judicial District was not without authority to hear defendant's motion to dismiss in Swain County over written objection of plaintiff who had filed his complaint in Cherokee County. Scroggs v. Ramsey, 74 N.C. App. 730, 329 S.E.2d 680 (1985).

Judgment Entered by Unauthorized Judge Is Void. — The judgment entered by a district court judge in favor of plaintiff, which directed, among other things, that defendant immediately pay to plaintiff's attorney a certain sum for legal services rendered, was interlocutory and was void, since the district court judge who entered the order had not been assigned by the chief district judge to preside over a session of court in the county where the judgment was entered, nor was he authorized by order or rule entered by the chief judge to hear motions and enter interlocutory orders on that date. Stroupe v. Stroupe, 301 N.C. 656, 273 S.E.2d 434 (1981).

Administrative Order for Discovery in Abuse, Neglect, and Dependency Proceedings. — Trial court did not commit an abuse of discretion by applying an administrative order governing all discovery in abuse, neglect, and dependency proceedings and denying the parents' motions to continue because the gravamen of the problem fell with the inability of the attorneys to make time to review the records in accordance with the administrative order. In re J.S., — N.C. App. —, 641 S.E.2d 395, 2007 N.C. App. LEXIS 494 (2007).

Applied in Routh v. Weaver, 67 N.C. App. 426, 313 S.E.2d 793 (1984).

Cited in Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975); In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977); Dishman v. Dishman, 37 N.C. App. 543, 246 S.E.2d 819 (1978); Laroque v. Laroque, 46 N.C. App. 578, 265 S.E.2d 444 (1980); Schumacher v. Schumacher, 109 N.C. App. 309, 426 S.E.2d 467 (1993); Ward v. Ward, 116 N.C. App. 643, 448 S.E.2d 862 (1994); Young v. Young, 133 N.C. App. 332, 515 S.E.2d 478 (1999).

OPINIONS OF ATTORNEY GENERAL

Time When Trial Session of District Court Ends. — See opinion of Attorney General to Honorable John C. Clifford, Judge of the District Court, 21st Judicial District, 40 N.C.A.G. 117 (1969).

§ 7A-147. Specialized judgeships.

(a) Prior to January 1 of each year in which elections for district court judges are to be held, the Administrative Officer of the Courts may, with the approval of the chief district judge, designate one or more judgeships in districts having three or more judgeships, as specialized judgeships, naming in each case the specialty. Designations shall become effective when filed with the State Board of Elections. Nominees for the position or positions of specialist judge shall be made in the ensuing primary and the position or positions shall be filled at the general election thereafter. The State Board of Elections shall prepare primary and general election ballots to effectuate the purposes of this section.

(b) The designation of a specialized judgeship shall in no way impair the right of the chief district judge to arrange sessions for the trial of specialized cases and to assign any district judge to preside over these sessions. A judge elected to a specialized judgeship has the same powers as a regular district judge.

(c) The policy of the State is to encourage specialization in juvenile cases by district court judges who are qualified by training and temperament to be effective in relating to youth and in the use of appropriate community resources to meet their needs. The Administrative Office of the Courts is therefore authorized to encourage judges who hear juvenile cases to secure appropriate training whether or not they were elected to a specialized judgeship as provided herein. Such training shall be provided within the funds available to the Administrative Office of the Courts for such training, and judges attending such training shall be reimbursed for travel and subsistence expenses at the same rate as is applicable to other State employees.

The Administrative Office of the Courts shall develop a plan whereby a district court judge may be better qualified to hear juvenile cases by reason of training, experience, and demonstrated ability. Any district court judge who completes the training under this plan shall receive a certificate to this effect from the Administrative Office of the Courts. In districts where there is a district court judge who has completed this training as herein provided, the chief district judge shall give due consideration in the assignment of such cases where practical and feasible. (1965, c. 310, s. 1; 1975, c. 823; 1979, c. 622, s. 1.)

§ 7A-148. Annual conference of chief district judges.

(a) The chief district judges of the various district court districts shall meet at least once a year upon call of the Chief Justice of the Supreme Court to discuss mutual problems affecting the courts and the improvement of court operations, to prepare and adopt uniform schedules of offenses for the types of offenses specified in G.S. 7A-273(2) and G.S. 7A-273(2a) for which magistrates and clerks of court may accept written appearances, waivers of trial or hearing and pleas of guilty or admissions of responsibility, and establish a schedule of penalties or fines therefor, and to take such further action as may be found practicable and desirable to promote the uniform administration of justice.

(b) The chief district judges shall prescribe a multicopy uniform traffic ticket and complaint for exclusive use in each county of the State not later than December 31, 1970. (1965, c. 310, s. 1; 1967, c. 691, s. 11; 1983, c. 586, s. 2; 1985, c. 425, s. 1; c. 764, s. 9; 1985 (Reg. Sess., 1986), c. 852, s. 17; 1991, c. 151, s. 1; c. 609, s. 2; 1991 (Reg. Sess., 1992), c. 900, s. 118(a); 1999-80, s. 2.)

CASE NOTES

Cited in In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

§ 7A-149. Jurisdiction; sessions.

(a) Notwithstanding any other provision of law, a district court judge of a district court district which is in a set of districts as defined by G.S. 7A-200 has jurisdiction in the entire county or counties in which the district is located to the same extent as if the district encompassed the entire county, and has jurisdiction in the entire set of districts to the same extent as if the district encompassed the entire set of districts.

(b) All sessions of district court shall be for an entire county, whether that county comprises or is located in a district or in a set of districts as defined in G.S. 7A-200, and at each session all matters and proceedings arising anywhere in the county may be heard.

(c) All clerks of court for a county have jurisdiction over the entire county, notwithstanding that the county may be part of a set of districts. (1995, c. 507, s. 21.1(b).)

§§ 7A-150 through 7A-159: Reserved for future codification purposes.

Article 15.

District Prosecutors.

§§ 7A-160 through 7A-165: Repealed by Session Laws 1967, c. 1049, s. 6.

§§ 7A-166 through 7A-169: Reserved for future codification purposes.

Article 16.

Magistrates.

§ 7A-170. Nature of office and oath.

A magistrate is an officer of the district court. Before entering upon the duties of his office, a magistrate shall take the oath of office prescribed for a magistrate of the General Court of Justice. A magistrate possesses all the powers of his office at all times during his term. (1965, c. 310, s. 1; 1969, c. 1190, s. 13; 1977, c. 945, s. 2.)

CASE NOTES

A magistrate is an officer of the district court, and in issuing a warrant a magistrate performs a judicial act. Foust v. Hughes, 21 N.C. App. 268, 204 S.E.2d 230, cert. denied, 285 N.C. 589, 205 S.E.2d 722 (1974).

And Is Not Subject to Civil Action for Errors in Discharge of His Duties. — A judge of a court of this State is not subject to civil action for errors committed in the discharge of his official duties. This immunity applies even when the judge is accused of acting maliciously and corruptly, and is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences. Thus plaintiff failed to state a claim for false imprisonment against a magistrate by reason of any act of the magistrate in issuing warrants for plaintiff's arrest. Foust v. Hughes, 21 N.C. App. 268, 204 S.E.2d 230, cert. denied, 285 N.C. 589, 205 S.E.2d 722 (1974).

Judicial Immunity Granted. — Whether or not a magistrate's alleged comments made in connection with plaintiff's arrest regarding a domestic violence matter were appropriate, they were made in connection with judicial acts within the magistrate's jurisdiction; he was, therefore, entitled to immunity, and his motion to dismiss plaintiff's 42 U.S.C.S. § 1983 claim was granted. Cole v. Summey, 329 F. Supp. 2d 591, 2004 U.S. Dist. LEXIS 15840 (M.D.N.C. 2004).

Applied in State v. Flowers, 12 N.C. App. 487, 183 S.E.2d 820 (1971); First Union Nat'l Bank v. Richards, 90 N.C. App. 650, 369 S.E.2d 620 (1988).

Cited in Sutton v. Figgatt, 280 N.C. 89, 185 S.E.2d 97 (1971); Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975); Bradshaw v. Administrative Office of Courts, 320 N.C. 132, 357 S.E.2d 370 (1987).

OPINIONS OF ATTORNEY GENERAL

No Continued Residence Requirements. — Continued residence in the county for which a magistrate is appointed is not a prerequisite to remain in the office of magistrate for the term of the appointment. See opinion of Attorney General to Mr. David A. Phillips, Attorney at Law, 1997 N.C.A.G. 61 (10/8/97).

§ 7A-171. Numbers; appointment and terms; vacancies.

(a) The General Assembly shall establish a minimum quota of magistrates for each county. In no county shall the minimum quota be less than one. The number of magistrates in a county, above the minimum quota set by the General Assembly, is determined by the Administrative Office of the Courts after consultation with the chief district court judge for the district in which the county is located.

(a1) The initial term of appointment for a magistrate is two years and subsequent terms shall be for a period of four years. The term of office begins on the first day of January of the odd-numbered year after appointment. The service of an individual as a magistrate filling a vacancy as provided in subsection (d) of this section does not constitute an initial term. For purposes of this section, any term of office for a magistrate who has served a two-year term is for four years even if the two-year term of appointment was before the effective date of this section, the term is after a break in service, or the term is for appointment in a different county from the county where the two-year term of office was served.

(b) Not earlier than the Tuesday after the first Monday nor later than the third Monday in December of each even-numbered year, the clerk of the superior court shall submit to the senior regular resident superior court judge of the district or set of districts as defined in G.S. 7A-41.1(a) in which the clerk's county is located the names of two (or more, if requested by the judge) nominees for each magisterial office for the county for which the term of office of the magistrate holding that position shall expire on December 31 of that year. Not later than the fourth Monday in December, the senior regular resident superior court judge shall, from the nominations submitted by the clerk of the superior court, appoint magistrates to fill the positions for each county of the judge's district or set of districts.

(c) If an additional magisterial office for a county is approved to commence on January 1 of an odd-numbered year, the new position shall be filled as provided in subsection (b) of this section. If the additional position takes effect at any other time, it is to be filled as provided in subsection (d) of this section.

(d) Within 30 days after a vacancy in the office of magistrate occurs the clerk of superior court shall submit to the senior regular resident superior court judge the names of two (or more, if so requested by the judge) nominees for the office vacated. Within 15 days after receipt of the nominations the senior regular resident superior court judge shall appoint from the nominations received a magistrate who shall take office immediately and shall serve until December 31 of the even-numbered year, and thereafter the position shall be filled as provided in subsection (b) of this section. (1965, c. 310, s. 1; 1967, c. 691, s. 15; 1971, s. 84, s. 1; 1973, c. 503, s. 2; 1977, c. 945, ss. 3, 4; 1987 (Reg. Sess., 1988), c. 1037, s. 17; 2004-128, s. 19; 2006-187, s. 7(c).)

Editor's Note. — Session Laws 1993, c. 321, s. 200.4(h), provides that the magistrates' positions created by the amendment to G.S. 7A-133 by c. 321, s. 200.4(e) for Person County in newly created District 9A shall be filled by the magistrates currently serving Person County in District 9 and that the magistrates' positions created by the amendment to G.S. 7A-133 by c. 321, s. 200.4(e) for Caswell County in newly created District 9A shall be filled by the magistrates currently serving Caswell County in District 17A. Section 200.4(h) of c. 321 becomes effective November 1, 1993, or the date upon which subsections (e) and (f) of the section are approved under Section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated February 14, 1994.

Session Laws 2004-128, ss. 17 and 18, provide: "Section 17. The amendment set out in

Section 16 of this act shall be submitted to the qualified voters of the State at the general election in November 2004, which election shall be conducted under the laws then governing elections in the State. Ballots, voting systems, or both may be used in accordance with Chapter 163 of the General Statutes. The question to be used in the voting systems and ballots shall be:

"[ ] FOR [ ] AGAINST

"Constitutional amendment to provide for the first term of office for magistrates of the General Court of Justice to be two years and for subsequent terms to be four years.

"Section 18. If a majority of the votes cast on the question are in favor of the amendment set out in Section 16 of this act, the State Board of Elections shall certify the amendment to the Secretary of State, who shall enroll the amendment so certified among the permanent records of that office. The amendment becomes effective January 1, 2005."

Session Laws 2004-128, s. 20, provides that s. 19 of the act becomes effective January 1, 2005, but only upon voter approval of the constitutional amendment to N.C. Const. art. IV, § 10, proposed in s. 16 of the act, and is applicable to appointments that take effect after January 1, 2005.

The constitutional amendment proposed by Session Laws 2004-128, s. 16, was adopted by vote of the people at the general election held November 2, 2004.

Effect of Amendments. — Session Laws 2006-187, s. 7(c), effective July 1, 2006, in subsection (a), deleted "and a maximum" preceding "quota of magistrates" in the first sentence, and substituted "above the minimum quota" for "within the quota" in the second sentence.

CASE NOTES

Appointing Judge Conducting Magistrate Removal Hearing. — Every Resident Regular Superior Court Judge who appoints a magistrate does not have, as a matter of law, a personal bias or prejudice which would disqualify him under Code of Judicial Conduct, Canon 3 from conducting a magistrate's removal hearing pursuant to G.S. 7A-173(c). In re Ezzell, 113 N.C. App. 388, 438 S.E.2d 482 (1994).

Cited in Bradshaw v. Administrative Office of Courts, 83 N.C. App. 237, 349 S.E.2d 621 (1986).

OPINIONS OF ATTORNEY GENERAL

Judge has duty to appoint magistrates, which may be enforced by a writ of mandamus. See opinion of Attorney General to Honorable Ralph A. Allison, Clerk of Superior Court, 40 N.C.A.G. 137 (1970).

§ 7A-171.1. Duty hours, salary, and travel expenses within county.

(a) The Administrative Officer of the Courts, after consultation with the chief district judge and pursuant to the following provisions, shall set an annual salary for each magistrate.

(1) A full-time magistrate shall be paid the annual salary indicated in the table set out in this subdivision. A full-time magistrate is a magistrate who is assigned to work an average of not less than 40 hours a week during the term of office. The Administrative Officer of the Courts shall designate whether a magistrate is full-time. Initial appointment shall be at the entry rate. A magistrate's salary shall increase to the next step every two years on the anniversary of the date the magistrate was originally appointed for increases to Steps 1 through 3, and every four years on the anniversary of the date the magistrate was originally appointed for increases to Steps 4 through 6.

Table of Salaries of Full-Time Magistrates

Step Level	*Annual Salary*
Entry Rate	*$31,533*
Step 1	*34,425*

Step Level	*Annual Salary*
Step 2	*37,571*
Step 3	*41,006*
Step 4	*44,768*
Step 5	*49,007*
Step 6	*53,760.*

(2) A part-time magistrate is a magistrate who is assigned to work an average of less than 40 hours of work a week during the term, except that no magistrate shall be assigned an average of less than 10 hours of work a week during the term. A part-time magistrate is included, in accordance with G.S. 7A-170, under the provisions of G.S. 135-1(10) and G.S. 135-40.2(a). The Administrative Officer of the Courts designates whether a magistrate is a part-time magistrate. A part-time magistrate shall receive an annual salary based on the following formula: The average number of hours a week that a part-time magistrate is assigned work during the term shall be multiplied by the annual salary payable to a full-time magistrate who has the same number of years of service prior to the beginning of that term as does the part-time magistrate and the product of that multiplication shall be divided by the number 40. The quotient shall be the annual salary payable to that part-time magistrate.

(3) Notwithstanding any other provision of this subsection, a magistrate who is licensed to practice law in North Carolina or any other state shall receive the annual salary provided in the Table in subdivision (1) of this subsection for Step 4.

(a1) Notwithstanding subsection (a) of this section, the following salary provisions apply to individuals who were serving as magistrates on June 30, 1994:

(1) The salaries of magistrates who on June 30, 1994, were paid at a salary level of less than five years of service under the table in effect that date shall be as follows:

Less than 1 year of service	*$25,428*
1 or more but less than 3 years of service	*26,595*
3 or more but less than 5 years of service	*28,944.*

Upon completion of five years of service, those magistrates shall receive the salary set as the Entry Rate in the table in subsection (a).

(2) The salaries of magistrates who on June 30, 1994, were paid at a salary level of five or more years of service shall be based on the rates set out in subsection (a) as follows:

Salary Level on June 30, 1994	*Salary Level on July 1, 1994*
5 or more but less than 7 years of service	*Entry Rate*
7 or more but less than 9 years of service	*Step 1*
9 or more but less than 11 years of service	*Step 2*
11 or more years of service	*Step 3*

Thereafter, their salaries shall be set in accordance with the provisions in subsection (a).

(3) The salaries of magistrates who are licensed to practice law in North Carolina shall be adjusted to the annual salary provided in the table in subsection (a) as Step 4, and, thereafter, their salaries shall be set in accordance with the provisions in subsection (a).

(4) The salaries of "part-time magistrates" shall be set under the formula set out in subdivision (2) of subsection (a) but according to the rates set out in this subsection.

(a2) The Administrative Officer of the Courts shall provide magistrates with longevity pay at the same rates as are provided by the State to its employees subject to the State Personnel Act.

(b) Notwithstanding G.S. 138-6, a magistrate may not be reimbursed by the State for travel expenses incurred on official business within the county in which the magistrate resides. (1977, c. 945, s. 5; 1979, c. 838, s. 84; c. 991; 1979, 2nd Sess., c. 1137, s. 11; 1981, c. 914, s. 1; c. 1127, s. 11; 1983, c. 761, s. 199; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1034, ss. 84, 211; 1985, c. 479, s. 210; c. 698, ss. 13(a), (b) (14); 791, s. 39.1; 1985 (Reg. Sess., 1986), c. 1014, ss. 36, 223(a); 1987, c. 564, s. 12; c. 738, ss. 22, 34; 1987 (Reg. Sess., 1988), c. 1086, s. 16; 1989, c. 752, s. 33; 1991, c. 742, s. 14(a); 1991 (Reg. Sess., 1992), c. 900, ss. 41, 43; c. 1044, s. 9.1; 1993, c. 321, s. 60; 1993 (Reg. Sess., 1994), c. 769, s. 7.13(b), (c); 1995, c. 507, s. 7.7(a), (b); 1996, 2nd Ex. Sess., c. 18, s. 28.6(a), (b); 1999-237, s. 28.6(a), (b); 2000-67, s. 26.6; 2001-424, s. 32.7; 2004-124, s. 31.7(b); 2005-276, s. 29.7(a), (b); 2006-66, s. 22.7(a), (b); 2007-323, ss. 28.7(a), (b).)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 7.13(d), provides: "Notwithstanding the provisions of G.S. 7A-171.1 or G.S. 7A-171.2, as rewritten by this act, any magistrate hired on or after July 1, 1994 and before the date of ratification of this act [July 16, 1994] shall be treated as though they were employed on June 30, 1994, if the magistrate does not possess the educational and experience qualifications required by this section."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

Session Laws 1999-237, s. 1.1, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999'."

Session Laws 1999-237, s. 28.6(a), repealed Session Laws 1993, c. 769, s. 7.13(c), which had provided that subsection (a1) of G.S. 7A-171.1 would expire June 30, 1999.

Session Laws 1999-237, s. 30.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 30.4, contains a severability clause.

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6, contains a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 30.7, as amended by Session Laws 2004-124, s. 31.7(a), provides: "For the 2003-2004 fiscal year, the compensation of magistrates shall remain as set forth in G.S. 7A-171.1, except that there shall be awarded to each magistrate not receiving a statutory step increase a compensation bonus for the 2003-2004 fiscal year as authorized in this Part [Part XXX of Session Laws 2003-284]."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5, contains a severability clause.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2005-144, s. 3, effective July 1, 2005, and expires 11:59 p.m., August 11, 2005, provides: "State employees subject to G.S. 7A-102(c), 7A-171.1, or 20-187.3 shall not move up on salary schedules or receive automatic increases, including automatic step increases, until authorized by the General Assembly.

"Public school employees paid on the teacher salary schedule or the school-based administrator salary schedule shall not move up on salary schedules or receive automatic step increases until authorized by the General Assembly."

Session Laws 2005-144, s. 10, effective July 1, 2005, as amended by Session Laws 2005-201, s. 1, as amended by Session Laws 2005-246, s. 1, provides for Session Laws 2005-144, s. 3 to expire at 11:59 P.M. on August 11, 2005.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 22.7(a) and (b), effective July 1, 2006, updated the "Table of Salaries of Full-Time Magistrates" in subdivision (a)(1); and updated the salaries in subdivision (a1)(1).

Session Laws 2007-323, ss. 28.7(a) and 28.7(b), effective July 1, 2007, increased the annual salary of full-time magistrates in subdivision (a)(1); and increased the annual salary of magistrates in subdivision (a1)(1).

Legal Periodicals. — For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

§ 7A-171.2. Qualifications for nomination or renomination.

(a) In order to be eligible for nomination or for renomination as a magistrate an individual shall be a resident of the county for which he is appointed.

(b) To be eligible for nomination as a magistrate, an individual shall have at least eight years' experience as the clerk of superior court in a county of this State or shall have a four-year degree from an accredited senior institution of higher education or shall have a two-year associate degree and four years of work experience in a related field, including teaching, social services, law enforcement, arbitration or mediation, the court system, or counseling. The Administrative Officer of the Courts may determine whether the work experience is sufficiently related to the duties of the office of magistrate for the purposes of this subsection. In determining whether an individual's work experience is in a related field, the Administrative Officer of the Courts shall consider the requisite knowledge, skills, and abilities for the office of magistrate.

The eligibility requirements prescribed by this subsection do not apply to individuals holding the office of magistrate on June 30, 1994, and do not apply to individuals who have been nominated by June 30, 1994, but who have not been appointed or taken the oath of office by that date.

(c) In order to be eligible for renomination as a magistrate an individual shall have successfully completed the course of basic training for magistrates prescribed by G.S. 7A-177.

(d) Notwithstanding any other provision of this subsection, an individual who holds the office of magistrate on July 1, 1977, shall not be required to have successfully completed the course of basic training for magistrates prescribed by G.S. 7A-177 in order to be eligible for renomination as a magistrate. (1977, c. 945, s. 6; 1993 (Reg. Sess., 1994), c. 769, s. 7.13(a); 2003-381, s. 1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 7.13(d), provides: "Notwithstanding the provisions of G.S. 7A-171.1 or G.S. 7A-171.2, as rewritten by this act, any magistrate hired on or after July 1, 1994 and before the date of ratification of this act [July 16, 1994] shall be treated as though they were employed on June 30, 1994, if the magistrate does not possess the educational and experience qualifications required by this section."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5, is a severability clause.

Legal Periodicals. — For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

OPINIONS OF ATTORNEY GENERAL

No Continued Residence Requirements. — Continued residence in the county for which a magistrate is appointed is not a prerequisite to remain in the office of magistrate for the term of the appointment. See opinion of Attorney General to Mr. David A. Phillips, Attorney at Law, 1997 N.C.A.G. 61 (10/8/97).

§ **7A-172:** Repealed by Session Laws 1977, c. 945, s. 5.

Editor's Note. — This section was repealed by Session Laws 1977, c. 945, s. 5, ratified July 1, 1977, and amended by Session Laws 1977, 2nd Sess., c. 1136, s. 12, ratified June 14, 1978.

§ 7A-173. Suspension; removal; reinstatement.

(a) A magistrate may be suspended from performing the duties of his office by the chief district judge of the district court district in which his county is located, or removed from office by the senior regular resident superior court judge of, or any regular superior court judge holding court in the district or set of districts as defined in G.S. 7A-41.1(a) in which the county is located. Grounds for suspension or removal are the same as for a judge of the General Court of Justice.

(b) Suspension from performing the duties of the office may be ordered upon filing of sworn written charges in the office of clerk of superior court for the county in which the magistrate resides. If the chief district judge, upon examination of the sworn charges, finds that the charges, if true, constitute grounds for removal, he may enter an order suspending the magistrate from performing the duties of his office until a final determination of the charges on the merits. During suspension the salary of the magistrate continues.

(c) If a hearing, with or without suspension, is ordered, the magistrate against whom the charges have been made shall be given immediate written notice of the proceedings and a true copy of the charges, and the matter shall be set by the chief district judge for hearing before the senior regular resident superior court judge or a regular superior court judge holding court in the district or set of districts as defined in G.S. 7A-41.1(a) in which the county is located. The hearing shall be held in a county within the district or set of districts not less than 10 days nor more than 30 days after the magistrate has received a copy of the charges. The hearing shall be open to the public. All testimony offered shall be recorded. At the hearing the superior court judge shall receive evidence, and make findings of fact and conclusions of law. If he finds that grounds for removal exist, he shall enter an order permanently removing the magistrate from office, and terminating his salary. If he finds that no such grounds exist, he shall terminate the suspension, if any.

(d) A magistrate may appeal from an order of removal to the Court of Appeals on the basis of error of law by the superior court judge. Pending decision of the case on appeal, the magistrate shall not perform any of the duties of his office. If, upon final determination, he is ordered reinstated, either by the appellate division or by the superior court on remand, his salary shall be restored from the date of the original order of removal. (1965, c. 310, s. 1; 1967, c. 108, s. 4; 1973, c. 148, ss. 3, 4; 1987 (Reg. Sess., 1988), c. 1037, s. 18.)

CASE NOTES

This section and G.S. 7A-376 are not irreconcilably in conflict with G.S. 14-230. State v. Greer, 308 N.C. 515, 302 S.E.2d 774 (1983).

And the legislature did not intend to exempt magistrates from indictment and criminal prosecution under G.S. 14-230 when it included magistrates under the sanctions of this section and G.S. 7A-376. Section 14-230 applies to misconduct in office unless another statute provides for the "indictment" of the officer, but neither this section nor G.S. 7A-376 provide for criminal charges to be brought against a magistrate who is guilty of misconduct in office. State v. Greer, 308 N.C. 515, 302 S.E.2d 774 (1983).

District Attorney's Participation in Proceedings. — Magistrate did not have standing to challenge involvement of the District Attorney in magistrate's removal proceeding as in violation of the constitutional limits on the District Attorney's office, where, had trial court the inherent authority to appoint an independent counsel, magistrate could not show that a different result would have occurred. In re Ezzell, 113 N.C. App. 388, 438 S.E.2d 482 (1994).

Judge Who Appoints Magistrate Is Not Biased Per Se. — Every Resident Regular Superior Court Judge who appoints a magistrate does not have, as a matter of law, a personal bias or prejudice which would disqualify him under Code of Judicial Conduct, Canon 3 from conducting a magistrate's removal hearing pursuant to subsection (c). In re Ezzell, 113 N.C. App. 388, 438 S.E.2d 482 (1994).

Grounds for suspension or removal of a magistrate are the same as for a judge of the General Court of Justice. In re Kiser, 126 N.C. App. 206, 484 S.E.2d 441 (1997).

The statutory procedures for removal of magistrates are entirely different from those providing for censure or removal of judges. In re Kiser, 126 N.C. App. 206, 484 S.E.2d 441 (1997).

Magistrate properly removed from office for engaging in willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute where he aided and abetted a minor in the possession of alcohol. In re Kiser, 126 N.C. App. 206, 484 S.E.2d 441 (1997).

§ 7A-174. Bonds.

Prior to taking office, magistrates shall be bonded, individually or collectively, in such amount or amounts as the Administrative Officer of the Courts shall determine. The bond or bonds shall be conditioned upon the faithful performance of the duties of the office of magistrate. The Administrative Officer shall procure such bond or bonds from any indemnity or guaranty company authorized to do business in North Carolina, and the premium or premiums shall be paid by the State. (1965, c. 310, s. 1.)

§ 7A-175. Records to be kept.

A magistrate shall keep such dockets, accounts, and other records, under the general supervision of the clerk of superior court, as may be prescribed by the Administrative Office of the Courts. (1965, c. 310, s. 1.)

CASE NOTES

Cited in Lewis v. Blackburn, 555 F. Supp. 713 (W.D.N.C. 1983).

§ 7A-176. Office of justice of the peace abolished.

The office of justice of the peace is abolished in each county upon the establishment of a district court therein. (1965, c. 310, s. 1.)

§ 7A-177. Training course in duties of magistrate.

(a) Within six months of taking the oath of office as a magistrate for the first time, a magistrate is required to attend and satisfactorily complete a course of basic training of at least 40 hours in the civil and criminal duties of a magistrate. The Administrative Office of the Courts is authorized to contract with the School of Government at the University of North Carolina at Chapel Hill or with any other qualified educational organization to conduct this training, and to reimburse magistrates for travel and subsistence expenses incurred in taking such training.

(b) In addition to the basic training course required in under subsection (a) of this section, continuing education courses shall be provided at such times and locations as necessary to assure that they are conveniently available to all magistrates without extensive travel to other parts of the State. (1975, c. 956, s. 11; 1983 (Reg. Sess., 1984), c. 1116, s. 87; 2006-264, s. 29(a); 2007-393, s. 15; 2007-484, s. 25.5.)

Editor's Note. — Session Laws 2007-484, s. 25.5, amended this section in the coded bill drafting format prescribed by G.S. 120-20.1. However, the act failed to account for the amendments by Session Laws 2007-393, s. 15. Subsection (b) has been set out in the form above as directed by the Revisor of Statutes.

Effect of Amendments. — Session Laws 2006-264, s. 29(a), effective August 27, 2006, substituted "School of Government at the University of North Carolina at Chapel Hill" for "Institute of Government" in subsection (a).

Session Laws 2007-393, s. 15, effective August 20, 2007, in subsection (b), substituted "In addition to the basic training course required in subsection (a) of this section, continuing education" for "Training" and deleted the former last sentence which read: "Courses shall be provided in Asheville for the magistrates from the western region of the State."

Session Laws 2007-484, s. 25.5, effective August 30, 2007, in subsection (b), substituted "In addition to the basic training course required under subsection (a) of this section, continuing education" for "Training" in the first sentence and deleted the second sentence.

§ 7A-178. Magistrate as child support hearing officer.

A magistrate who meets the qualifications of G.S. 50-39 and is properly designated pursuant to G.S. Chapter 50, Article 2, to serve as a child support hearing officer, may serve in that capacity and has the authority and responsibility assigned to child support hearing officers by Chapter 50. (1985 (Reg. Sess., 1986), c. 993, s. 2.)

§ 7A-179: Reserved for future codification purposes.

Article 17.

Clerical Functions in the District Court.

§ 7A-180. Functions of clerk of superior court in district court matters.

The clerk of superior court:

(1) Has and exercises all of the judicial powers and duties in respect of actions and proceedings pending from time to time in the district court

of his county which are now or hereafter conferred or imposed upon him by law in respect of actions and proceedings pending in the superior court of his county;

(2) Performs all of the clerical, administrative and fiscal functions required in the operation of the district court of his county in the same manner as he is required to perform such functions in the operation of the superior court of his county;

(3) Maintains, under the supervision of the Administrative Office of the Courts, an office of uniform consolidated records of all judicial proceedings in the superior court division and the district court division of the General Court of Justice in his county. Those records shall include civil actions, special proceedings, estates, criminal actions, juvenile actions, minutes of the court and all other records required by law to be maintained. The form and procedure for filing, docketing, indexing, and recording shall be as prescribed by the Administrative Officer of the Courts notwithstanding any contrary statutory provision as to the title and form of the record or as a method of indexing;

(4) Has the power to accept written appearances, waivers of trial or hearing and pleas of guilty or admissions of responsibility for the types of offenses specified in G.S. 7A-273(2) in accordance with the schedules of offenses promulgated by the Conference of Chief District Judges pursuant to G.S. 7A-148, and in such cases, to enter judgment and collect the fine or penalty and costs;

(5) Has the power to issue warrants of arrest valid throughout the State, and search warrants valid throughout the county of the issuing clerk;

(6) Has the power to conduct an initial appearance in accordance with Chapter 15A, Article 24, Initial Appearance, and to fix conditions of release in accordance with Chapter 15A, Article 26, Bail;

(7) Continues to exercise all powers, duties and authority theretofore vested in or imposed upon clerks of superior court by general law, with the exception of jurisdiction in juvenile matters; and

(8) Has the power to accept written appearances, waivers of trial and pleas of guilty to violations of G.S. 14-107 when restitution, including service charges and processing fees allowed under G.S. 14-107, is made, the amount of the check is two thousand dollars ($2,000) or less, and the warrant does not charge a fourth or subsequent violation of this statute, and, in such cases, to enter such judgments as the chief district judge shall direct and, forward the amounts collected as restitution to the appropriate prosecuting witnesses and to collect the costs.

(9) Repealed by Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 118(c). (1965, c. 310, s. 1; 1967, c. 691, s. 16; 1969, c. 1190, s. 14; 1973, c. 503, ss. 3, 4; c. 1286, s. 6; 1975, c. 166, s. 23; c. 626, s. 2; 1981, c. 142; 1983, c. 586, s. 4; 1985, c. 425, s. 3; c. 764, s. 10; 1985 (Reg. Sess., 1986), c. 852, s. 17; 1987, c. 355, s. 3; 1989 (Reg. Sess., 1990), c. 1041, s. 2; 1991, c. 520, s. 1; 1991 (Reg. Sess., 1992), c. 900, s. 118(c); 1993, c. 374, s. 3.)

Legal Periodicals. — For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

CASE NOTES

The issuance of a search warrant is neither a district court matter nor a superior court matter, but pertains to pretrial investigation which need not — indeed, often cannot at that point — be classified according to the court where the defendant may eventually be tried. State v. Pennington, 327 N.C. 89, 393 S.E.2d 847 (1990).

Newly Created District Court Division Does Not Limit Superior Court Clerk's Power to Issue Search Warrants. — In prescribing the organization and procedure of the newly created district court division, the General Assembly did not intend to limit the authority of superior court clerks to issue search warrants within their operative counties exclusively to criminal matters to be tried in district court. State v. Pennington, 327 N.C. 89, 393 S.E.2d 847 (1990).

Applied in State v. Holloway, 66 N.C. App. 491, 311 S.E.2d 707 (1984).

Cited in State v. Bellar, 16 N.C. App. 339, 192 S.E.2d 86 (1972).

§ 7A-181. Functions of assistant and deputy clerks of superior court in district court matters.

Assistant and deputy clerks of superior court:

(1) Have the same powers and duties with respect to matters in the district court division as they have in the superior court division;

(2) Have the same powers as the clerk of superior court with respect to the issuance of warrants and acceptance of written appearances, waivers of trial and pleas of guilty; and

(3) Have the same power as the clerk of superior court to fix conditions of release in accordance with Chapter 15A, Article 26, Bail, and the same power as the clerk of superior court to conduct an initial appearance in accordance with Chapter 15A, Article 24, Initial Appearance. (1965, c. 310, s. 1; 1967, c. 691, s. 17; 1973, c. 503, s. 5; 1975, c. 166, s. 24; c. 626, s. 3.)

Legal Periodicals. — For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

CASE NOTES

The issuance of a search warrant is neither a district court matter nor a superior court matter, but pertains to pretrial investigation which need not — indeed, often cannot at that point — be classified according to the court where the defendant may eventually be tried. State v. Pennington, 327 N.C. 89, 393 S.E.2d 847 (1990).

Newly Created District Court Division Does Not Limit Superior Court Clerk's Power to Issue Search Warrants. — In prescribing the organization and procedure of the newly created district court division, the General Assembly did not intend to limit the authority of superior court clerks to issue search warrants within their operative counties exclusively to criminal matters to be tried in district court. State v. Pennington, 327 N.C. 89, 393 S.E.2d 847 (1990).

Applied in State v. Holloway, 66 N.C. App. 491, 311 S.E.2d 707 (1984).

Cited in State v. Holloway, 311 N.C. 573, 319 S.E.2d 261 (1984).

§ 7A-182. Clerical functions at additional seats of court.

(a) In any county in which the General Assembly has authorized the district court to hold sessions at a place or places in addition to the county seat, the clerk of superior court shall furnish assistant and deputy clerks to the extent necessary to process efficiently the judicial business at such additional seat or seats of court. Only such records as are necessary for the expeditious processing of current judicial business shall be kept at the additional seat or seats of court. The office of the clerk of superior court at the county seat shall remain the permanent depository of official records.

(b) If an additional seat of a district court is designated for any municipality located in more than one county of a district, the clerical functions for that seat of court shall be provided by the clerks of superior court of the contiguous counties, in accordance with standing rules issued by the chief district judge, after consultation with the clerks concerned and a committee of the district bar appointed for this purpose. An assistant or deputy clerk assigned to a seat of district court described in this subsection shall have the same powers and authority as if he were acting in his own county. (1965, c. 310, s. 1; 1967, c. 691, s. 18; 1969, c. 1190, s. 15.)

§ 7A-183. Clerk or assistant clerk as child support hearing officer.

A clerk or assistant clerk of superior court who meets the qualifications of G.S. 50-39 and is properly designated pursuant to G.S. Chapter 50, Article 2, to serve as a child support hearing officer, may serve in that capacity and has the authority and responsibility assigned to child support hearing officers by Chapter 50. (1985 (Reg. Sess., 1986), c. 993, s. 3.)

§§ 7A-184 through 7A-189: Reserved for future codification purposes.

ARTICLE 18.

District Court Practice and Procedure Generally.

§ 7A-190. District courts always open.

The district courts shall be deemed always open for the disposition of matters properly cognizable by them. But all trials on the merits shall be conducted at trial sessions regularly scheduled as provided in this Chapter. (1965, c. 310, s. 1.)

Legal Periodicals. — For article, "Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts," see 66 N.C.L. Rev. 467 (1988).

CASE NOTES

This section and G.S. 7A-191 are both subject to the provisions of G.S. 7A-192. Bowen v. Hodge Motor Co., 29 N.C. App. 463, 224 S.E.2d 699 (1976), rev'd on other grounds, 292 N.C. 633, 234 S.E.2d 748 (1977).

Cited in Laws v. Laws, 1 N.C. App. 243, 161 S.E.2d 40 (1968); Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969); WSOC Television, Inc. v. State ex rel. Att'y Gen., 107 N.C. App. 448, 420 S.E.2d 682 (1992); Schumacher v. Schumacher, 109 N.C. App. 309, 426 S.E.2d 467 (1993); Ward v. Ward, 116 N.C. App. 643, 448 S.E.2d 862 (1994).

OPINIONS OF ATTORNEY GENERAL

When Session Ends. — See opinion of Attorney General to Honorable John C. Clifford, Judge of the Twenty-first Judicial District Court, 40 N.C.A.G. 117 (1969).

§ 7A-191. Trials; hearings and orders in chambers.

All trials on the merits and all hearings on infractions conducted pursuant to Article 66 of Chapter 15A shall be conducted in open court and so far as convenient in a regular courtroom. All other proceedings, hearings, and acts may be done or conducted by a judge in chambers in the absence of the clerk or other court officials and at any place within the district; but no hearing may be held, nor order entered, in any cause outside the district in which it is pending without the consent of all parties affected thereby. (1965, c. 310, s. 1; 1985, c. 764, s. 11; 1985 (Reg. Sess., 1986), c. 852, s. 17.)

CASE NOTES

G.S. 7A-190 and this section are both subject to the provisions of G.S. 7A-192. Bowen v. Hodge Motor Co., 29 N.C. App. 463, 224 S.E.2d 699 (1976), rev'd on other grounds, 292 N.C. 633, 234 S.E.2d 748 (1977).

This section and G.S. 7A-192 make a distinction between the jurisdiction of the district courts and the power and authority of a district judge other than the chief district judge to act. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

And Recognize Distinction Between Trial on Merits and Hearing of Motion. — This section and G.S. 7A-192 recognize a fundamental procedural distinction between a trial on the merits and the hearing of a motion in the cause. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

A hearing on motions in a cause comes within the purview of "all other proceedings, hearings and acts" referred to in this section. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Cited in WSOC Television, Inc. v. State ex rel. Att'y Gen., 107 N.C. App. 448, 420 S.E.2d 682 (1992); In re a Judge, No. 238 Brown, 351 N.C. 601, 527 S.E.2d 651, 2000 N.C. LEXIS 353 (2000).

§ 7A-191.1. Recording of proceeding in which defendant pleads guilty or no contest to felony in district court.

The trial judge shall require that a true, complete, and accurate record be made of the proceeding in which a defendant pleads guilty or no contest to a Class H or I felony pursuant to G.S. 7A-272. (1995 (Reg. Sess., 1996), c. 725, s. 4.)

§ 7A-192. By whom power of district court to enter interlocutory orders exercised.

Any district judge may hear motions and enter interlocutory orders in causes regularly calendared for trial or for the disposition of motions, at any session to which the district judge has been assigned to preside. The chief district judge and any district judge designated by written order or rule of the chief district judge, may in chambers hear motions and enter interlocutory orders in all causes pending in the district courts of the district, including causes transferred from the superior court to the district court under the provisions of this Chapter. The designation is effective from the time filed in the office of the clerk of superior court of each county of the district until revoked or amended by written order of the chief district judge. (1965, c. 310, s. 1; 1969, c. 1190, s. 16.)

CASE NOTES

G.S. 7A-190 and G.S. 7A-191 are both subject to the provisions of this section. Bowen v. Hodge Motor Co., 29 N.C. App. 463, 224 S.E.2d 699 (1976), rev'd on other grounds, 292 N.C. 633, 234 S.E.2d 748 (1977).

This section and G.S. 7A-191 make a distinction between the jurisdiction of the district courts and the power and authority of a district judge other than the chief district judge to act. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

And recognize a fundamental procedural distinction between a trial on the merits and the hearing of a motion in the cause. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

It was improper for a district judge to have held a trial on the merits of a divorce action at a civil motion session, and because the judge had no jurisdiction, the judgment was void. Schumacher v. Schumacher, 109 N.C. App. 309, 426 S.E.2d 467 (1993).

Limitations on Authority of Judge Other Than Chief Judge to Hear Motions and Enter Interlocutory Orders. — The authority of a district judge (other than the chief district judge) to hear motions and enter interlocutory orders in cases properly pending in the district court is a special authority which is limited by this section. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Under the provisions of the first portion of this section, before a district court judge, other than the chief district judge, may hear motions and enter interlocutory orders at any session of district court in cases calendared for trial or hearing at such session, he must be first assigned by the chief district judge under the provisions of subdivision (1) of G.S. 7A-146 to preside at such session. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

In order to have authority to act on any motion, a district judge, other than the chief district judge, must be properly authorized under G.S. 7A-146 and this section to hold a session of court at which the matter is properly before him, or under this section to hear the matter in chambers. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Authority of Such Judge Must Affirmatively Appear on Record. — There is no presumption that a district judge (other than the chief district judge) has authority in chambers to hear motions and enter interlocutory orders in all cases pending in the district courts of the district; it must affirmatively appear in the record that the district judge was authorized pursuant to this section. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Written Authorization for Hearing Motions in Chambers. — A district judge other than the chief district judge may hear motions and enter interlocutory orders during any session over which he has been assigned to preside, whether the assignment be oral or written, but he may not hear motions in chambers without written authorization. Jim Walter Homes, Inc. v. Peartree, 28 N.C. App. 709, 222 S.E.2d 706 (1976).

Chambers matters may be heard by the chief district judge at any time and place within the district, but other district judges have no authority to hear chambers matters out of session except upon written order or rule of the chief district judge. Bowen v. Hodge Motor Co., 29 N.C. App. 463, 224 S.E.2d 699 (1976), rev'd on other grounds, 292 N.C. 633, 234 S.E.2d 748 (1977).

Judge Authorized to Hear Motion. — District judge assigned to preside at the session in question by the chief district judge of the Thirtieth Judicial District was not without authority to hear defendant's motion to dismiss in Swain County over written objection of plaintiff who had filed his complaint in Cherokee County. Scroggs v. Ramsey, 74 N.C. App. 730, 329 S.E.2d 680 (1985).

Restraining Order in Action Pending in Another County in District. — A chief judge of the district court has jurisdiction to enter, in chambers in one county, a temporary restraining order in an action pending in the district court of another county in the judicial district, to return the order for hearing before him, and to enter an order continuing the restraining order in effect in the district court of the other county until the trial of the case on its merits. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Temporary Restraining Order Is Interlocutory Order. — A temporary restraining order, made permanent pending trial of the cause on its merits, is an interlocutory order. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Judgment Entered by Unauthorized Judge Is Void. — The judgment entered by district court judge in favor of plaintiff, which directed, among other things, that defendant immediately pay to plaintiff's attorney a certain sum for legal services rendered, was interlocutory and was void, since the district court judge who entered the order had not been assigned by the chief district judge to preside over a session of court in the county where the judgment was entered, nor was he authorized by order or rule entered by the chief judge to hear motions and enter interlocutory orders on that date. Stroupe v. Stroupe, 301 N.C. 656, 273 S.E.2d 434 (1981).

Applied in Routh v. Weaver, 67 N.C. App. 426, 313 S.E.2d 793 (1984).

Cited in Condie v. Condie, 51 N.C. App. 522, 277 S.E.2d 122 (1981).

§ 7A-193. Civil procedure generally.

Except as otherwise provided in this Chapter, the civil procedure provided in Chapters 1 and 1A of the General Statutes applies in the district court division of the General Court of Justice. Where there is reference in Chapters 1 and 1A of the General Statutes to the superior court, it shall be deemed to refer also to the district court in respect of causes in the district court division. (1965, c. 310, s. 1; 1969, c. 1190, s. 17.)

Legal Periodicals. — For comment on the present and future use of the writ of recordari in North Carolina, see 2 Wake Forest Intra. L. Rev. 77 (1966).

As to form for writ of recordari, see 2 Wake Forest Intra. L. Rev. 88 (1966).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Making Calendar for Trial of Civil Cases Discretionary. — In the superior court, making a calendar for the trial of civil cases appears to be discretionary rather than mandatory; this section makes the same rule apply to the district court. Laws v. Laws, 1 N.C. App. 243, 161 S.E.2d 40 (1968).

Separate Findings and Conclusions Required. — The rule that upon trial of an issue of fact by the court, its decision shall be in writing and shall contain a statement of the facts found and the conclusions of law separately, applies in the district court division of the General Court of Justice as well as in the superior court. Public Serv. Co. v. Beal, 5 N.C. App. 659, 169 S.E.2d 41 (1969).

This Chapter does not change the effect of G.S. 1A-1, Rule 52(a)(1), and therefore it is necessary for the district judge who is authorized to hear a case involving the custody and support of minor children to find the facts specially and state separately his conclusions of law before entering an appropriate judgment. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Actions under the Juvenile Code (G.S. 7A-516, et seq. [see now G.S. 7B-100 and 7B-1500]) are in the nature of civil actions. As such, proceedings in juvenile matters are to be governed by the Rules of Civil Procedure, G.S. 1A-1, unless otherwise provided by the Juvenile Code or some other statute. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Applied in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969); Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971); Thrift v. Buncombe County Dep't of Soc. Servs., 137 N.C. App. 559, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000); In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

Cited in Alexiou v. O.R.I.P., Ltd., 36 N.C. App. 246, 243 S.E.2d 412 (1978); Roberson v. Roberson, 40 N.C. App. 193, 252 S.E.2d 237 (1979).

§ 7A-194: Repealed by Session Laws 1977, c. 711, s. 33.

§ 7A-195: Repealed by Session Laws 1969, c. 911, s. 5.

§ 7A-196. Jury trials.

(a) In civil cases in the district court there shall be a right to trial by a jury of 12 in conformity with Rules 38 and 39 of the Rules of Civil Procedure.

(b) In criminal cases there shall be no jury trials in the district court. Upon appeal to superior court trial shall be de novo, with jury trial as provided by law.

(c) In adjudicatory hearings for infractions, there shall be no right to trial by jury in the district court. (1965, c. 310, s. 1; 1967, c. 954, s. 3; 1985, c. 764, s. 12; 1985 (Reg. Sess., 1986), c. 852, s. 17.)

Editor's Note. — Rules 38 and 39 of the Rules of Civil Procedure, referred to in this section, are codified as G.S. 1A-1, Rules 38 and 39.

CASE NOTES

Right to Jury Trial in Civil Cases. — The right to trial by jury in civil cases in the district court is preserved by this section, provided timely demand is made in one of the ways authorized by statute. Ford Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971).

Right to Jury Trial in Criminal Cases. — The constitutional right of a defendant charged with a misdemeanor to have a jury trial is not infringed by the fact that he has first to submit to trial without a jury in the district court and then appeal to superior court in order to obtain a jury trial. State v. Sherron, 4 N.C. App. 386, 166 S.E.2d 836 (1969).

The effect of a verdict of guilty by the district court in the trial of a misdemeanor is tantamount to a verdict of guilty returned by a jury. State v. Surles, 55 N.C. App. 179, 284 S.E.2d 738 (1981), cert. denied, 305 N.C. 307, 290 S.E.2d 707 (1982).

The trial judge's authority over its nonjury verdict is no greater than the authority of the trial judge over a jury verdict. State v. Surles, 55 N.C. App. 179, 284 S.E.2d 738 (1981), cert. denied, 305 N.C. 307, 290 S.E.2d 707 (1982).

When Demand for Trial by Jury Is Timely. — The demand for trial by jury in a civil case is timely if made in writing not later than 10 days after the filing of the last pleading directed to the issues. Holcomb v. Holcomb, 7 N.C. App. 329, 172 S.E.2d 212 (1970); Ford Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971).

One authorized method of making the demand is by endorsement on the pleading of the party. Ford Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971).

Error to Deny Jury Trial Timely Demanded. — Defendants having made timely demand in a manner authorized by statute, it was error for the district judge to deny them a jury trial. Ford Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971).

Waiver of Jury Trial. — The failure of a party to make a demand for jury trial within the 10-day limitation period is a waiver of the right to a jury trial. Holcomb v. Holcomb, 7 N.C. App. 329, 172 S.E.2d 212 (1970).

Transfer of Case Without Notice Denied Defendant's Right to Jury Trial. — Defendant was denied its constitutional right to a jury trial where the action was transferred from the superior court division to the district court division without notice to defendant, so that defendant made no demand for jury trial in the district court within the 10-day time period formerly allowed by this section (see now G.S. 1A-1, Rule 38), and the district court subsequently denied defendant's demand for a jury trial. Thermo-Industries v. Talton Constr. Co., 9 N.C. App. 55, 175 S.E.2d 370 (1970).

Applied in Kelly v. Davenport, 7 N.C. App. 670, 173 S.E.2d 600 (1970); Wendell Tractor & Implement Co. v. Lee, 9 N.C. App. 524, 176 S.E.2d 854 (1970); Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972).

Cited in State v. Thompson, 2 N.C. App. 508, 163 S.E.2d 410 (1968); Boring v. Mitchell, 5 N.C. App. 550, 169 S.E.2d 79 (1969); In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969); State v. Guffey, 283 N.C. 94, 194 S.E.2d 827 (1973); N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888, 2004 N.C. LEXIS 909 (2004).

§ 7A-197. Petit jurors.

Unless otherwise provided in this Chapter, the provisions of Chapter 9 of the General Statutes with respect to petit jurors for the trial of civil actions in the superior court are applicable to the trial of civil actions in the district court. (1965, c. 310, s. 1.)

§ 7A-198. Reporting of civil trials.

(a) Court-reporting personnel shall be utilized, if available, for the reporting of civil trials in the district court. If court reporters are not available in any county, electronic or other mechanical devices shall be provided by the Administrative Office of the Courts upon request of the chief district judge.

(b) The Administrative Office of the Courts shall from time to time investigate the state of the art and techniques of recording testimony, and shall provide such electronic or mechanical devices as are found to be most efficient for this purpose.

(c) If an electronic or other mechanical device is utilized, it shall be the duty of the clerk of the superior court or some other person designated by him to operate the device while a trial is in progress, and the clerk shall thereafter preserve the record thus produced, which may be transcribed, as required, by any person designated by the Administrative Office of the Courts. If stenotype, shorthand, or stenomask equipment is used, the original tapes, notes, discs, or other records are the property of the State, and the clerk shall keep them in his custody.

(d) Reporting of any trial may be waived by consent of the parties.

(e) Reporting will not be provided in trials before magistrates or in hearings to adjudicate and dispose of infractions in the district court.

(f) Appointment of a reporter or reporters for district court proceedings in each district court district shall be made by the chief district judge for that district. The compensation and allowances of reporters in each district shall be fixed by the chief district judge, within limits determined by the Administrative Officer of the Courts, and paid by the State.

(g) A party to a civil trial in district court may request a private agreement from the opposing party or parties to share equally in the cost of a court reporter to be selected from a list provided by the Administrative Office of the Courts. If the opposing party does not consent to share this cost, the requesting party may nevertheless pay to have a court reporter present to record the trial and, in the event that the opposing party appeals the case, that party shall reimburse the party providing the court reporter in full for the costs incurred for the court reporter's services and transcripts.

In the event that the recording device in a civil trial conducted without a court reporter fails for any reason to provide a reasonably accurate record of the trial for purposes of appeal, then the trial judge shall grant a motion for a new trial made by a losing party whose request pursuant to this section to share the cost of a court reporter was not consented to by the opposing party. (1965, c. 310, s. 1; 1969, c. 1190, s. 18; 1985, c. 764, s. 13; 1985 (Reg. Sess., 1986), c. 852, s. 17; 1987, c. 384, s. 2; 1987 (Reg. Sess., 1988), c. 1037, s. 19; 1996, 2nd Ex. Sess., c. 18, s. 22.11.)

Editor's Note. — Subsections (e) and (f) of this section were subject to approval under Section 5 of the Voting Rights Act of 1965. Preclearance was received from the U.S. Department of Justice by letter dated February 14, 1994.

CASE NOTES

A hearing on a motion for alimony pendente lite is not a civil trial within the meaning of this section. Howell v. Howell, 19 N.C. App. 260, 198 S.E.2d 462 (1973).

A hearing on a motion in the cause requesting a modification of a child support order is a "trial" within the meaning of G.S. 7A-198. Miller v. Miller, 92 N.C. App. 351, 374 S.E.2d 467 (1988).

When Motion for Services of Reporter May Be Refused. — If the case is one in which a court reporter's services can be dispensed with without prejudice, and no reporter can be found, it is not error to refuse a motion for the services of a reporter. McAlister v. McAlister, 14 N.C. App. 159, 187 S.E.2d 449, cert. denied, 281 N.C. 315, 188 S.E.2d 898 (1972).

Request for Recordation in District Court. — In district court, where there are no official court reporters, a party seeking recordation of a hearing or trial must request a reporter or mechanical recordation; failure to make such a request prevents the issue from being raised on appeal. Holterman v. Holterman, 127 N.C. App. 109, 488 S.E.2d 265 (1997).

It is not error for the trial judge to fail to appoint a stenographer where no stenographer is available and where the defendant made no motion that any other means be employed when his motion for a court reporter was denied. McAlister v. McAlister, 14 N.C. App. 159, 187 S.E.2d 449, cert. denied, 281 N.C. 315, 188 S.E.2d 898 (1972).

The absence of stenographic notes is not always fatal, even when oral testimony is introduced, if no prejudice is shown to result. McAlister v. McAlister, 14 N.C. App. 159, 187 S.E.2d 449, cert. denied, 281 N.C. 315, 188 S.E.2d 898 (1972).

Failure of Court to Record Hearing. — Court's violation of this section, by not preserving or recording hearing on modification of child custody order, did not relieve appellant of her burden of complying with N.C.R.A.P., Rule 9(a)(1)(v) and showing prejudicial error. Miller v. Miller, 92 N.C. App. 351, 374 S.E.2d 467 (1988).

Where respondent argued that he must receive a new hearing because children's testimony, which was taken in chambers with all counsel present, was not recorded, respondent did not argue any error in the unrecorded testimony itself and failed to show prejudice. In re Nolen, 117 N.C. App. 693, 453 S.E.2d 220 (1995).

Failure of Tape Device. — Absent contemporaneous objection to the use of tape devices, in order to show prejudicial error on account of a tape device not working, an appellant must at least indicate the import of some specific testimony or other proceeding that has been lost. Simply conjecturing that there may have been objections to critical testimony, without showing why any such testimony ought to have been excluded, will not support reversal, particularly when trial counsel assists in reconstructing the record. In re Caldwell, 75 N.C. App. 299, 330 S.E.2d 513 (1985).

Reporting of Juvenile Proceedings. — Proceedings under former G.S. 7A-636 are to be reported as other "civil trials" in accordance with this section. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Transcript of Juvenile Proceedings Held Necessary. — Where lower court ordered preparation of the transcript of juvenile proceedings for appeal purposes, and the record disclosed no adequate alternative devices that would have fulfilled the same functions as the transcript, the transcript was necessary for appellant to prepare her appeal and was "required" under subsection (c) of this section. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Reimbursement of Juvenile's Attorney for Preparation of Transcript. — As juvenile appellant was entitled to transcript at state expense, her attorney was entitled to be reimbursed for his reasonable expenses in having the transcript prepared. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Applied in In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

Cited in Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975); North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451 (M.D.N.C. 1976); Pollock v. Parnell, 126 N.C. App. 358, 484 S.E.2d 864 (1997); Coppley v. Coppley, 128 N.C. App. 658, 496 S.E.2d 611 (1998).

§ 7A-199. Special venue rule when district court sits without jury in seat of court lying in more than one county; where judgments recorded.

(a) In any nonjury civil action or juvenile matter properly pending in the district court division, regularly assigned for a hearing or trial before a district judge at a seat of the district court in a municipality the corporate limits of which extend into two or more contiguous counties, venue is properly laid for such trial or hearing if by statute or common law it is properly laid in any of the contiguous counties.

(b) In any jury civil action regularly assigned for a hearing or trial before a district judge at a seat of the district court in a municipality the corporate limits of which extend into two or more contiguous counties, venue is properly laid for such jury trial if by statute or common law it is properly laid in any of the contiguous counties; provided, however, any such action shall be instituted in the county of proper venue, and the jurors summoned shall be from the county where such action was instituted. Notwithstanding the fact that the place of trial within such municipality is in a different county from the county where such action was commenced, the sheriff of the county where such action was commenced is authorized to summon the jurors to appear at such place of trial. Such jurors shall be subject to the same challenge as other jurors, except challenges for nonresidence in the county of trial.

(c) A district court judge sitting at a seat of court described in this section may, in criminal cases, conduct preliminary hearings and try misdemeanors arising within the corporate limits of the municipality plus the territory embraced within a distance of one mile in all directions therefrom.

If the corporate limits of the municipality extend into two counties, each of which is in a separate district court district, a district court judge assigned to sit at the seat of court has the same authority over criminal cases arising in the municipality and the territory embraced within a distance of one mile in all directions that he would have if the corporate limits of the municipality were solely located in a single district court district. Judges assigned to sit in such a municipality shall be assigned by the chief district court judge serving the district in which a majority of the voters of the municipality reside, but offenses arising in the portion of the municipality in which the minority of the voters reside shall not be disposed of in the municipality unless the chief district court judge for that district consents in writing to the disposition of criminal cases in the municipality.

(d) The judgment or order rendered in any civil action or juvenile matter heard or tried under the authority of this section shall be recorded in the county where the action was commenced. The judgment or finding of probable cause or other determination in any criminal action heard or tried under the authority of this section shall be recorded in the county where the offense was committed. (1967, c. 691, s. 19; 1989, c. 795, s. 23(c2).)

§ 7A-200. District and set of districts defined; chief district court judges and their authority.

(a) In this section:

(1) "District" means any district court district established by G.S. 7A-133 which consists exclusively of one or more entire counties;

(2) "Set of districts" means any set of two or more district court districts established under G.S. 7A-133, none of which consists exclusively of one or more entire counties, but both or all of which include territory from the same county or counties and together comprise all of the territory of that county or those counties; "set of districts" also means a set of three district court districts in one county, one consisting of the entire county and the other two consisting of parts of that county; and

(3) "Chief district court judge" means in the case of a set of districts, the chief district court judge for those districts, designated by the chief justice from among the district court judges for the districts in the set of districts.

(b) Whenever by law a duty is imposed upon the chief district court judge, it means for a set of districts the chief district court judge designated under subsection (a)(3) of this section. (1995, c. 507, s. 21.1(a); 2007-484, s. 25(c).)

Effect of Amendments. — Session Laws 2007-484, s. 25(c), effective August 30, 2007, inserted "'set of districts' also means a set of three district court districts in one county, one consisting of the entire county and the other two consisting of parts of that county" in subsdivision (a)(2).

§§ 7A-201 through 7A-209: Reserved for future codification purposes.

ARTICLE 19.

Small Claim Actions in District Court.

§ 7A-210. Small claim action defined.

For purposes of this Article a small claim action is a civil action wherein:

(1) The amount in controversy, computed in accordance with G.S. 7A-243, does not exceed five thousand dollars ($5,000); and

(2) The only principal relief prayed is monetary, or the recovery of specific personal property, or summary ejectment, or any combination of the foregoing in properly joined claims; and

(3) The plaintiff has requested assignment to a magistrate in the manner provided in this Article.

The seeking of the ancillary remedy of claim and delivery or an order from the clerk of superior court for the relinquishment of property subject to a lien pursuant to G.S 44A-4(a) does not prevent an action otherwise qualifying as a small claim under this Article from so qualifying. (1965, c. 310, s. 1; 1973, c. 1267, s. 1; 1979, c. 144, s. 1; 1981, c. 555, s. 1; 1985, c. 329; c. 655, s. 1; 1989, c. 311, s. 1; 1993, c. 107, s. 1; c. 553, s. 73(a); 1999-411, s. 1; 2004-128, s. 1.)

Editor's Note. — The fee increase from $4000 to $5000 in subdivision (1), as amended by Session Laws 2004-128, s. 1, effective October 1, 2004, is applicable to actions filed on or after that date.

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

For article, "Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts," see 66 N.C.L. Rev. 467 (1988).

CASE NOTES

Amount in Controversy. — Where the amount in controversy for plaintiff's claims was in excess of the dollar requirement for a small claim action, but less than the $ 10,000 requirement for an action in the superior court, the claim was within the jurisdiction of the district court, and the district court erred in concluding that it lacked jurisdiction to hear these claims. Wilson v. Jefferson-Green, Inc., 136 N.C. App. 824, 526 S.E.2d 506, 2000 N.C. App. LEXIS 161 (2000).

Remedy of summary ejectment may be obtained in a small claim action heard by a magistrate. Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

Applied in Falk Integrated Technologies, Inc. v. Stack, 132 N.C. App. 807, 513 S.E.2d 572 (1999).

Cited in Porter v. Cahill, 1 N.C. App. 579, 162 S.E.2d 128 (1968); Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81, 398 S.E.2d 628 (1990); Cloer v. Smith, 132 N.C. App. 569, 512 S.E.2d 779 (1999); Fickley v. Greystone Enters., 140 N.C. App. 258, 536 S.E.2d 331, 2000 N.C. App. LEXIS 1110 (2000).

OPINIONS OF ATTORNEY GENERAL

Magistrate's Authority to Hear a Summary Ejectment Action. — A magistrate does not have the authority to hear a summary ejectment action involving residential rental property in another county if the landlord and the tenant so provide in the lease. See opinion of Attorney General to Mr. James E. Lanning, Chief District Court Judge, 26th Judicial District, 60 N.C.A.G. 26 (1990).

§ 7A-211. Small claim actions assignable to magistrates.

In the interest of speedy and convenient determination, the chief district judge may, in his discretion, by specific order or general rule, assign to any magistrate of his district any small claim action pending in his district if the defendant is a resident of the county in which the magistrate resides. If there is more than one defendant, at least one of them must be a bona fide resident of the county in which the magistrate resides. (1965, c. 310, s. 1, 1967, c. 1165.)

Legal Periodicals. — For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Cited in Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977); Bradshaw v. Administrative Office of Courts, 320 N.C. 132, 357 S.E.2d 370 (1987); Falk Integrated Technologies, Inc. v. Stack, 132 N.C. App. 807, 513 S.E.2d 572 (1999); Chandak v. Electronic Interconnect Corp., 144 N.C. App. 258, 550 S.E.2d 25, 2001 N.C. App. LEXIS 413 (2001).

OPINIONS OF ATTORNEY GENERAL

Magistrate's Authority to Hear a Summary Ejectment Action. — A magistrate does not have the authority to hear a summary ejectment action involving residential rental property in another county if the landlord and the tenant so provide in the lease. See opinion of Attorney General to Mr. James E. Lanning, Chief District Court Judge, 26th Judicial District, — N.C.A.G. — May 1, 1990.

§ 7A-211.1. Actions to enforce motor vehicle mechanic and storage liens.

Notwithstanding the provisions of G.S. 7A-210(2) and 7A-211, the chief district judge may in his discretion, by specific order or general rule, assign to any magistrate of his district actions to enforce motor vehicle mechanic and storage liens arising under G.S. 44A-2(d) or 20-77(d) when the claim arose in the county in which the magistrate resides. The defendant may be subjected to the jurisdiction of the court over his person by the methods provided in G.S. 7A-217 or 1A-1, Rules 4(j) and 4(j1), Rules of Civil Procedure. (1977, c. 86, s. 1; 1979, c. 602, s. 1; 2000-185, s. 1.)

Legal Periodicals. — For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Applied in Drummond v. Cordell, 72 N.C. App. 262, 324 S.E.2d 301 (1985).

Cited in Bradshaw v. Administrative Office of Courts, 320 N.C. 132, 357 S.E.2d 370 (1987).

§ 7A-212. Judgment of magistrate in civil action improperly assigned or not assigned.

No judgment of the district court rendered by a magistrate in a civil action assigned to him by the chief district judge is void, voidable, or irregular for the reason that the action is not one properly assignable to the magistrate under this article. The sole remedy for improper assignment is appeal for trial de novo before a district judge in the manner provided in this article. No judgment rendered by a magistrate in a civil action is valid when the action was not assigned to him by the chief district judge. (1965, c. 310, s. 1.)

CASE NOTES

Judgment of magistrate in civil action assigned to him by chief district judge is judgment of the district court. Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

Action Brought After Dismissal on Jurisdictional Grounds. — This section did not apply to an action brought in district court after being dismissed by a magistrate on jurisdictional grounds, where the plaintiff did not appeal the magistrate's action, but bowed to the magistrate's judgment by refiling the case. Falk Integrated Technologies, Inc. v. Stack, 132 N.C. App. 807, 513 S.E.2d 572 (1999).

Cited in Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

§ 7A-213. Procedure for commencement of action; request for and notice of assignment.

The plaintiff files his complaint in a small claim action in the office of the clerk of superior court of the county wherein the defendant, or one of the defendants resides. The designation "Small Claim" on the face of the complaint is a request for assignment. If, pursuant to order or rule, the action is assigned to a magistrate, the clerk issues a magistrate summons substantially in the form prescribed in this Article as soon as practicable after the assignment is made. The issuance of a magistrate summons commences the action. After service of the magistrate summons on the defendant, the clerk gives written notice of the assignment to the plaintiff. The notice of assignment identifies the action, designates the magistrate to whom assignment is made, and specifies the time, date and place of trial. By any convenient means the clerk notifies the magistrate of the assignment and the setting. (1965, c. 310, s. 1; 1969, c. 1190, s. 19; 1971, c. 377, s. 9.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Cited in Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

OPINIONS OF ATTORNEY GENERAL

Summary Ejectment Proceedings. — Because G.S. 7-217(4) states that the procedure found in G.S. 42-29 can be used in summary ejectment cases only, and because summary ejectment is in the nature of an in rem proceeding, an in personam money damages claim cannot be heard and a money judgment cannot be entered in an action where service of process is effected through the alternative method under G.S. 42-29. The requirements for actual service of process found elsewhere in this section and in G.S. 1A-1, Rule 4 would still apply to the claim for rents and other money damages. — N.C.A.G. — (February 26, 1992).

§ 7A-214. Time within which trial is set.

The time for trial of a small claim action is set not later than 30 days after the action is commenced. By consent of all parties the time for trial may be changed from the time set. For good cause shown, the magistrate to whom the action is assigned may grant continuances from time to time. (1965, c. 310, s. 1.)

CASE NOTES

Cited in Chandak v. Electronic Interconnect Corp., 144 N.C. App. 258, 550 S.E.2d 25, 2001 N.C. App. LEXIS 413 (2001).

OPINIONS OF ATTORNEY GENERAL

A summary ejectment action heard by a magistrate is an expedited judicial proceeding and the trial is set no more than 30 days after the action is commenced. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary of the Department of Crime Control and Public Safety, -- N.C.A.G. -- (February 10, 1995).

§ 7A-215. Procedure upon nonassignment of small claim action.

Failure of the chief district judge to assign a claim within five days after filing of a complaint requesting its assignment constitutes nonassignment. The chief district judge may sooner order nonassignment. Upon nonassignment, the clerk immediately issues summons in the manner and form provided for commencement of civil actions generally, whereupon process is served, return made, and pleadings are required to be filed in the manner provided for civil actions generally. Upon issuing civil summons, the clerk gives written notice of nonassignment to the plaintiff. The plaintiff within five days after notice of nonassignment, and the defendant before or with the filing of his answer, may request a jury trial. Failure within the times so limited to request a jury trial constitutes a waiver of the right thereto. Upon the joining of issue, the clerk places the action upon the civil issue docket for trial in the district court division. (1965, c. 310, s. 1.)

CASE NOTES

Cited in Chandak v. Electronic Interconnect Corp., 144 N.C. App. 258, 550 S.E.2d 25, 2001 N.C. App. LEXIS 413 (2001).

§ 7A-216. Form of complaint.

The complaint in a small claim action shall be in writing, signed by the party or his attorney, except the complaint in an action for summary ejectment may be signed by an agent for the plaintiff. It need be in no particular form, but is sufficient if in a form which enables a person of common understanding to know what is meant. In any event, the forms prescribed in this Article are sufficient under this requirement, and are intended to indicate the simplicity and brevity of statement contemplated. Demurrers and motions to challenge the legal and formal sufficiency of a complaint in an assigned small claim action shall not be used. But at any time after its filing, the clerk, the chief district judge, or the magistrate to whom such an action is assigned may, on oral or written ex parte motion of the defendant, or on his own motion, order the plaintiff to perfect the statement of his claim before proceeding to its determination, and shall grant extensions of time to plead and continuances of trial pending any perfecting of statement ordered. (1965, c. 310, s. 1; 1971, c. 377, s. 10.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Applied in Jones v. Ratley, 168 N.C. App. 126, 607 S.E.2d 38, 2005 N.C. App. LEXIS 147 (2005).

§ 7A-217. Methods of subjecting person of defendant to jurisdiction.

When by order or rule a small claim action is assigned to a magistrate, the defendant may be subjected to the jurisdiction of the court over his person by the following methods:

(1) By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. When the defendant is under any legal disability, he may be subject to personal jurisdiction only by personal service of process in the manner provided by law.

(2) When the defendant is not under any legal disability, he may be served by registered or certified mail as provided in G.S. 1A-1, Rule 4(j). Proof of service is as provided in G.S. 1A-1, Rule 4(j2).

(3) When the defendant is under no legal disability, he may be subjected to the jurisdiction of the court over his person by his written acceptance of service, or by his voluntary appearance.

(4) In summary ejectment cases only, service as provided in G.S. 42-29 is also authorized. (1965, c. 310, s. 1; 1969, c. 1190, s. 20; 1973, c. 90; 1983, c. 332, s. 3.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

CASE NOTES

Applied in Drummond v. Cordell, 72 N.C. App. 262, 324 S.E.2d 301 (1985).

OPINIONS OF ATTORNEY GENERAL

Summary Ejectment Proceedings. — Because subdivision (4) of this section states that the procedure found in G.S. 42-29 can be used in summary ejectment cases only, and because summary ejectment is in the nature of an in rem proceeding, an in personam money damages claim cannot be heard and a money judgment cannot be entered in an action where service of process is effected through the alternative method under G.S. 42-29. The requirements for actual service of process found elsewhere in G.S. 7A-213 and in G.S. 1A-1, Rule 4 would still apply to the claim for rents and other money damages. See opinion of Attorney General to Hon. Thomas N. Hix, Chief District Court Judge, 29th Judicial Circuit, 60 N.C.A.G. 95 (1992).

§ 7A-218. Answer of defendant.

At any time prior to the time set for trial, the defendant may file a written answer admitting or denying all or any of the allegations in the complaint, or pleading new matter in avoidance. No particular form is required, but it is sufficient if in a form to enable a person of common understanding to know the nature of the defense intended. A general denial of all the allegations of the complaint is permissible.

Failure of defendant to file a written answer after being subjected to the jurisdiction of the court over his person constitutes a general denial. (1965, c. 310, s. 1; 1967, c. 691, s. 20.)

CASE NOTES

Failure to Plead Affirmative Defense on Appeal. — When a landlord successfully sued a tenant for summary ejectment in small claims court, and the tenant obtained a trial de novo in district court, the tenant was not required to file an answer to preserve its affirmative defense of estoppel for a trial de novo in the district court because there were no required pleadings in assigned small claim actions other than the complaint, and defendant's failure to file an answer in small claims court after being subjected to the jurisdiction of the court over his person was a general denial. Don Setliff & Assocs. v. Subway Real Estate Corp., 178 N.C. App. 385, 631 S.E.2d 526, 2006 N.C. App. LEXIS 1414 (2006).

§ 7A-219. Certain counterclaims; cross claims; third-party claims not permissible.

No counterclaim, cross claim or third-party claim which would make the amount in controversy exceed the jurisdictional amount established by G.S. 7A-210(1) is permissible in a small claim action assigned to a magistrate. No determination of fact or law in an assigned small claim action estops a party thereto in any subsequent action which, except for this section, might have been asserted under the Code of Civil Procedure as a counterclaim in the small claim action. Notwithstanding G.S. 1A-1, Rule 13, failure by a defendant to file a counterclaim in a small claims action assigned to a magistrate, or failure by a defendant to appeal a judgment in a small claims action to district court, shall not bar such claims in a separate action. (1965, c. 310, s. 1; 1973, c. 1267, s. 2; 1979, c. 144, s. 2; 1981, c. 555, s. 2; 1985, c. 329; 1989, c. 311, s. 2; 1993, c. 553, s. 73(b); 2005-423, s. 9.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Counterclaim in Ejectment Action Not Allowed. — Where a tenant sought damages in excess of $10,000 on improper summary ejectment claim, the tenant could not plead the claim as a compulsory counterclaim to the ejectment action while it was before a magistrate. Cloer v. Smith, 132 N.C. App. 569, 512 S.E.2d 779 (1999).

Applied in Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975); Ervin Co. v. Hunt, 26 N.C. App. 755, 217 S.E.2d 93 (1975); Fickley v. Greystone Enters., 140 N.C. App. 258, 536 S.E.2d 331, 2000 N.C. App. LEXIS 1110 (2000); Don Setliff & Assocs. v. Subway Real Estate Corp., 178 N.C. App. 385, 631 S.E.2d 526, 2006 N.C. App. LEXIS 1414 (2006).

§ 7A-220. No required pleadings other than complaint.

There are no required pleadings in assigned small claim actions other than the complaint. Answers and counterclaims may be filed by the defendant in accordance with G.S. 7A-218 and G.S. 7A-219. Any new matter pleaded in avoidance in the answer is deemed denied or avoided. On appeal from the judgment of the magistrate for trial de novo before a district judge, the judge shall allow appropriate counterclaims, cross claims, third party claims, replies, and answers to cross claims, in accordance with G.S. 1A-1, et seq. (1965, c. 310, s. 1; 1987, c. 628.)

CASE NOTES

Failure to Assert Counterclaim on Appeal Resulted in Res Judicata. — The plaintiffs' claims for retaliatory eviction were a compulsory counterclaim which should have been asserted in the appeal from the magistrate's judgment in the prior summary ejectment proceeding—the amount in controversy would have prevented it from being asserted before the magistrate—and the plaintiffs were, therefore, precluded by the doctrine of res judicata from asserting their claims in a second action; the determinative question in both actions was whether the plaintiffs breached their respective lease agreements, making defendants' termination of the lease agreements valid. Fickley v. Greystone Enters., 140 N.C. App. 258, 536 S.E.2d 331, 2000 N.C. App. LEXIS 1110 (2000).

Assertion of Affirmative Defense on Appeal. — When a landlord successfully sued a tenant for summary ejectment in small claims court, and the tenant obtained a trial de novo in district court, the tenant did not waive its affirmative defense of estoppel by not pleading it in district court because, in small claims court, the only pleading was the complaint, and on appeal to district court, the district court judge could elect to try the case on the pleadings filed, so the tenant did not waive its affirmative defense. Don Setliff & Assocs. v. Subway Real Estate Corp., 178 N.C. App. 385, 631 S.E.2d 526, 2006 N.C. App. LEXIS 1414 (2006).

Cited in Cloer v. Smith, 132 N.C. App. 569, 512 S.E.2d 779 (1999); Jones v. Ratley, 168 N.C. App. 126, 607 S.E.2d 38, 2005 N.C. App. LEXIS 147 (2005).

§ 7A-221. Objections to venue and jurisdiction over person.

By motion prior to filing answer, or in the answer, the defendant may object that the venue is improper, or move for change of venue, or object to the jurisdiction of the court over his person. These motions or objections are heard on notice by the chief district judge or a district judge designated by order or rule of the chief district judge. Assignment to the magistrate is suspended pending determination of the objection, and the clerk gives notice of the suspension by any convenient means to the magistrate to whom the action has been assigned. All these objections are waived if not made prior to the date set for trial. If venue is determined to be improper, or is ordered changed, the action is transferred to the district court of the new venue, and is not thereafter assigned to a magistrate, but proceeds as in the case of civil actions generally. (1965, c. 310, s. 1.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§ 7A-222. General trial practice and procedure.

Trial of a small claim action before a magistrate is without a jury. The rules of evidence applicable in the trial of civil actions generally are observed. At the conclusion of plaintiff's evidence the magistrate may render judgment of dismissal if plaintiff has failed to establish a prima facie case. If a judgment of dismissal is not rendered the defendant may introduce evidence. At the conclusion of all the evidence the magistrate may render judgment or may in his discretion reserve judgment for a period not in excess of 10 days. (1965, c. 310, s. 1; 1971, c. 377, s. 11.)

Legal Periodicals. — For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

For article, "Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts," see 66 N.C.L. Rev. 467 (1988).

CASE NOTES

Cited in Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977); Jones v. Ratley, 168 N.C. App. 126, 607 S.E.2d 38, 2005 N.C. App. LEXIS 147 (2005).

§ 7A-223. Practice and procedure in small claim actions for summary ejectment.

In any small claim action demanding summary ejectment or past due rent, or both, the complaint may be signed by an agent acting for the plaintiff who has actual knowledge of the facts alleged in the complaint. If a small claim action demanding summary ejectment is assigned to a magistrate, the practice and procedure prescribed for commencement, form and service of process, assignment, pleadings, and trial in small claim actions generally are observed, except that if the defendant by written answer denies the title of the plaintiff, the action is placed on the civil issue docket of the district court division for trial before a district judge. In such event, the clerk withdraws assignment of the action from the magistrate and immediately gives written notice of withdrawal, by any convenient means, to the plaintiff and the magistrate to whom the action has been assigned. The plaintiff, within five days after receipt of the notice, and the defendant, in his answer, may request trial by jury. Failure to request jury trial within the time limited is a waiver of the right to trial by jury. (1965, c. 310, s. 1; 1967, c. 691, s. 21; 1971, c. 377, s. 12.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

CASE NOTES

Applied in Amey v. Amey, 71 N.C. App. 76, 321 S.E.2d 458 (1984).

Cited in Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

OPINIONS OF ATTORNEY GENERAL

Pleadings in small claim summary ejectment actions are the same as in other small claim actions. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary of the Department of Crime Control and Public safety, — N.C.A.G. — (February 10, 1995).

For a summary ejectment action to be processed as a small claim, the complaint must designate it as a small claim and the action must be assigned to a magistrate. This practice is almost universal, and Article 3 of the Landlord and Tenant Act, which describes summary ejectment procedures, refers only to determinations being made in the first instance by magistrates. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary of the Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

§ 7A-224. Rendition and entry of judgment.

Judgment in a small claim action is rendered in writing and signed by the magistrate. The judgment so rendered is a judgment of the district court, and is recorded and indexed as are judgments of the district and superior court generally. Entry is made as soon as practicable after rendition. (1965, c. 310, s. 1; 1969, c. 1190, s. 21.)

Legal Periodicals. — For article, "Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts," see 66 N.C.L. Rev. 467 (1988).

CASE NOTES

Effect of Section. — This section does not control the manner of "rendering" magistrate's judgments under G.S. 1A-1, Rule 58; it merely requires the magistrate's judgment to be rendered in writing in order to be deemed a judgment of the district court entitled to recording and indexing as any other district court judgment. The statement that "entry is made as soon as practicable after rendition" merely refers to the entry of that judgment in the records and indexes of the general courts. Thus, this section simply sets forth the requirements for filing a magistrate's judgment as a judgment of the district court. Provident Fin. Co. v. Locklear, 89 N.C. App. 535, 366 S.E.2d 599 (1988).

Cited in Chandak v. Electronic Interconnect Corp., 144 N.C. App. 258, 550 S.E.2d 25, 2001 N.C. App. LEXIS 413 (2001).

§ 7A-225. Lien and execution of judgment.

From the time of docketing, the judgment rendered by a magistrate in a small claim action constitutes a lien and is subject to execution in the manner provided in Chapter 1, Article 28, of the General Statutes. (1965, c. 310, s. 1.)

CASE NOTES

This section and G.S. 7A-226 merely establish priority of liens; the statutes do not address the effect of a voluntary dismissal in the district court. G.S. 1A-1, Rule 41(a)(1) allows plaintiff to voluntarily dismiss the action without prejudice, and this section and G.S. 7A-226 do not alter this right. First Union Nat'l Bank v. Richards, 90 N.C. App. 650, 369 S.E.2d 620 (1988).

Cited in Jones v. Ratley, 168 N.C. App. 126, 607 S.E.2d 38, 2005 N.C. App. LEXIS 147 (2005).

§ 7A-226. Priority of judgment when appeal taken.

When appeal is taken from a judgment in a small claim action, the lien acquired by docketing merges into any judgment rendered after trial de novo on appeal, continues as a lien from the first docketing, and has priority over any judgment docketed subsequent to the first docketing. (1965, c. 310, s. 1.)

CASE NOTES

G.S. 7A-225 and this section merely establish priority of liens; the statutes do not address the effect of a voluntary dismissal in the district court. G.S. 1A-1, Rule 41(a)(1) allows plaintiff to voluntarily dismiss the action without prejudice, and G.S. 7A-225 and this section do not alter this right. First Union Nat'l Bank v. Richards, 90 N.C. App. 650, 369 S.E.2d 620 (1988).

§ 7A-227. Stay of execution on appeal.

Appeal from judgment of a magistrate does not stay execution if the judgment is for recovery of specific property. Such execution may be stayed by order of the clerk of superior court upon petition by the appellant accompanied by undertaking in writing, executed by one or more sufficient sureties approved by the clerk, to the effect that if judgment be rendered against appellant the sureties will pay the amount thereof with costs awarded against the appellant. Appeal from judgment of a magistrate does stay execution if the judgment is for money damages. This section shall not require any undertaking of appellants in summary ejectment actions other than those imposed by Chapter 42 of the General Statutes. (1965, c. 310, s. 1; 1967, c. 24, s. 1; 1977, c. 844; 1979, c. 820, s. 9.)

Legal Periodicals. — For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Cited in Porter v. Cahill, 1 N.C. App. 579, 162 S.E.2d 128 (1968); Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

§ 7A-228. New trial before magistrate; appeal for trial de novo; how appeal perfected; oral notice; dismissal.

(a) The chief district court judge may authorize magistrates to hear motions to set aside an order or judgment pursuant to G.S. 1A-1, Rule 60(b)(1) and order a new trial before a magistrate. The exercise of the authority of the chief district court judge in allowing magistrates to hear Rule 60(b)(1) motions shall not be construed to limit the authority of the district court to hear motions pursuant to Rule 60(b)(1) through (6) of the Rules of Civil Procedure for relief from a judgment or order entered by a magistrate and, if granted, to order a new trial before a magistrate. After final disposition before the magistrate, the sole remedy for an aggrieved party is appeal for trial de novo before a district court judge or a jury. Notice of appeal may be given orally in open court upon announcement or after entry of judgment. If not announced in open court, written notice of appeal must be filed in the office of the clerk of superior court within 10 days after entry of judgment. The appeal must be perfected in the manner set out in subsection (b). Upon announcement of the appeal in open court or upon receipt of the written notice of appeal, the appeal shall be noted upon the judgment. If the judgment was mailed to the parties, then the time computations for appeal of such judgment shall be pursuant to G.S. 1A-1, Rule 6.

(b) The appeal shall be perfected by (1) oral announcement of appeal in open court; or (2) by filing notice of appeal in the office of the clerk of superior court within 10 days after entry of judgment, pursuant to subsection (a), and by serving a copy of the notice of appeal on all parties pursuant to G.S. 1A-1, Rule 5. Failure to pay the costs of court to appeal within 20 days after entry of judgment shall result in the automatic dismissal of the appeal. The failure to demand a trial by jury in district court by the appealing party before the time to perfect the appeal has expired is a waiver of the right thereto.

(b1) A person desiring to appeal as an indigent shall, within 10 days of entry of judgment by the magistrate, file an affidavit that he or she is unable by reason of poverty to pay the costs of appeal. Within 20 days after entry of judgment, a superior or district court judge, magistrate, or the clerk of the superior court may authorize a person to appeal to district court as an indigent if the person is unable to pay the costs of appeal. The clerk of superior court shall authorize a person to appeal as an indigent if the person files the required affidavit and meets one or more of the criteria listed in G.S. 1-110. A superior or district court judge, a magistrate, or the clerk of the superior court may authorize a person who does not meet any of the criteria listed in G.S. 1-110 to appeal as an indigent if the person cannot pay the costs of appeal.

The district court may dismiss an appeal and require the person filing the appeal to pay the court costs advanced if the allegations contained in the affidavit are determined to be untrue or if the court is satisfied that the action is frivolous or malicious. If the court dismisses the appeal, the court shall affirm the judgment of the magistrate.

(c) Whenever such appeal is docketed and is regularly set for trial, and the appellant fails to appear and prosecute his appeal, the presiding judge may have the appellant called and the appeal dismissed; and in such case the judgment of the magistrate shall be affirmed. (1965, c. 310, s. 1; 1969, c. 1190, s. 22; 1979, 2nd Sess., c. 1328, s. 3; 1981, c. 599, s. 3; 1985, c. 753, ss. 1, 2; 1987, c. 553; 1993, c. 435, s. 2; 1998-120, s. 1.)

Legal Periodicals. — For comment on the present and future use of the writ of recordari in North Carolina, see 2 Wake Forest Intra. L. Rev. 77 (1966).

As to form for writ of recordari, see 2 Wake Forest Intra. L. Rev. 88 (1966).

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

For article, "Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts," see 66 N.C.L. Rev. 467 (1988).

For article, "Court-Ordered Arbitration in North Carolina: Selected Issues of Practice and Procedure," see 21 Campbell L. Rev. 191 (1999).

CASE NOTES

G.S. 1A-1, Rule 41(a)(1) is available in actions in the district court on appeal de novo from a magistrate's judgment. First Union Nat'l Bank v. Richards, 90 N.C. App. 650, 369 S.E.2d 620 (1988).

Requirements of this section are not inconsistent with those of G.S. 1A-1, Rule 41(a)(1), since this section sets forth the right to appeal for trial de novo in district court and the procedures to perfect the appeal and G.S. 1A-1, Rule 41(a)(1) sets forth the right to a voluntary dismissal and the procedures to effect the dismissal. This section does not address the same phase of the action as does G.S. 1A-1, Rule 41(a)(1). The rule is therefore not subject to the provisions of this section. First Union Nat'l Bank v. Richards, 90 N.C. App. 650, 369 S.E.2d 620 (1988).

Entry of Magistrate's Judgment. — G.S. 1A-1, Rule 58 specifically controls the determination of the magistrate's "entry" of the small claims court judgment in the court minutes for purposes of appeal under this section. Under G.S. 1A-1, Rule 58, where the magistrate "rendered" his judgment in open court and the evidence was clear that he announced the judgment in open court, both dismissing plaintiff's action and awarding defendants a sum certain on their counterclaim, entry of the magistrate's judgment was deemed to occur at the time of rendition. Provident Fin. Co. v. Locklear, 89 N.C. App. 535, 366 S.E.2d 599 (1988).

Entry of the magistrate's judgment for purposes of G.S. 1A-1, Rule 58 was not less automatic simply because the magistrate himself, rather than a clerk, noted the judgment in the court minutes. Provident Fin. Co. v. Locklear, 89 N.C. App. 535, 366 S.E.2d 599 (1988).

Collection of Costs. — Although in Porter v. Cahill, 1 N.C. App. 579, 581, 162 S.E.2d 128, 130 (1968) the court held it is the duty of the clerk of superior court to collect the costs of appeal, that case was decided before the effective date of the amendment to this section requiring the payment of the costs of appeal to perfect the appeal. Principal Mut. Life Ins. Co. v. Burnup & Sims, Inc., 114 N.C. App. 494, 442 S.E.2d 85 (1994).

Duty to Pay. — Plaintiff has the responsibility of ascertaining and paying the costs of appeal. Principal Mut. Life Ins. Co. v. Burnup & Sims, Inc., 114 N.C. App. 494, 442 S.E.2d 85 (1994).

Motions to Set Aside Magistrate's Judgment. — Subsection (a) of this section provides for motions under G.S. 1A-1, Rule 60(b)(1) to set aside the magistrate's judgment. Provident Fin. Co. v. Locklear, 89 N.C. App. 535, 366 S.E.2d 599 (1988).

Magistrate's judgment did not become a final judgment, where, after the magistrate's judgment was entered, plaintiff exercised its right to appeal for trial de novo in the district court pursuant to subsection (a) of this section, and then took a voluntary dismissal of the action pursuant to G.S. 1A-1, Rule 41(a). Therefore the doctrine of res judicata did not apply. First Union Nat'l Bank v. Richards, 90 N.C. App. 650, 369 S.E.2d 620 (1988).

Magistrate Cannot Extend Time to Pay Fees. — Magistrate did not have the authority under G.S. 1A-1, Rule 60(b) to extend the time provided in this section for party to pay appeal fees. Riverview Mobile Home Park v. Bradshaw, 119 N.C. App. 585, 459 S.E.2d 283 (1995).

Appearance in Forma Pauperis on Trial de Novo. — A party, plaintiff or defendant, may petition to appear in forma pauperis in the trial de novo of cases appealed to the district court judge from judgments of a magistrate in small claims actions. Atlantic Ins. & Realty Co. v. Davidson, 320 N.C. 159, 357 S.E.2d 668 (1987).

Tenant Estopped From Arguing that Ap-

peal Vacated Summary Ejectment. — In an action in which a tenant claimed that a public housing agency's termination of benefits pursuant to 24 C.F.R. § 982.552(b)(2) violated due process by not mentioning at the termination hearing that her appeal in a summary ejectment action limited the agency's right to terminate benefits, the tenant was estopped from arguing that her appeal in the summary ejectment action vacated the ejectment. Mack v. W. Piedmont Council of Gov'ts, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 28123 (W.D.N.C. Dec. 23, 2002).

Dismissal for failure to appear proper. — Trial court properly dismissed a county's appeal from a small claims court judgment in favor an of employee where the county failed to appear for the scheduled trial de novo before the trial court; the fact that the county had obtained an arbitrator's award was irrelevant. Brown v. County of Avery, 164 N.C. App. 704, 596 S.E.2d 334, 2004 N.C. App. LEXIS 975 (2004).

Dismissal Not Proper. — Because this section refers to the failure of the appellant to appear and prosecute his appeal once the appeal is docketed and regularly set for trial, dismissal for failure to prosecute was not proper. Fairchild Properties v. Hall, 122 N.C. App. 286, 468 S.E.2d 605 (1996).

Applied in Ervin Co. v. Hunt, 26 N.C. App. 755, 217 S.E.2d 93 (1975); Ball Photo Supply Co. v. McClain, 30 N.C. App. 132, 226 S.E.2d 178 (1976); Stephens v. John Koenig, Inc., 119 N.C. App. 323, 458 S.E.2d 233 (1995).

Cited in Porter v. Cahill, 1 N.C. App. 579, 162 S.E.2d 128 (1968); Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977); Satterfield v. Pappas, 67 N.C. App. 28, 312 S.E.2d 511 (1984); Windley v. Dockery, 95 N.C. App. 771, 383 S.E.2d 682 (1989); Chandak v. Electronic Interconnect Corp., 144 N.C. App. 258, 550 S.E.2d 25, 2001 N.C. App. LEXIS 413 (2001); N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888, 2004 N.C. LEXIS 909 (2004).

§ 7A-229. Trial de novo on appeal.

Upon appeal noted, the clerk of superior court places the action upon the civil issue docket of the district court division. The district judge before whom the action is tried may order repleading or further pleading by some or all of the parties; may try the action on stipulation as to the issue; or may try it on the pleadings as filed. (1965, c. 310, s. 1.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

CASE NOTES

Appearance in Forma Pauperis on Trial de Novo. — A party, plaintiff or defendant, may petition to appear in forma pauperis in the trial de novo of cases appealed to the district court judge from judgments of a magistrate in small claims actions. Atlantic Ins. & Realty Co. v. Davidson, 320 N.C. 159, 357 S.E.2d 668 (1987).

District Court Could Decide Trial De Novo on Appeal on the Basis of Just the Pleadings. — In a trial de novo on appeal to the district court from a small claims money judgment, the district court had the statutory authority under G.S. 7A-229 to decide the case on the pleadings and, since the informal procedures of the small claims court carried over to the appeal, the district court was not required to give the separate, detailed legal conclusions that were required by N.C. R. Civ. P. 52. Jones v. Ratley, 168 N.C. App. 126, 607 S.E.2d 38, 2005 N.C. App. LEXIS 147 (2005).

When a landlord successfully sued a tenant for summary ejectment in small claims court, and the tenant obtained a trial de novo in district court, the tenant did not waive its affirmative defense of estoppel by not pleading it in district court because, in small claims court, the only pleading was the complaint, and on appeal to district court, the district court judge could elect to try the case on the pleadings filed, so the tenant did not waive its affirmative defense. Don Setliff & Assocs. v. Subway Real Estate Corp., 178 N.C. App. 385, 631 S.E.2d 526, 2006 N.C. App. LEXIS 1414 (2006).

Cited in Porter v. Cahill, 1 N.C. App. 579, 162 S.E.2d 128 (1968); Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

§ 7A-230. Jury trial on appeal.

The appellant in his written notice of appeal may demand a jury on the trial de novo. Within 10 days after receipt of the notice of appeal stating that the costs of the appeal have been paid, any appellee by written notice served on all parties and on the clerk of superior court may demand a jury on the trial de novo. (1965, c. 310, s. 1; 1981, c. 599, s. 3.)

CASE NOTES

Cited in Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

§ 7A-231. Provisional and incidental remedies.

The provisional and incidental remedies of claim and delivery, subpoena duces tecum, production of documents and orders for the relinquishment of property subject to a possessory lien pursuant to G.S. 44A-4(a) are obtainable in small claims actions. The practice and procedure provided therefor in respect of civil actions generally is observed, conformed as may be required. No other provisional or incidental remedies are obtainable while the action is pending before the magistrate. (1965, c. 310, s. 1; 1985, c. 655, s. 3.)

OPINIONS OF ATTORNEY GENERAL

The plaintiff's prosecution bond set out in G.S. 1-109 is one of the provisional or incidental remedies which are not obtainable while a civil action is pending before the magistrate by virtue of the last sentence of this section. See opinion of Attorney General to Ms. Jane M. Eason Civil Magistrate, New Hanover County, 55 N.C.A.G. 99 (1986).

§ 7A-232. Forms.

The following forms are sufficient for the purposes indicated under this article. Substantial conformity is sufficient.

FORM 1.

MAGISTRATE SUMMONS

NORTH CAROLINA General Court of Justice
District Court Division
________________ COUNTY Before the Magistrate

A. B., Plaintiff
v. SUMMONS
C. D., Defendant

To the above-named Defendant:

You are hereby summoned to appear before His Honor ________, Magistrate of the District Court, at ______ (time) ______, on ____ (date) ____, at the ______ (address) ________ in the ________ (city) ________, then and there to defend against proof of the claim stated in the complaint filed in this action, copy of which is served herewith. You may file written answer making defense to the claim in the office of the Clerk of Superior Court ____________ County in ____________, N. C., not later than the time set for trial. If you do not file answer, plaintiff must nevertheless prove his claim before the Magistrate. But if you fail to appear and defend against the proof offered, judgment for the relief demanded in the complaint may be rendered against you.

This ________ day of ________ (month) ________, ________.

____
Clerk of Superior Court
____________________ County

FORM 2.

NOTICE OF NON-ASSIGNMENT OF ACTION

NORTH CAROLINA
General Court of Justice
District Court Division
____________ County

A. B., Plaintiff
v.
C. D., Defendant

NOTICE OF NON-ASSIGNMENT OF ACTION

To the above-named Plaintiff:

Take notice that the civil action styled as above which you requested be assigned for trial before a Magistrate will not be assigned. Thirty-day summons to answer is being issued for service upon defendant, and upon the joining of issue this action will be placed on the civil issue docket for trial before a district judge.

This ________ day of ________, ______.

____
Clerk of Superior Court
____________________ County

FORM 3.

NOTICE OF ASSIGNMENT OF ACTION

NORTH CAROLINA
General Court of Justice
District Court Division
Before the Magistrate
____________ County

A. B., Plaintiff
v.
C. D., Defendant

NOTICE OF ASSIGNMENT OF ACTION

To the above-named Plaintiff:

Take notice that the civil action styled as above, commenced by you as plaintiff, has been assigned for trial before His Honor ____________, Magistrate of the District Court, at ________ (time) ________ on ________ (date) ________, at ________ (address) ____________ in ________ (city) ________, N.C.

____
Clerk of Superior Court
____________________ County

FORM 4.

COMPLAINT ON A PROMISSORY NOTE

NORTH CAROLINA
General Court of Justice
District Court Division
SMALL CLAIM
____________ COUNTY

A. B., Plaintiff
v.
C. D., Defendant

COMPLAINT

1. Plaintiff is a resident of ____________ County; defendant is a resident of ____________ County.

2. Defendant on or about January 1, 1964, executed and delivered to plaintiff a promissory note (in the following words and figures: (here set out the note verbatim)); (a copy of which is annexed as Exhibit ______); (whereby defendant promised to pay to plaintiff or order on June 1, 1964, the sum of two hundred and fifty dollars ($250.00) with interest thereon at the rate of six percent (6%) per annum).

3. Defendant owes the plaintiff the amount of said note and interest.

Wherefore plaintiff demands judgment against defendant for the sum of two hundred and fifty dollars ($250.00), interest and costs.

This ________ day of ________, ________.

____
(signed) A. B., Plaintiff
(or E. F., Attorney for Plaintiff)

Service by mail is, is not, requested.

____
(signed) A. B., Plaintiff
(or E. F., Attorney for Plaintiff)

FORM 5.

COMPLAINT ON AN ACCOUNT

(Caption as in form 4)

1. (Allegation of residence of parties)

2. Defendant owes plaintiff two hundred and fifty dollars ($250.00) according to the account annexed as Exhibit A.

Wherefore (etc., as in form 4).

FORM 6.

COMPLAINT FOR GOODS SOLD AND DELIVERED

(Caption as in form 4)

1. (Allegation of residence of parties)

2. Defendant owes plaintiff two hundred and fifty dollars ($250.00) for goods sold and delivered to defendant between June 1, 1965, and December 1, 1965.

Wherefore (etc., as in form 4).

FORM 7.

COMPLAINT FOR MONEY LENT

(Caption as in form 4)

1. (Allegation of residence of parties)

2. Defendant owes plaintiff two hundred and fifty dollars ($250.00) for money lent by plaintiff to defendant on or about June 1, 1965.

Wherefore (etc., as in form 4.)

FORM 8.

COMPLAINT FOR CONVERSION

(Caption as in form 4)

1. (Allegation of residence of parties)

2. On or about June 1, 1965, defendant converted to his own use a set of plumbing tools of the value of two hundred and fifty dollars ($250.00), the property of plaintiff.

Wherefore (etc., as in form 4).

FORM 9.

COMPLAINT FOR INJURY TO PERSON OR PROPERTY

(Caption as in form 4)

1. (Allegation of residence of parties)

2. On or about June 1, 1965, at the intersection of Main and Church Streets in the Town of Ashley, N. C., defendant (intentionally struck plaintiff a blow in the face) (negligently drove a bicycle into plaintiff) (intentionally tore plaintiff's clothing) (negligently drove a motorcycle into the side of plaintiff's automobile).

3. As a result (plaintiff suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one hundred and fifty dollars ($150.00) (plaintiff suffered damage to his property above described in the sum of two hundred and fifty dollars ($250.00).

Wherefore (etc., as in form 4).

FORM 10.

COMPLAINT TO RECOVER POSSESSION OF CHATTEL

(Caption as in form 4)

1. (Allegation of residence of parties)

2. Defendant has in his possession a set of plumber's tools of the value of two hundred dollars ($200.00), the property of plaintiff. Plaintiff is entitled to immediate possession of the same but defendant refuses on demand to deliver the same to plaintiff.

3. Defendant has unlawfully kept possession of the property above described since on or about June 1, 1965, and has thereby deprived plaintiff of its use, to his damage in the sum of fifty dollars ($50.00).

Wherefore plaintiff demands judgment against defendant for the recovery of possession of the property above described and for the sum of fifty dollars ($50.00), interest and costs. (etc., as in form 4).

FORM 11.

COMPLAINT IN SUMMARY EJECTMENT

(Caption as in form 4)

1. (Allegation of residence of parties)

2. Defendant entered into possession of a tract of land (briefly described) as a lessee of plaintiff (or as lessee of E. F. who, after making the lease, assigned his estate to the plaintiff); the term of defendant expired on the 1st day of June, 1965 (or his term has ceased by nonpayment of rent, or otherwise, as the fact may be); the plaintiff has demanded possession of the premises of the defendant, who refused to surrender it, but holds over; the estate of plaintiff is still subsisting, and the plaintiff is entitled to immediate possession.

3. Defendant owes plaintiff the sum of fifty dollars ($50.00) for rent of the premises from the 1st of May, 1965, to the 1st day of June, 1965, and one

hundred dollars ($100.00) for the occupation of the premises since the 1st day of June, 1965 to the present.

Wherefore, plaintiff demands judgment against defendant that he be put in immediate possession of the premises, and that he recover the sum of one hundred and fifty dollars ($150.00), interest and costs. (etc., as in form 4). (1965, c. 310, s. 1; 1971, c. 1181, s. 2; 1999-456, s. 59.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Cited in Duke Power Co. v. Daniels, 86 N.C. App. 469, 358 S.E.2d 87 (1987).

§§ 7A-233 through 7A-239: Reserved for future codification purposes.

SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE.

ARTICLE 20.

Original Civil Jurisdiction of the Trial Divisions.

§ 7A-240. Original civil jurisdiction generally.

Except for the original jurisdiction in respect of claims against the State which is vested in the Supreme Court, original general jurisdiction of all justiciable matters of a civil nature cognizable in the General Court of Justice is vested in the aggregate in the superior court division and the district court division as the trial divisions of the General Court of Justice. Except in respect of proceedings in probate and the administration of decedents' estates, the original civil jurisdiction so vested in the trial divisions is vested concurrently in each division. (1965, c. 310, s. 1.)

Legal Periodicals. — For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

For survey of 1976 case law on wills, trusts and estates, see 55 N.C.L. Rev. 1109 (1977).

CASE NOTES

Judicial Immunity. — Judges of courts of general jurisdiction are fully clothed by both logic and precedent with the shield of judicial immunity. Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972), aff'd, 478 F.2d 694 (4th Cir. 1973).

Jurisdiction over Member of Eastern Band of Cherokee in Tort Claim. — The courts of this State have jurisdiction over a member of the Eastern Band of Cherokee Indians in a tort claim by a non-Indian arising from an occurrence on land within the Qualla Boundary. Sasser v. Beck, 40 N.C. App. 668, 253 S.E.2d 577, cert. denied, 298 N.C. 300, 259 S.E.2d 915 (1979).

Jurisdiction over All Justiciable Matters Not Placed Elsewhere. — Except for areas specifically placing jurisdiction elsewhere (such as claims under the Workers' Compensation Act), the trial courts of North Carolina have subject matter jurisdiction over "all justiciable matters of a civil nature." Harris v. Pembaur, 84 N.C. App. 666, 353 S.E.2d 673 (1987).

Unless jurisdiction is specifically placed elsewhere, both the superior court division and the district court division have subject matter jurisdiction over all "justiciable" civil claims. State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

Contract dispute between the parties constituted a "justiciable matter" that is "cognizable" in North Carolina trial courts; therefore, trial judge's determination that there was no subject matter jurisdiction was in error. Harris v. Pembaur, 84 N.C. App. 666, 353 S.E.2d 673 (1987).

Challenge to Statutes Regarding Trial Calendar. — Plaintiffs' pending criminal prosecutions did not deprive the superior court of jurisdiction to consider plaintiffs' constitutional challenge to the statutes which authorize the district attorney to set the criminal trial calendar. Simeon v. Hardin, 339 N.C. 358, 451 S.E.2d 858 (1994).

Claims Clearly Justiciable Matters. — Where executor of decedent's estate filed its petition for hearing requesting instructions from the clerk of superior court as to whether surviving spouse was entitled to participate in the administration, settlement and distribution of decedent's estate, the claims at issue were claims of misrepresentation, undue influence and inadequate disclosure of assets or liabilities, clearly justiciable matters of a civil nature, original general jurisdiction over which is vested in the trial division; the superior court judge properly found that the clerk lacked jurisdiction in this matter and properly voided the clerk's order. In re Estate of Wright, 114 N.C. App. 659, 442 S.E.2d 540, cert. denied, 338 N.C. 516, 453 S.E.2d 174 (1994).

Concurrent Jurisdiction to Hear Application for Restraining Order Pending Trial on the Merits. — An application for a restraining order pending trial on the merits is a justiciable matter of a civil nature which is cognizable in the General Court of Justice, and the original general jurisdiction to hear the application and issue such order is vested concurrently in the superior court division and the district court division. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Superior Court Jurisdiction in Personal Injury Actions. — The superior court is a court of general jurisdiction and has jurisdiction in all actions for personal injuries caused by negligence, except where its jurisdiction is divested by statute. Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

Jurisdiction over Action to Recover for Breach of Duties, Negligence, and Fraud in Administration of Estate. — In action to recover for breach of fiduciary duties, negligence, and fraud arising from administration of estate of plaintiff's husband and a trust created under his will, dismissal for want of subject matter jurisdiction on the ground that the claims alleged should have been brought initially before the clerk was improper, since the claims were "justiciable matters of a civil nature," original general jurisdiction over which was vested in the trial division, and their resolution was not part of the administration, settlement, or distribution of an estate so as to make jurisdiction properly exercisable initially by the clerk; moreover, inclusion by plaintiff in her complaint of matters which should have been brought initially before the clerk did not require dismissal for want of subject matter jurisdiction of the entire action. Ingle v. Allen, 53 N.C. App. 627, 281 S.E.2d 406 (1981).

Superior Court Jurisdiction in Summary Ejectment Actions. — When the legislature created the district court division and gave it concurrent original jurisdiction over all matters except probate and matters of decedents' estates, it did not thereby divest the superior court division of any of its original jurisdiction; hence, the superior court division has original jurisdiction over summary ejectment actions. East Carolina Farm Credit v. Salter, 113 N.C. App. 394, 439 S.E.2d 610 (1994).

Superior Court Jurisdiction in Child Custody Actions. — The legislature has enunciated a public policy that every child should have a permanent plan of care. Because adoption is more likely than a custody proceeding between non-parents to result in a permanent plan of care, and because the superior court has jurisdiction over adoptions, that court's jurisdiction supersedes that of the district court with regard to the custody of a child who is the subject of a simultaneous adoption and custody proceeding. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

Upon the entry of an interlocutory order of adoption by the superior court, the jurisdiction of the district court with regard to the custody of the child who is the subject of the interlocutory order is in abeyance until such time as the interlocutory decree is vacated, the adoption petition is dismissed, or a final decree of adoption is entered. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

Disposition of Case in Superior Court After Transfer to District Court. — After a judge entered his order transferring a case from the superior court division of the General Court of Justice to the district court division, the latter being the proper division in which to try the case, nothing else appearing, disposition of the case thereafter in the superior court was irregular and contrary to the course and practice in the General Court of Justice. Brady v. Town of Chapel Hill, 277 N.C. 720, 178 S.E.2d 446 (1971).

Dispute Over Settlement Agreement. — When petitioner on appeal from an order of the clerk of superior court attacked a prior court decision, there was no merit to her claim that the prior decision was void for lack of subject matter jurisdiction; the trial court had not been addressing an estate matter under G.S. 28A-2-1 but determining whether there were issues of fact about the terms of a settlement agreement following a mediation; it had jurisdiction under G.S. 7A-240 to do this, as it later had jurisdiction to enforce a settlement agreement reached by the parties. In re Estate of Whitaker, 179 N.C. App. 375, 633 S.E.2d 849, 2006 N.C. App. LEXIS 1902 (2006).

Institution of Action in Improper Trial Division. — It is fairly common practice for an attorney to institute an action in district court, although not the proper division, in order to schedule an earlier trial date than would be available on the superior court calendar. This practice is allowed since original civil jurisdiction is vested concurrently in both divisions and since a judgment is not void or voidable solely because it was rendered in the improper trial division. Circle J. Farm Center, Inc. v. Fulcher, 57 N.C. App. 206, 290 S.E.2d 798 (1982).

Absent proper objection, an action begun in the wrong division may continue in that division to its conclusion. Circle J. Farm Center, Inc. v. Fulcher, 57 N.C. App. 206, 290 S.E.2d 798 (1982).

Civil Forfeiture. — Where the civil forfeiture dispute at the trial level was a "justiciable" matter, the superior court's determination that it had subject matter jurisdiction was proper. State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

Applied in Chemical Realty Corp. v. Home Fed. Sav. & Loan Ass'n, 40 N.C. App. 675, 253 S.E.2d 621 (1979); Church v. Carter, 94 N.C. App. 286, 380 S.E.2d 167 (1989); Schall v. Jennings, 99 N.C. App. 343, 393 S.E.2d 130 (1990); Bynum v. Frederickson Motor Express Corp., 112 N.C. App. 125, 434 S.E.2d 241 (1993); Hodge v. North Carolina DOT, 137 N.C. App. 247, 528 S.E.2d 22, 2000 N.C. App. LEXIS 334 (2000).

Cited in Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970); Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975); Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 239 S.E.2d 566 (1977); Grissom v. North Carolina Dep't of Revenue, 34 N.C. App. 381, 238 S.E.2d 311 (1977); North Brook Farm Lines v. McBrayer, 35 N.C. App. 34, 241 S.E.2d 74 (1978); Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992); Republican Party v. Martin, 980 F.2d 943 (4th Cir. 1992), rehearing denied, 991 F.2d 1202 (4th Cir.), cert. denied, 510 U.S. 828, 114 S. Ct. 93, 126 L. Ed. 2d 60 (1993); Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995); Tart v. Prescott's Pharmacies, Inc., 118 N.C. App. 516, 456 S.E.2d 121 (1995).

§ 7A-241. Original jurisdiction in probate and administration of decedents' estates.

Exclusive original jurisdiction for the probate of wills and the administration of decedents' estates is vested in the superior court division, and is exercised by the superior courts and by the clerks of superior court as ex officio judges of probate according to the practice and procedure provided by law. (1965, c. 310, s. 1.)

Legal Periodicals. — For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

For survey of 1976 case law on wills, trusts and estates, see 55 N.C.L. Rev. 1109 (1977).

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

The clerk is a part of the superior court. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

And Continues to Exercise Probate Jurisdiction. — Under this section, the clerk of superior court, "as ex officio judge of probate," continues to exercise probate jurisdiction "according to the practice and procedure provided by law"; and in doing so, he continues to act as "a judicial officer of the superior court division, and not as a separate court" pursuant to G.S. 7A-40. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

Section Supports G.S. 28A-2-1 Assignment of Authority to Clerk. — The assignment of original authority of probate matters to the clerk in G.S. 28A-2-1 is supported by, and not contravened by, this section. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

Reference to "Practice and Procedure Provided by Law". — When this section was enacted in 1965 its reference to "the practice and procedure provided by law" was a reference to Chapter 28, which remained applicable to the estates of all decedents dying on or before October 1, 1975. After that date the reference in this section was to Chapter 28A. Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

This section reemphasizes the fact that the district courts have no jurisdiction of probate matters, and except in those instances where the clerk is disqualified to act, it vests probate jurisdiction in the superior courts to be exercised originally by the clerks as ex officio judges of probate in the manner specified in the applicable statutes, that is, "according to the practice and procedure provided by law." Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

Derivative Probate Jurisdiction of Judge. — In most instances a superior court judge's probate jurisdiction is, in effect, that of an appellate court, because his jurisdiction is derivative and not concurrent. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied, 314 N.C. 330, 333 S.E.2d 488 (1985).

Allocation of Jurisdiction Between Clerk and Judge. — This section does not say that concurrent jurisdiction in probate matters is vested in the clerk and the judge of the superior court. It says that probate jurisdiction is vested in the superior court division to be exercised by the superior court and the clerk according to the practice and procedure provided by law. The law, that is, the statutes specifying this practice and procedure, has allocated the jurisdiction between the clerk and the judge. By G.S. 28A-2-1 the clerk is given exclusive original jurisdiction of "the administration, settlement and distribution of estates of decedents" except in cases where the clerk is disqualified to act under G.S. 28A-2-3. When the clerk is disqualified to exercise his jurisdiction the judge has equal authority to perform the clerk's probate duties and, in that sense, he exercises concurrent jurisdiction of probate matters. In all other instances, however, the judge's probate jurisdiction is, in effect, that of an appellate court pursuant to G.S. 7A-251. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

Although this section provides that exclusive original jurisdiction in probate matters is vested in the "superior court division," G.S. 28A-2-1 specifies that the clerk is given exclusive original jurisdiction in the administration of decedents' estates except in cases where the clerk is disqualified to act. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied, 314 N.C. 330, 333 S.E.2d 488 (1985).

Submission of Issue Involving Probate and Nonprobate Matters. — The judge of superior court in the exercise of his inherent powers upon appeal from the clerk's finding had the right to submit to the jury the one issue that would resolve both the right to qualify as administratrix, a probate matter, and the right to share in the decedent's estate, which was not a probate matter. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

Strict Construction of Appeal Procedure from Clerk Conflicts with Section. — Under a strict construction of G.S. 1-272 and 1-273 [see now G.S. 1-301.1 et seq.] as they affect G.S. 7A-251, in probate matters originally heard by the clerk, an appeal would lie directly to the judge of superior court in matters of law and legal inference; but in the hearing before the clerk if issues of fact, or both law and fact, were raised, the appeal would lie directly to the superior court for jury trial on the issues of fact. But this strict construction would ignore the "according to the practice and procedure provided by law" mandate of this section. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

Procedure in Superior Court on Appeal from Clerk. — In an appeal from an order of the clerk in a probate matter, the superior court is not required to conduct a de novo hearing. Rather, when a finding of fact by the clerk of court is properly challenged by specific exception, the superior court judge will review those findings, and either affirm, reverse, or modify them. If he deems it advisable, he may submit the issue to a jury, which course he could not follow without hearing evidence. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied, 314 N.C. 330, 333 S.E.2d 488 (1985).

An administratrix' petition for allowance of commissions and attorneys' fees is initially properly brought before the clerk of superior court. In re Green, 9 N.C. App. 326, 176 S.E.2d 19 (1970).

Cited in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969); In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970); Turner v. Lea, 25 N.C. App. 113, 212 S.E.2d 391 (1975); Beck v. Beck, 36 N.C. App. 774, 245 S.E.2d 199 (1978); Kimrey v. Dorsett, 10 Bankr. 466 (M.D.N.C. 1981); Ingle v. Allen, 53 N.C. App. 627, 281 S.E.2d 406 (1981); In re Estate of Tucci, 94 N.C. App. 428, 380 S.E.2d 782 (1989); State ex rel. Pilard v. Berninger, 154 N.C. App. 45, 571 S.E.2d 836, 2002 N.C. App. LEXIS 1407 (2002), cert. denied, 356 N.C. 694, 579 S.E.2d 100 (2003); In re Estate of Whitaker, 179 N.C. App. 375, 633 S.E.2d 849, 2006 N.C. App. LEXIS 1902 (2006).

§ 7A-242. Concurrently held original jurisdiction allocated between trial divisions.

For the efficient administration of justice in respect of civil matters as to which the trial divisions have concurrent original jurisdiction, the respective divisions are constituted proper or improper for the trial and determination of specific actions and proceedings in accordance with the allocations provided in this Article. But no judgment rendered by any court of the trial divisions in any civil action or proceeding as to which the trial divisions have concurrent original jurisdiction is void or voidable for the sole reason that it was rendered by the court of a trial division which by such allocation is improper for the trial and determination of the civil action or proceeding. (1965, c. 310, s. 1.)

Legal Periodicals. — For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Administrative allocations of case loads between the divisions are not jurisdictional, since a judgment is not void or voidable for the reason that it was rendered by a court of the trial division which by the statutory allocation was the improper division for hearing and determining the matter. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

The superior court division or the district court division, or both, are designated as "proper" divisions in which to bring a given civil action, and no order of the district court may be overturned merely because it was not the proper division to enter the order. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Party May Move for Transfer of Case as Matter of Right. — Although the case allocations of this Chapter are merely administrative directives, a party may move, as a matter of right, for transfer of a case in accordance with the proper statutory allocation. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

Institution of Action in Improper Trial Division. — It is fairly common practice for an attorney to institute an action in district court, although not the proper division, in order to schedule an earlier trial date than would be available on the superior court calendar. This practice is allowed since original civil jurisdiction is vested concurrently in both divisions and since a judgment is not void or voidable solely because it was rendered in the improper trial division. Circle J. Farm Center, Inc. v. Fulcher, 57 N.C. App. 206, 290 S.E.2d 798 (1982).

Absent proper objection, an action begun in the wrong division may continue in that division to its conclusion. Circle J. Farm Center, Inc. v. Fulcher, 57 N.C. App. 206, 290 S.E.2d 798 (1982).

Superior Court Jurisdiction of Personal Injury Actions. — The superior court is a court of general jurisdiction and has jurisdiction in all actions for personal injuries caused by negligence, except where its jurisdiction is divested by statute. Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

Easement from Highway to State-Owned Lake. — The district court had subject matter jurisdiction to determine the parties' rights in an easement over a street from a highway to the edge of a state-owned lake. Woodlief v. Johnson, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

Enforcement of Judgment for Alimony Entered in Superior Court Before Establishment of District Court. — A district court judge may hold a party to a proceeding before him in civil contempt for failure to comply with court orders issued pursuant to a confession of judgment regarding payment of alimony which was entered in the superior court prior to the establishment of a district court for the district in which the order was entered. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Cited in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969); Boring v. Mitchell, 5 N.C. App. 550, 169 S.E.2d 79 (1969).

§ 7A-243. Proper division for trial of civil actions generally determined by amount in controversy.

Except as otherwise provided in this Article, the district court division is the proper division for the trial of all civil actions in which the amount in controversy is ten thousand dollars ($10,000) or less; and the superior court division is the proper division for the trial of all civil actions in which the amount in controversy exceeds ten thousand dollars ($10,000).

For purposes of determining the amount in controversy, the following rules apply whether the relief prayed is monetary or nonmonetary, or both, and with respect to claims asserted by complaint, counterclaim, cross-complaint or third-party complaint:

(1) The amount in controversy is computed without regard to interest and costs.

(2) Where monetary relief is prayed, the amount prayed for is in controversy unless the pleading in question shows to a legal certainty that the amount claimed cannot be recovered under the applicable measure of damages. The value of any property seized in attachment, claim and delivery, or other ancillary proceeding, is not in controversy and is not considered in determining the amount in controversy.

(3) Where no monetary relief is sought, but the relief sought would establish, enforce, or avoid an obligation, right or title, the value of the obligation, right, or title is in controversy. Where the owner or legal possessor of property seeks recovery of property on which a lien is asserted pursuant to G.S. 44A-4(a) the amount in controversy is that portion of the asserted lien which is disputed. The judge may require by rule or order that parties make a good faith estimate of the value of any nonmonetary relief sought.

(4)a. Except as provided in subparagraph c of this subdivision, where a single party asserts two or more properly joined claims, the claims are aggregated in computing the amount in controversy.

b. Except as provided in subparagraph c, where there are two or more parties properly joined in an action and their interests are aligned, their claims are aggregated in computing the amount in controversy.

c. No claims are aggregated which are mutually exclusive and in the alternative, or which are successive, in the sense that satisfaction of one claim will bar recovery upon the other.

d. Where there are two or more claims not subject to aggregation the highest claim is the amount in controversy.

(5) Where the value of the relief to a claimant differs from the cost thereof to an opposing party, the higher amount is used in determining the amount in controversy. (1965, c. 310, s. 1; 1981 (Reg. Sess., 1982), c. 1225; 1985, c. 655, s. 2.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

The term "cost," as used in subdivision (5) of this section, means value of loss, whether monetary or nonmonetary. McLaurin v. Winston-Salem Southbound Ry., 87 N.C. App. 413, 361 S.E.2d 95 (1987), aff'd in part, and rev'd in part, 323 N.C. 609, 374 S.E.2d 265 (1988).

District Court Had Jurisdiction. — Where the amount in controversy for plaintiff's claims was in excess of the dollar requirement for a small claim action, but less than the

$10,000 requirement for an action in the superior court, the claim was within the jurisdiction of the district court, and the district court erred in concluding that it lacked jurisdiction to hear these claims. Wilson v. Jefferson-Green, Inc., 136 N.C. App. 824, 526 S.E.2d 506, 2000 N.C. App. LEXIS 161 (2000).

Disposition of Case in Superior Court After Transfer to District Court. — After a judge entered his order transferring a case from the superior court division of the General Court of Justice to the district court division, and the latter was the proper division in which to try the case, nothing else appearing, disposition of the case thereafter in the superior court is irregular and contrary to the course and practice in the General Court of Justice. Brady v. Town of Chapel Hill, 277 N.C. 720, 178 S.E.2d 446 (1971).

Transfer to Superior Court Upheld. — In an action against a railroad seeking a declaration of ownership of land through adverse possession, the district court was correct in granting a motion to transfer the case to the superior court, since the evidence showed that the railroad had received an offer of $18,000.00 from codefendant for the property. McLaurin v. Winston-Salem Southbound Ry., 87 N.C. App. 413, 361 S.E.2d 95 (1987), aff'd in part, rev'd in part, 323 N.C. 609, 374 S.E.2d 265 (1988).

Applied in Chemical Realty Corp. v. Home Fed. Sav. & Loan Ass'n, 40 N.C. App. 675, 253 S.E.2d 621 (1979); Ingle v. Allen, 69 N.C. App. 192, 317 S.E.2d 1 (1984); Amey v. Amey, 71 N.C. App. 76, 321 S.E.2d 458 (1984); Schall v. Jennings, 99 N.C. App. 343, 393 S.E.2d 130 (1990); Meehan v. Cable, 127 N.C. App. 336, 489 S.E.2d 440 (1997).

Cited in Kinney v. Goley, 4 N.C. App. 325, 167 S.E.2d 97 (1969); Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 438 (1971); North Brook Farm Lines v. McBrayer, 35 N.C. App. 34, 241 S.E.2d 74 (1978); Ingle v. Allen, 53 N.C. App. 627, 281 S.E.2d 406 (1981); Circle J. Farm Center, Inc. v. Fulcher, 57 N.C. App. 206, 290 S.E.2d 798 (1982); Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992).

§ 7A-244. Domestic relations.

The district court division is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for annulment, divorce, equitable distribution of property, alimony, child support, child custody and the enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof. (1965, c. 310, s. 1; 1981, c. 815, s. 5; 1987, c. 573, s. 1.)

Editor's Note. — Session Laws 1998-202, s. 25, effective October 27, 1998, provides: "(a) The Administrative Office of the Courts shall establish pilot programs for the holding of family court within district court districts to be chosen by the Administrative Office of the Courts. Each pilot program shall be conducted following the guidelines for the establishment of family courts contained in the report of the Commission for the Future of Justice and the Courts in North Carolina and shall be assigned to hear all matters involving intrafamily rights, relationships, and obligations, and all juvenile justice matters, including:

"(1) Child abuse, neglect, and dependency;

"(2) Delinquent and undisciplined juvenile matters;

"(3) Emancipation of minors and termination of parental rights;

"(4) Divorce;

"(5) Annulment;

"(6) Equitable distribution;

"(7) Alimony and postseparation support;

"(8) Child custody;

"(9) Child support;

"(10) Paternity;

"(11) Adoption;

"(12) Domestic violence civil restraining orders;

"(13) Abortion consent waivers;

"(14) Adult protective services; and

"(15) Guardianship, involuntary commitment, and voluntary admissions to mental health facilities.

"(b) The Administrative Office of the Courts shall report to the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety and to the Fiscal Research Division of the General Assembly by March 1, 2000, on the success of the pilot programs in bringing consistency, efficiency, and fairness to the resolution of family matters and on the impact of the programs on caseloads in the district court division.

"(c) If no funds are appropriated in the 1998-99 fiscal year to implement this section, this section shall not become effective."

Session Laws 1998-202, s. 36, contains a severability clause.

Session Laws 1999-237, s. 1.1, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999'."

Session Laws 1999-237, s. 17.16(a) through (d), provides in part that the Administrative

Office of the Courts shall establish a program to educate and sensitize separated or divorcing couples with children about the needs of their children during and after the separation and divorce process. The program shall be administered as part of the family court pilot program, established by Session Laws 1998-202, s. 25. The Administrative Office of the Courts shall ensure involvement and input into the development of the program by persons who have experience in assisting families through and after the divorcing process. The court shall order participation in this educational course if it finds that significant parental conflict has adversely affected the children and that the children's best interests would be served by the party or parties' participation in the course. The Administrative Office of the Courts shall report to the General Assembly not later than March 1, 2001, on the program developed pursuant to this section.

Session Laws 1999-237, s. 21.6(b), provides that funds appropriated in Session Laws 1998-212 for the family court pilot programs established in Session Laws 1998-202 shall not revert but shall remain available to the Administrative Office of the Courts for the 1999-2000 fiscal year.

Session Laws 1999-237, s. 30.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effect beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 30.4, contains a severability clause.

Session Laws 2005-356, s. 4, provides: "The Administrative Office of the Courts shall expand the Family Court Model to additional jurisdictions of the State, as resources allow, shall study the elements of the model that might be adopted without additional funding, and implement those elements in jurisdictions where possible. The Administrative Office of the Courts shall also study the automation of court records to allow queries on civil, criminal, and juvenile matters.

"The Administrative Office of the Courts shall report to the Joint Legislative Committee on Domestic Violence and the North Carolina Courts Commission no later than January 1, 2007, on the results of the studies, the recommendations of the Administrative Office of the Courts, and any steps requiring legislative action to implement the recommendations."

Legal Periodicals. — For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

This section is merely an administrative allocation of annulment, divorce, alimony, child support and child custody actions to the district court division. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

Jurisdiction of District Court. — The district court is, under the provisions of this section, a court of general jurisdiction for the trial of civil actions and proceedings for annulment, divorce, alimony, child support, and child custody. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971); Smith v. Smith, 56 N.C. App. 812, 290 S.E.2d 390 (1982).

Alimony Jurisdiction. — The district court has jurisdiction over alimony proceedings and, indeed, the legislature has decreed that it is the only "proper" division for such a proceeding. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Divorce Property Settlement Agreement Disputes. — Transfer of a matter regarding a settlement of a divorce property agreement dispute to the district court was proper as there was no support for a husband's claim that a consent order was set aside only because it was entered in the improper division; the district court was the proper division for litigating the matter under G.S. 7A-244. Small v. Parker, — N.C. App. —, 646 S.E.2d 658, 2007 N.C. App. LEXIS 1398 (2007).

Child Custody Jurisdiction. — The district courts of this State possess general subject matter jurisdiction over child custody disputes. Such matters are in no wise reserved by the Constitution or laws of North Carolina to the exclusive consideration of another tribunal. Therefore, the real question under the Uniform Child Custody Jurisdiction Act is whether jurisdiction is properly exercised according to the statutory requirements in a particular case. Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

The district court had jurisdiction over the subject matter of petition filed, signed and verified by the county division of social services, which alleged that the child had been placed with DSS by its mother; that the putative father was unknown; that North Carolina was the home state of the child and no other state had jurisdiction over the child; and that the best interest of the child would be served if the court assumed jurisdiction over him. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

The legislature has enunciated a public policy that every child should have a permanent plan of care. Because adoption is more likely than a custody proceeding between non-parents to result in a permanent plan of care, and because the superior court has jurisdiction over adoptions, that court's jurisdiction supersedes that of the district court with regard to the custody of a child who is the subject of a simultaneous adoption and custody proceeding. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

Upon the entry of an interlocutory order of adoption by the superior court, the jurisdiction of the district court with regard to the custody of the child who is the subject of the interlocutory order is in abeyance until such time as the interlocutory decree is vacated, the adoption petition is dismissed, or a final decree of adoption is entered. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

Continuing Jurisdiction in Child Custody Matters. — Once jurisdiction of the court attaches to a child custody matter, it exists for all time until the cause is fully and completely determined. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

The question of subject matter jurisdiction may be raised at any point in a proceeding under the Uniform Child Custody Jurisdiction Act (G.S. 50A-1, et seq.), and that such jurisdiction cannot be conferred by waiver, estoppel or consent. Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

Waiver of Venue in Custody and Support Modification Action. — Waiver of venue occurs when a custody and support modification request is filed with the district court in an improper county and there is no timely demand that the trial be conducted in the proper county. In such event, the district court in the improper county appropriately adjudicates the modification request. Brooks v. Brooks, 107 N.C. App. 44, 418 S.E.2d 534 (1992).

Proceedings Pursuant to Uniform Reciprocal Enforcement of Support Act. — The district court had exclusive original jurisdiction to entertain a proceeding pursuant to the former Uniform Reciprocal Enforcement of Support Act (G.S. 52A-1, et seq.). Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969).

Same — Determination of Paternity. — Since the district court has exclusive original jurisdiction to entertain a proceeding under the former Uniform Reciprocal Enforcement of Support Act (G.S. 52A-1, et seq.), it is clear that the district court has jurisdiction to determine the issue of paternity in such a case. Amaker v. Amaker, 28 N.C. App. 558, 221 S.E.2d 917 (1976).

Authority to Enforce Judgments. — It is manifest that the court which has been given the duty to supervise domestic relations matters, including alimony judgments and orders pursuant thereto, must have the authority to enforce those judgments and orders. This is true whether the judgment was entered in the superior court or the district court. It would be anomalous to assume that when the legislature changed the statutory framework to make the district court division the proper agency in which to bring actions for alimony or actions to enforce alimony judgments, it meant to leave supervision of prior alimony judgments to the superior court. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Enforcement of Judgment Entered in Superior Court Before Establishment of District Court. — The district court has the power to enforce by a civil contempt proceeding a confession of judgment entered in the superior court before the establishment of the district court allowing alimony to an appellee. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Transfer of Action for Absolute Divorce Which Has Ended in Mistrial. — The superior court has authority under G.S. 7A-259 to transfer to the district court an action for absolute divorce which has twice ended in mistrial in the superior court and this section gives the district court jurisdiction to try the action. Pence v. Pence, 8 N.C. App. 484, 174 S.E.2d 860 (1970).

An order for the payment of alimony is not a final judgment, since it may be modified upon application of either party; thus, an action for alimony would continue to be "pending" in the court of proper jurisdiction, which is now the district court. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Superior court had no authority to partition marital property pursuant to G.S. 46-1, et seq., where the jurisdiction of the district court had been properly invoked to equitably distribute such marital property. Garrison v. Garrison, 90 N.C. App. 670, 369 S.E.2d 628 (1988).

Where the parties invoked the jurisdiction of the district court to equitably distribute their marital property in the action for absolute divorce and equitable distribution of their marital property, the district court did not lose jurisdiction to equitably distribute the marital property because of its failure to enter a judgment in the equitable distribution case before the special proceeding seeking partition of the marital property was filed in the office of the clerk of superior court. Garrison v. Garrison, 90 N.C. App. 670, 369 S.E.2d 628 (1988).

Where an action dealing with marital property distribution had been previously filed in district court and another action relating to the same subject matter was then filed in superior court, the district court's jurisdiction over the subject matter had already been invoked, and the superior court did not have jurisdiction in the subsequently filed action. Hudson Int'l, Inc. v. Hudson, 145 N.C. App. 631, 550 S.E.2d 571, 2001 N.C. App. LEXIS 746 (2001).

A hearing on a motion in the cause requesting a modification of a child support order is a "trial" within the meaning of G.S. 7A-198. Miller v. Miller, 92 N.C. App. 351, 374 S.E.2d 467 (1988).

Applied in Bonavia v. Torreso, 7 N.C. App. 21, 171 S.E.2d 108 (1969); Russ v. Russ, 43 N.C. App. 74, 257 S.E.2d 676 (1979); Schall v. Jennings, 99 N.C. App. 343, 393 S.E.2d 130 (1990).

Cited in In re Hopper, 11 N.C. App. 611, 182 S.E.2d 228 (1971); In re Greer, 26 N.C. App. 106, 215 S.E.2d 404 (1975); Francis v. Durham County Dep't. of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979); Neal v. Neal, 69 N.C. App. 766, 318 S.E.2d 255 (1984); Vick v. Vick, 80 N.C. App. 697, 343 S.E.2d 245 (1986); Watson v. Watson, 93 N.C. App. 315, 377 S.E.2d 809 (1989); Ward v. Ward, 116 N.C. App. 643, 448 S.E.2d 862 (1994); Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995); Sparks v. Peacock, 129 N.C. App. 640, 500 S.E.2d 116 (1998); Hudson v. Hudson, 135 N.C. App. 97, 518 S.E.2d 811 (1999); Smith v. Barbour, 154 N.C. App. 402, 571 S.E.2d 872, 2002 N.C. App. LEXIS 1450 (2002), cert. denied, — N.C. —, 599 S.E.2d 408 (2004).

§ 7A-245. Injunctive and declaratory relief to enforce or invalidate statutes; constitutional rights.

(a) The superior court division is the proper division without regard to the amount in controversy, for the trial of civil actions where the principal relief prayed is

(1) Injunctive relief against the enforcement of any statute, ordinance, or regulation;
(2) Injunctive relief to compel enforcement of any statute, ordinance, or regulation;
(3) Declaratory relief to establish or disestablish the validity of any statute, ordinance, or regulation; or
(4) The enforcement or declaration of any claim of constitutional right.

(b) When a case is otherwise properly in the district court division, a prayer for injunctive or declaratory relief by any party not a plaintiff on grounds stated in this section is not ground for transfer. (1965, c. 310, s. 1.)

Legal Periodicals. — For article, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

CASE NOTES

Jurisdiction of injunctive relief generally is vested concurrently in the superior court division and the district court division, because even the four types of injunctive relief which the legislature suggested should be heard in the superior court division are not confined jurisdictionally to that division; the statute merely specifies that the superior court division is the proper division for the trial of such actions. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Under subsection (b) of this section a prayer for injunctive relief of any of the types enumerated in subsection (a) is not even grounds for transfer to the superior court division unless such injunctive relief is prayed for by a party plaintiff. So it is abundantly clear that the district court division has jurisdiction to grant injunctive relief in cases docketed in that division. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Exhaustion of Administrative Remedies Not Required. — There is no requirement that the agency must exhaust any administrative remedies before seeking the court's help in enforcing an administrative rule adopted by that agency or in seeking a declaration that contracts adopted in violation of the agency's rule are contrary to public policy or the constitution. State v. Whittle Communications, 328 N.C. 456, 402 S.E.2d 556 (1991).

Injunction Not Warranted. — The plaintiff, who sued when he was reinstated as Internal Auditor II, rather than Chief of the Internal Audit Section for DOT, was not entitled to an injunction where the DOT showed that it would be harmed if the position of Chief Internal Auditor could not be filled with anyone other than plaintiff because the section's operations would be disrupted, and the DOT would be unfairly restricted in management of its own operations; additionally, the plaintiff, reinstated in a similar position at same pay grade, was unable to show financial loss or irreparable injury. Hodge v. North Carolina DOT, 137 N.C. App. 247, 528 S.E.2d 22, 2000 N.C. App. LEXIS 334 (2000).

Challenge to Statutes Regarding Trial Calendar. — Plaintiffs' pending criminal prosecutions did not deprive the superior court of jurisdiction to consider plaintiffs' constitutional challenge to the statutes which authorize the district attorney to set the criminal trial calendar. Simeon v. Hardin, 339 N.C. 358, 451 S.E.2d 858 (1994).

Challenge to Statutes Regarding the Duties of the District Attorney. — The superior court is empowered to review the constitutionality of the statutes which prescribe the duties of the district attorney and to fashion an appropriate remedy should such statutes violate the Constitution. Simeon v. Hardin, 339 N.C. 358, 451 S.E.2d 858 (1994).

Challenge to HIV Testing Rule. — This section conferred jurisdiction on the superior court to determine whether a Commission for Health Services Rule (15A NCAC 19A.0102(a)(3)), eliminating anonymous HIV testing, was unconstitutional. Act-Up Triangle v. Commission for Health Servs., 345 N.C. 699, 483 S.E.2d 388 (1997).

Applied in White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983); Brooks v. Gooden, 69 N.C. App. 701, 318 S.E.2d 348 (1984); State v. Whittle Communications, 328 N.C. 456, 402 S.E.2d 556 (1991).

Cited in Royal v. State, 153 N.C. App. 495, 570 S.E.2d 738, 2002 N.C. App. LEXIS 1167 (2002); Clayton v. N.C. State Bar, 168 N.C. App. 717, 608 S.E.2d 821, 2005 N.C. App. LEXIS 455 (2005), cert. denied, — N.C. —, 615 S.E.2d 867 (2005).

§ 7A-246. Special proceedings; exceptions; guardianship and trust administration.

The superior court division is the proper division, without regard to the amount in controversy, for the hearing and trial of all special proceedings except proceedings under the Protection of the Abused, Neglected or Exploited Disabled Adult Act (Chapter 108A, Article 6, of the General Statutes), proceedings for involuntary commitment to treatment facilities (Chapter 122C, Article 5, of the General Statutes), adoption proceedings (Chapter 48 of the General Statutes) and of all proceedings involving the appointment of guardians and the administration by legal guardians and trustees of express trusts of the estates of their wards and beneficiaries, according to the practice and procedure provided by law for the particular proceeding. (1965, c. 310, s. 1; 1973, c. 726, s. 5; c. 1378, s. 3; 1981, c. 682, s. 1; 1985, c. 689, s. 4; 1995, c. 88, s. 7.)

CASE NOTES

The legitimation procedure, which is identified in G.S. 49-10 as "a special proceeding in the superior court of the county in which the putative father resides," is within the jurisdictional purview of the clerk of superior court. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Spousal Support from Estate of Incompetent. — The district court was not the proper forum in which to seek spousal support from the estate of an incompetent; the superior court is the only proper division to hear matters regarding the administration of incompetents' estates. Therefore, the incompetent's spouse should have made her demand for support before the clerk of superior court either as a motion in the cause pursuant to G.S. 35A-1207, or as a special proceeding for the sale of her husband's property under G.S. 35A-1307. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

Attorney-Client Privilege. — When the State sought the production of a deceased client's statements to his attorney in a murder investigation, and the State did not convene an investigative grand jury under G.S. 15A-623(h) or strictly comply with G.S. 1A-1, Rule 3, it nonetheless filed its petition in the superior court, which was the proper court to hear a "special proceeding," under G.S. 7A-246, and it could, to accommodate the exigent circumstances presented, hear the matter. In re Investigation of the Death of Miller, 357 N.C. 316, 584 S.E.2d 772, 2003 N.C. LEXIS 831 (2003).

Applied in In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818 (1979).

Cited in In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988); In re Brooks, 143 N.C. App. 601, 548 S.E.2d 748, 2001 N.C. App. LEXIS 344 (2001).

OPINIONS OF ATTORNEY GENERAL

Preneed Funeral Contracts. — If a purchaser or beneficiary of a preneed contract has been adjudicated incompetent, the clerk of the superior court is a "court of competent jurisdiction" and, a hearing should be held in order for the clerk to make findings establishing that it is in the best interest of the ward to revoke the contract. See opinion of Attorney General to Mr. William R. Hoke, Attorney for the North Carolina State Board of Mortuary Science, — N.C.A.G. — (November 3, 1995).

§ 7A-247. Quo warranto.

The superior court division is the proper division, without regard to the amount in controversy, for the trial of all civil actions seeking as principal relief the remedy of quo warranto, according to the practice and procedure provided for obtaining that remedy. (1965, c. 310, s. 1; 1971, c. 377, s. 13.)

Legal Periodicals. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

For article, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

§ 7A-248. Condemnation actions and proceedings.

The superior court division is the proper division, without regard to the amount in controversy, for the trial of all actions and proceedings wherein property is being taken by condemnation in exercise of the power of eminent domain, according to the practice and procedure provided by law for the particular action or proceeding. Nothing in this section is in derogation of the validity of such administrative or quasi-judicial procedures for value appraisal as may be provided for the particular action or proceeding prior to the raising of justiciable issues of fact or law requiring determination in the superior court. (1965, c. 310, s. 1.)

CASE NOTES

Admission of Evidence. — Trial court properly (1) admitted a land owner's statements to an expert, (2) prevented the owner from testifying on potential property uses, (3) allowed the city to offer evidence of sales and listings, and (4) denied a motion to set aside the verdict. City of Wilson v. Hawley, 156 N.C. App. 609, 577 S.E.2d 161, 2003 N.C. App. LEXIS 193 (2003).

§ 7A-249. Corporate receiverships.

The superior court division is the proper division, without regard to the amount in controversy, for actions for corporate receiverships under Chapter 1, Article 38, of the General Statutes, and proceedings under Chapters 55 (North Carolina Business Corporation Act) and 55A (Nonprofit Corporation Act) of the General Statutes. (1965, c. 310, s. 1; 1973, c. 503, s. 6; 1989 (Reg. Sess., 1990), c. 1024, s. 3.)

§ 7A-250. Review of decisions of administrative agencies.

(a) Except as otherwise provided in subsections (b) and (c) of this section, the superior court division is the proper division, without regard to the amount in controversy, for review by original action or proceeding, or by appeal, of the decisions of administrative agencies, according to the practice and procedure provided for the particular action, proceeding, or appeal.

(b) The Court of Appeals shall have jurisdiction to review final orders or decisions of the North Carolina Utilities Commission and the North Carolina Industrial Commission, as provided in Article 5 of this Chapter, and any order or decision of the Commissioner of Insurance described in G.S. 58-2-80.

(c) Appeals from rulings of county game commissions shall be heard in the district court division. The appeal shall be heard *de novo* before a district court judge sitting in the county in which the game commission whose ruling is being appealed is located. (1965, c. 310, s. 1; 1967, c. 108, s. 6; 1973, c. 503, s. 7; 1981, c. 444.)

Cross References. — As to jurisdiction of the Court of Appeals to review orders or decisions of the Commissioner of Insurance under this section, see G.S. 58-2-80.

Legal Periodicals. — For article, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

CASE NOTES

Applied in In re Dunn, 73 N.C. App. 243, 326 S.E.2d 309 (1985).

Cited in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969); City of Raleigh v. Stell, 53 N.C. App. 776, 281 S.E.2d 774 (1981); Harding v. North Carolina Dep't of Cor., 334 N.C. 414, 432 S.E.2d 298 (1993); North Carolina DOT v. Davenport, 334 N.C. 428, 432 S.E.2d 303 (1993); Howell v. Morton, 131 N.C. App. 626, 508 S.E.2d 804 (1998); State v. McNeill, 349 N.C. 634, 509 S.E.2d 415, 1998 N.C. App. LEXIS 853 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 102, 145 L. Ed. 2d 87 (1999), cert. denied, 358 N.C. 548, 599 S.E.2d 911 (2004).

§ 7A-251. Appeal from clerk to judge.

(a) In all matters properly cognizable in the superior court division which are heard originally before the clerk of superior court, appeals lie to the judge of superior court having jurisdiction from all orders and judgments of the clerk for review in all matters of law or legal inference, in accordance with the procedure provided in Chapter 1 of the General Statutes.

(b) In all matters properly cognizable in the district court division which are heard originally before the clerk of superior court, appeals lie to the judge of district court having jurisdiction from all orders and judgments of the clerk for review in all matters of law or legal inference, in accordance with the procedure provided in Chapter 1 of the General Statutes. (1965, c. 310, s. 1; 1995, c. 88, s. 8.)

Cross References. — As to appeals and transfers from the clerk, see G.S. 1-301.1 et seq.

CASE NOTES

Strict Construction of Appeal Procedure from Clerk Conflicts with G.S. 7A-241. — Under a strict construction of G.S. 1-272 and 1-273 [see now G.S. 1-301.1 et seq.] as they affect this section, in probate matters originally heard by the clerk, an appeal would lie directly to the judge of superior court in matters of law and legal inference; but in the hearing before the clerk if issues of fact, or both law and fact, were raised, the appeal would lie directly to the superior court for jury trial on the issues of fact. But this strict construction would ignore the "according to the practice and procedure provided by law" mandate of G.S. 7A-241. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

Allocation of Jurisdiction Between Clerk and Judge. — G.S. 7A-241 does not say that concurrent jurisdiction in probate matters is vested in the clerk and the judge of the superior court. It says that probate jurisdiction is vested in the superior court division to be exercised by the superior court and the clerk according to the practice and procedure provided by law. The law, that is, the statutes specifying this practice and procedure, has allocated the jurisdiction between the clerk and the judge. By G.S. 28A-2-1 the clerk is given exclusive original jurisdiction of "the administration, settlement and distribution of estates of decedents" except in cases where the clerk is disqualified to act under G.S. 28A-2-3. When the clerk is disqualified to exercise his jurisdiction the judge has equal authority to perform the clerk's probate duties and, in that sense, he exercises concurrent jurisdiction of probate matters. In all other instances, however, the judge's probate jurisdiction is, in effect, that of an appellate court pursuant to this section. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

Submission of Issue Involving Probate and Nonprobate Matters. — The judge of superior court in the exercise of his inherent powers upon appeal from the clerk's finding had the right to submit to the jury the one issue that would resolve both the right to qualify as administratrix, which was a probate matter, and the right to share in the decedent's estate, which was not a probate matter. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

Applied in State v. Edmondson, 316 S.E.2d 83 (N.C. 1984).

Cited in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969); In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970); In re Estate of Tucci, 104 N.C. App. 142, 408 S.E.2d 859 (1991).

§ 7A-252: Repealed by Session Laws 1971, c. 377, s. 32.

§ 7A-253. Infractions.

Except as provided in G.S. 7A-271(d), original, exclusive jurisdiction for the adjudication and disposition of infractions lies in the district court division. (1985, c. 764, s. 14; 1985 (Reg. Sess., 1986), c. 852, s. 17.)

§ 7A-254: Reserved for future codification purposes.

Article 21.

Institution, Docketing, and Transferring Civil Causes in the Trial Divisions.

§ 7A-255. Clerk of superior court processes all actions and proceedings.

All civil actions and proceedings in the General Court of Justice are instituted in, and the original records thereof are maintained in, the office of the clerk of superior court, without regard to the trial divisions in which the cause is pending from time to time. When the commencement of an action or proceeding requires issuance of summons, the clerk of superior court issues the summons, and such summons runs and is valid as general process of the State without regard to the trial division in which the action or proceeding may be pending from time to time. (1965, c. 310, s. 1; 1967, c. 691, s. 22.)

§ 7A-256. Causes docketed and retained in originally designated trial division until transferred.

Upon the institution of any action or proceeding in the General Court of Justice the party instituting it designates upon the face of the originating pleading or other originating paper when filed, which trial division of the General Court of Justice he deems proper for disposition of the cause. The clerk dockets the cause for the trial division so designated and the cause is retained for complete disposition in that division unless thereafter transferred in accordance with the provisions of this Article. If no designation is made the clerk dockets the cause for the superior court division, and the cause is retained for complete disposition in that division unless thereafter transferred in accordance with the provisions of this Article. (1965, c. 310, s. 1.)

§ 7A-257. Waiver of proper division.

Any party may move for transfer between the trial divisions as provided in this Article. Failure of a party to move for transfer within the time prescribed is a waiver of any objection to the division, except that there shall be no waiver of the jurisdiction of the superior court division in probate of wills and administration of decedents' estates. Where more than one party is aligned in interest, any party may move for transfer of the entire case, notwithstanding waiver by other parties or coparties. A waiver of objection to the division does not prevent the judge from ordering a transfer on his own motion as provided in this Article. (1965, c. 310, s. 1.)

CASE NOTES

Party May Move for Transfer of Case as Matter of Right. — Although the case allocations of this Chapter are merely administrative directives, a party may move, as a matter of right, for transfer of a case in accordance with the proper statutory allocation. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

Failure to Make Timely Objection. — An appellant's attack on the authority of the district court to enter an order holding him in contempt for failure to comply with an alimony consent order entered in the superior court must fail where there is no showing in the record that he entered a timely objection to the jurisdiction or venue of the district court. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Applied in Wyatt v. Wyatt, 69 N.C. App. 747, 318 S.E.2d 251 (1984).

Cited in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969); Northwestern Bank v. Morrison, 60 N.C. App. 767, 299 S.E.2d 830 (1983).

§ 7A-258. Motion to transfer.

(a) Any party, including the plaintiff, may move on notice to all parties to transfer the civil action or special proceeding to the proper division when the division in which the case is pending is improper under the rules stated in this Subchapter. A motion to transfer to another division may also be made if all parties to the action or proceeding consent thereto, and if the judge deems the transfer will facilitate the efficient administration of justice.

(b) A motion to transfer is filed in the action or proceeding sought to be transferred, but it is heard and determined by a judge of the superior court division whether the case is pending in that division or not. A superior court judge who has jurisdiction under G.S. 7A-47.1 or G.S. 7A-48 in the district or set of districts as defined in G.S. 7A-41.1(a) in which the county is located, may hear and determine such motion. The motion is heard and determined in a county within that district or set of districts, except by consent of the parties.

(c) A motion to transfer by any party other than the plaintiff must be filed within 30 days after the moving party is served with a copy of the pleading which justifies transfer. A motion to transfer by the plaintiff, if based upon the pleading of any other party, must be filed within 20 days after the pleading has been filed. A motion to transfer by any party, based upon an amendment to his own pleading must be made not later than 10 days after such amendment is filed. In no event is a motion to transfer made or determined after the case has been called for trial. Failure to move for transfer within the required time is a waiver of any objection to the division in which the case is pending, except in matters of probate of wills or administration of decedents' estates.

(d) A motion to transfer is in writing and contains:

(1) A short and direct statement of the grounds for transfer with specific reference to the provision of this Chapter which determines the proper division; and

(2) A statement by an attorney for the moving party, or if the party is not represented by counsel, a statement by the party that the motion is made in the good faith belief that it may be properly granted and that he intends no amendment which would affect propriety of transfer.

(e) A motion to transfer is made on notice to all parties.

(f) Objection to the jurisdiction of the court over person or property is waived when a motion to transfer is filed unless such objection is raised at the time of filing or before. In no other case does the filing of a motion to transfer waive any rights under other motions or pleadings, nor does it prevent the filing of other motions or pleadings, except as provided in Rule 12 of the Rules of Civil Procedure. The filing of a motion to transfer does not stay further proceedings in the case except that:

(1) Involuntary dismissal is not ordered while a motion to transfer is pending;

(2) Assignment to a magistrate is not ordered while a motion to transfer is pending; and

(3) A change of venue is not ordered while a motion to transfer is pending, except by consent.

When a change of venue is ordered by consent while a motion to transfer is pending, the motion to transfer is determined in the new venue. The filing of a motion to transfer does not enlarge the time for filing responsive pleadings, nor does the filing of any other motion or pleading waive any rights under the motion to transfer.

(g) The motion for transfer provided herein is the sole method for seeking a transfer, and no transfer is effected by the use of mandamus, injunction, prohibition, certiorari, or other extraordinary writs; provided, however, that transfer may be sought in a responsive pleading when permitted by Rules 7(b) and 12(b) of the Rules of Civil Procedure.

(h) Transfer is effected when an order of transfer is filed. When transfer is ordered, the clerk makes appropriate entries on the dockets of each division and transfers the file of the case to the new division. No further proceedings are taken in the division from which the case is transferred. Papers filed after a transfer are properly filed notwithstanding any erroneous reference to the division from which the case is transferred. All orders made prior to transfer including restraining orders, remain effective after transfer, as if no transfer had been made, until modified or set aside in the division to which the case is transferred.

(i) A claim of new or different relief asserted after transfer has been effected does not authorize a second transfer. (1965, c. 310, s. 1; 1967, c. 954, s. 3; 1969, c. 1190, s. 221/2; 1971, c. 377, s. 14; 1987 (Reg. Sess., 1988), c. 1037, s. 20.)

Editor's Note. — Rules 7 and 12 of the Rules of Civil Procedure, referred to in this section, are codified as G.S. 1A-1, Rules 7 and 12.

CASE NOTES

There is no such thing as an oral motion to transfer. East Carolina Farm Credit v. Salter, 113 N.C. App. 394, 439 S.E.2d 610 (1994).

Party May Move for Transfer of Case as Matter of Right. — Although the case allocations of this Chapter are merely administrative directives, a party may move, as a matter of right, for transfer of a case in accordance with the proper statutory allocation. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

Except Where Case Has Reached Trial Stage. — The General Assembly did not intend that cases called for trial or cases already tried and reduced to judgment be transferred under this section as a matter of right. Stanback v.

Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

Because this section clearly applies only to cases in the pleading stage. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

But where a matter is properly in the district court, a party is not entitled to move for a transfer to superior court. Thus, the prohibition contained in subdivision (f)(1) of this section against involuntary dismissal of an action in which a motion to transfer is pending would not apply. Brooks v. Gooden, 69 N.C. App. 701, 318 S.E.2d 348 (1984).

The right to transfer may be waived by consent or by failure to move for transfer within the prescribed time limits. Amey v. Amey, 71 N.C. App. 76, 321 S.E.2d 458 (1984).

Where an action was improperly brought in the district court, the parties could have moved pursuant to this section to transfer the case to the proper division while the case was pending in the improper division; however, the parties waived this right after the case had been called for trial, and the defect was not jurisdictional. Parslow v. Parslow, 47 N.C. App. 84, 266 S.E.2d 746 (1980).

Effect of Pending Motion to Transfer. — Under subsection (f) of this section, the filing of a motion to transfer does not stay further proceedings in the case, except that: (1) Involuntary dismissal is not ordered while a motion to transfer is pending; and (2) Assignment to a magistrate is not ordered while a motion to transfer is pending. Amey v. Amey, 71 N.C. App. 76, 321 S.E.2d 458 (1984).

Whether to proceed in an action pending a motion to transfer rests within the sound discretion of the court. Langley v. Moore, 64 N.C. App. 520, 307 S.E.2d 817 (1983).

Grant of Subsequent Motions While Motion to Transfer Was Pending Held Error. — By striking the answer and dismissing counterclaims under G.S. 1A-1, Rule 12(b)(6), the district court in effect entered two "involuntary dismissals." Therefore, the district court erred, as it considered plaintiff's substantive, and subsequently filed, motions, before ruling on defendant's earlier filed motion to transfer. Amey v. Amey, 71 N.C. App. 76, 321 S.E.2d 458 (1984).

Action Instituted in Superior Court Prior to Establishment of District Court. — Where an action was instituted in the superior court prior to the establishment of the district court in the county, and where no order was ever entered transferring the action from the superior court to the district court, a district court judge was without jurisdiction to enter an order in the action. Hodge v. Hodge, 9 N.C. App. 601, 176 S.E.2d 795 (1970).

The district court had no authority to modify a child-custody order entered in the superior court where the cause was pending in the superior court when district courts were established in the county, and where no order had been entered in the superior court transferring the cause to the district court pursuant to G.S. 7A-259, nor had a motion to transfer been made pursuant to this section. In re Hopper, 9 N.C. App. 730, 177 S.E.2d 326 (1970).

Applied in In re Hopper, 11 N.C. App. 611, 182 S.E.2d 228 (1971); Ervin Co. v. Hunt, 26 N.C. App. 755, 217 S.E.2d 93 (1975); Wyatt v. Wyatt, 69 N.C. App. 747, 318 S.E.2d 251 (1984).

Cited in Circle J. Farm Center, Inc. v. Fulcher, 57 N.C. App. 206, 290 S.E.2d 798 (1982); Northwestern Bank v. Morrison, 60 N.C. App. 767, 299 S.E.2d 830 (1983); McLaurin v. Winston-Salem Southbound Ry., 87 N.C. App. 413, 361 S.E.2d 95 (1987); Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992).

§ 7A-259. Transfer on judge's own motion.

(a) If no party has moved for transfer within the time allowed to parties, any superior court judge who may hear and determine motions to transfer may order a transfer upon his own motion for the purpose of efficient administration of the trial divisions at any time before the case is calendared for trial. Transfer is not made on the judge's own motion unless the pleadings clearly show that the case is pending in an improper division. No hearing is held on such transfers, but the parties are given prompt notice when transfer is effected. Nothing in this section affects the power of the clerk to transfer matters and proceedings pending before him when an issue of fact is raised.

(b) When a district court is established in a district, any superior court judge authorized to hear and determine motions to transfer may, on his own motion, subject to the requirements of subsection (a), transfer to the district court cases pending in the superior court. (1965, c. 310, s. 1; 1967, c. 691, s. 23.)

CASE NOTES

Causes Pending in Superior Court at Time of Establishment of District Court. — All causes pending in the superior court at the time of the establishment of the district court remained pending in the superior court unless and until transferred to the district court by proper order. In re Hopper, 11 N.C. App. 611, 182 S.E.2d 228, cert. denied, 279 N.C. 726, 184 S.E.2d 884 (1971).

Assumption of Compliance with Subsection (a). — Absent objection and exception to an order of transfer, it would be assumed that the provisions of subsection (a) of this section were complied with. Wendell Tractor & Implement Co. v. Lee, 9 N.C. App. 524, 176 S.E.2d 854 (1970).

This section includes giving prompt notice to the parties when the transfer is effected. Wendell Tractor & Implement Co. v. Lee, 9 N.C. App. 524, 176 S.E.2d 854 (1970).

When Judge Not Authorized to Order Transfer. — A judge, on his own motion, is not authorized to order a transfer once the case has reached the trial stage and has been calendared. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

Transfer of Action for Absolute Divorce Which Has Ended in Mistrial. — The superior court has authority under this section to transfer to the district court an action for absolute divorce which has twice ended in mistrial in the superior court, and G.S. 7A-244 gives the district court jurisdiction to try the action. Pence v. Pence, 8 N.C. App. 484, 174 S.E.2d 860 (1970).

Applied in H & B Co. v. Hammond, 17 N.C. App. 534, 195 S.E.2d 58 (1973); Blackley v. Blackley, 285 N.C. 358, 204 S.E.2d 678 (1974).

Cited in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969); Kelly v. Davenport, 7 N.C. App. 670, 173 S.E.2d 600 (1970); Radford v. Radford, 7 N.C. App. 569, 172 S.E.2d 897 (1970); Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 438 (1971).

§ 7A-260. Review of transfer matters.

Orders transferring or refusing to transfer are not immediately appealable, even for abuse of discretion. Such orders are reviewable only by the appellate division on appeal from a final judgment. If on review, such an order is found erroneous, reversal or remand is not granted unless prejudice is shown. If, on review, a new trial or partial new trial is ordered for other reasons, the appellate division may specify the proper division for new trial and order a transfer thereto. (1965, c. 310, s. 1; 1967, c. 108, s. 7.)

CASE NOTES

Applied in Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 438 (1971); In re Hopper, 11 N.C. App. 611, 182 S.E.2d 228 (1971); Flynn v. Flynn, 126 N.C. App. 545, 485 S.E.2d 866 (1997).

Cited in Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975); Flynn v. Flynn, 126 N.C. App. 545, 485 S.E.2d 866 (1997).

§ 7A-261: Repealed by Session Laws 1971, c. 377, s. 32.

§§ 7A-262 through 7A-269: Reserved for future codification purposes.

Article 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

§ 7A-270. Generally.

General jurisdiction for the trial of criminal actions is vested in the superior court and the district court divisions of the General Court of Justice. (1965, c. 310, s. 1.)

CASE NOTES

Jurisdiction of District Court. — Under this section and G.S. 7A-271, the district court has original jurisdiction for the trial of all criminal actions below the grade of felony, that is, of all prosecutions for misdemeanors; and the district court has exclusive original jurisdiction of all misdemeanors except in the four specific instances defined in subdivisions (a)(1), (a)(2), (a)(3) and (a)(4) of G.S. 7A-271. State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

State Has Burden to Show Jurisdiction. — When jurisdiction is challenged in a criminal case, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused. Former cases holding that a challenge to the jurisdiction is an affirmative defense with the burden of persuasion on the accused are no longer authoritative. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

The question of jurisdiction of the courts in this State in a criminal case is not an independent, distinct, substantive matter of exemption, immunity or defense and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, when contested, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

Cited in United States v. Alston, 717 F. Supp. 378 (M.D.N.C. 1989), aff'd, 902 F.2d 267 (4th Cir. 1990); Republican Party v. Martin, 980 F.2d 943 (4th Cir. 1992), rehearing denied, 991 F.2d 1202 (4th Cir.), cert. denied, 510 U.S. 828, 114 S. Ct. 93, 126 L. Ed. 2d 60 (1993).

§ 7A-271. Jurisdiction of superior court.

(a) The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this Article, except that the superior court has jurisdiction to try a misdemeanor:

(1) Which is a lesser included offense of a felony on which an indictment has been returned, or a felony information as to which an indictment has been properly waived; or

(2) When the charge is initiated by presentment; or

(3) Which may be properly consolidated for trial with a felony under G.S. 15A-926;

(4) To which a plea of guilty or nolo contendere is tendered in lieu of a felony charge; or

(5) When a misdemeanor conviction is appealed to the superior court for trial de novo, to accept a guilty plea to a lesser included or related charge.

(b) Appeals by the State or the defendant from the district court are to the superior court. The jurisdiction of the superior court over misdemeanors appealed from the district court to the superior court for trial de novo is the same as the district court had in the first instance, and when that conviction resulted from a plea arrangement between the defendant and the State pursuant to which misdemeanor charges were dismissed, reduced, or modified, to try those charges in the form and to the extent that they subsisted in the district court immediately prior to entry of the defendant and the State of the plea arrangement.

(c) When a district court is established in a district, any superior court judge presiding over a criminal session of court shall order transferred to the district court any pending misdemeanor which does not fall within the provisions of subsection (a), and which is not pending in the superior court on appeal from a lower court.

(d) The criminal jurisdiction of the superior court includes the jurisdiction to dispose of infractions only in the following circumstances:

(1) If the infraction is a lesser-included violation of a criminal action properly before the court, the court must submit the infraction for the jury's consideration in factually appropriate cases.

(2) If the infraction is a lesser-included violation of a criminal action properly before the court, or if it is a related charge, the court may accept admissions of responsibility for the infraction. A proper pleading for the criminal action is sufficient to support a finding of responsibility for the lesser-included infraction.

(e) The superior court has exclusive jurisdiction over all hearings held pursuant to G.S. 15A-1345(e) where the district court had accepted a defendant's plea of guilty or no contest to a felony under the provisions of G.S. 7A-272(c), except that the district court shall have jurisdiction to hear these matters with the consent of the State and the defendant. (1965, c. 310, s. 1; 1967, c. 691, s. 24; 1969, c. 1190, ss. 23, 24; 1971, c. 377, s. 15; 1977, c. 711, s. 6; 1979, 2nd Sess., c. 1328, s. 2; 1985, c. 764, s. 15; 1985 (Reg. Sess., 1986), c. 852, s. 17; 2004-128, s. 2.)

CASE NOTES

I. General Consideration.
II. Jurisdiction over Misdemeanors.
  A. In General.
  B. Charge Initiated by Presentment.
  C. Consolidation with Felony.
  D. Guilty Plea to Lesser Included or Related Charge.
  E. Particular Misdemeanors.

I. GENERAL CONSIDERATION.

Appeals in Civil Causes Distinguished from Appeals in Criminal Causes. — The constitutional and statutory structure of the General Court of Justice provides that, generally, appeals from the district court in civil causes go to the Court of Appeals, while appeals in criminal causes must first go to the superior court. State v. Killian, 25 N.C. App. 224, 212 S.E.2d 419 (1975).

Conviction Based on Plea Agreement. — This section sets forth an express exception where the conviction appealed from is the product of a plea agreement. State v. Monroe, 57 N.C. App. 597, 292 S.E.2d 21 (1982).

State Has Burden to Show Jurisdiction. — When jurisdiction is challenged in a criminal case, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused. Former cases holding that a challenge to the jurisdiction is an affirmative defense with the burden of persuasion on the accused are no longer authoritative. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

The question of jurisdiction of the courts in this State in a criminal case is not an independent, distinct, substantive matter of exemption, immunity or defense and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, when contested, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority. State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981).

Presumption of Regular Procedure. — On appeal to the superior court from a conviction in the district court, a presumption of regular procedure in the district court can be inferred. State v. Joyner, 33 N.C. App. 361, 235 S.E.2d 107 (1977).

The entire record may be considered on appeal to the superior court from a conviction in the district court in searching for evidence that proper procedure was followed. State v. Joyner, 33 N.C. App. 361, 235 S.E.2d 107 (1977).

The imposition of a greater sentence after a conviction by a jury in the superior court, upon appeal from a district court, does not violate a defendant's constitutional rights. State v. Martin, 16 N.C. App. 609, 192 S.E.2d 596 (1972).

The offense of habitual impaired driving constitutes a separate substantive felony offense which is properly within the original exclusive jurisdiction of the superior court. State v. Priddy, 115 N.C. App. 547, 445 S.E.2d 610, cert. denied, 337 N.C. 805, 449 S.E.2d 751 (1994).

Because felonious habitual impaired driving is a substantive felony offense, the Superior Court has jurisdiction pursuant to this section. State v. Baldwin, 117 N.C. App. 713, 453 S.E.2d 193 (1995).

Appeal of District Court's Judgment Revoking Probation. — Defendant was required to appeal the district court's judgment revoking his probation to the superior court before he was allowed to appeal that judgment to the court of appeals, and the court of appeals dismissed defendant's appeal from the district court's judgment because he had not appealed that judgment to the superior court. State v. Harless, 160 N.C. App. 78, 584 S.E.2d 339, 2003 N.C. App. LEXIS 1669 (2003).

When a district court revokes a defendant's probation, that defendant's appeal is to the superior court rather than the Court of Appeals of North Carolina; thus, G.S. 15A-1347, rather than G.S. 7A-272(d), governed defendant's appeal of a probation revocation and the court of appeals lacked jurisdiction to hear the appeal. State v. Hooper, 358 N.C. 122, 591 S.E.2d 514, 2004 N.C. LEXIS 12 (2004).

Sentence Contrary to Law Still Binding and Not Void Ab Initio. — Since the superior court had exclusive, original jurisdiction over defendant's motion for appropriate relief and had ordered that defendant's sentences on guilty pleas to armed robbery be served concurrently and not consecutively, the Department of Corrections could not refuse to obey an order to change defendant's records to reflect concurrent sentencing because, even though the sentencing order was contrary to law, the order was voidable, not void ab initio, and the order was binding on the Department until vacated or corrected; by refusing to honor the order, the Department was usurping the judiciary's exclusive power and was violating the separation of powers doctrine under N.C. Const. art. I, § 6. State v. Ellis, 167 N.C. App. 276, 605 S.E.2d 168, 2004 N.C. App. LEXIS 2161 (2004), rev'd 361 N.C. 200, 639 S.E.2d 425 (2007) (remanded to allow defendant to withdraw his guilty plea).

Applied in State v. Harrell, 279 N.C. 464, 183 S.E.2d 638 (1971); State v. Rowland, 13 N.C. App. 253, 185 S.E.2d 296 (1971); State v. Harris, 14 N.C. App. 268, 188 S.E.2d 1 (1972); State v. Snipes, 16 N.C. App. 416, 192 S.E.2d 62 (1972); State v. Weiderman, 19 N.C. App. 753, 200 S.E.2d 202 (1973); State v. Cole, 294 N.C. 304, 240 S.E.2d 355 (1978); State v. Hardy, 298 N.C. 191, 257 S.E.2d 426 (1979), appeal dismissed, 335 N.C. 561, 439 S.E.2d 154 (1993); State v. Streath, 72 N.C. App. 685, 325 S.E.2d 315 (1985); In re Dunn, 73 N.C. App. 243, 326 S.E.2d 309 (1985); State v. Pergerson, 73 N.C. App. 286, 326 S.E.2d 336 (1985); McCormick v. Hanson Aggregates Southeast, Inc., 164 N.C. App. 459, 596 S.E.2d 431 (2004).

Cited in State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971); State v. White, 22 N.C. App. 123, 205 S.E.2d 757 (1974); State v. Cash, 30 N.C. App. 677, 228 S.E.2d 85 (1976); State v. Morrow, 31 N.C. App. 592, 230 S.E.2d 182 (1976); State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649 (1979); State v. Tyner, 50 N.C. App. 206, 272 S.E.2d 626 (1980); State v. Lambert, 53 N.C. App. 799, 281 S.E.2d 754 (1981); State v. Huff, 56 N.C. App. 721, 289 S.E.2d 604 (1982); State v. Killian, 61 N.C. App. 155, 300 S.E.2d 257 (1983); State v. Triplett, 70 N.C. App. 341, 318 S.E.2d 913 (1984); State v. Jackson, 77 N.C. App. 491, 335 S.E.2d 903 (1985); State v. Birdsong, 325 N.C. 418, 384 S.E.2d 5 (1989); State v. Clemmons, 100 N.C. App. 286, 396 S.E.2d 616 (1990); State v. Grumbles, 104 N.C. App. 766, 411 S.E.2d 407 (1991); State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374 (1992); State v. Sullivan, 110 N.C. App. 779, 431 S.E.2d 502 (1993); State v. Petersilie, 334 N.C. 169, 432 S.E.2d 832 (1993); State v. Chase, 117 N.C. App. 686, 453 S.E.2d 195 (1995); Hamilton v. Freeman, 147 N.C. App. 195, 554 S.E.2d 856, 2001 N.C. App. LEXIS 1147 (2001), cert. denied, 355 N.C. 285, 560 S.E.2d 802 (2002); State v. Wilson, 151 N.C. App. 219, 565 S.E.2d 223, 2002 N.C. App. LEXIS 714 (2002), cert. denied, 356 N.C. 313, 571 S.E.2d 215 (2002); State v. Bowden, 177 N.C. App. 718, 630 S.E.2d 208, 2006 N.C. App. LEXIS 1218 (2006).

II. JURISDICTION OVER MISDEMEANORS.

A. In General.

Jurisdiction of Superior Court over Misdemeanors. — The superior court may try a misdemeanor when the conviction is appealed from the district court to the superior court for trial de novo, but has no jurisdiction to try a defendant upon warrants charging misdemeanors, where defendant has not first been tried upon the warrants in the district court and appealed to the superior court. State v. Taylor, 8 N.C. App. 544, 174 S.E.2d 872 (1970).

Where a prosecution was instituted under statutes which created misdemeanors, for which the district court has exclusive, original jurisdiction, until defendants were tried and convicted in the district court and appealed to the superior court for a trial de novo that court had no jurisdiction of the case. State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972).

The superior court has no jurisdiction to try an accused for a specific misdemeanor on the warrant of an inferior court unless he is first tried and convicted for such misdemeanor in the inferior court and appeals to the superior court from the sentence pronounced against him by the inferior court on his conviction for such misdemeanor. State v. Craig, 21 N.C. App. 51, 203 S.E.2d 401 (1974); State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979); State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981); State v. Martin, 97 N.C. App. 19, 387 S.E.2d 211 (1990).

The Superior Courts of North Carolina have exclusive original jurisdiction over all criminal actions not assigned to the district court division except that the superior courts have jurisdiction to try a misdemeanor offense where (1) it is a lesser included offense of a felony properly before the court by indictment or information, (2) the charge is initiated by presentment, (3) the misdemeanor is properly consolidated for trial with a felony, (4) a plea of guilty or nolo contendere is tendered in lieu of a felony charge, or (5) a misdemeanor conviction is appealed for trial de novo, to accept a guilty plea to a lesser included or related charge. State v. Petersilie, 105 N.C. App. 233, 414 S.E.2d 41 (1992), rev'd on other grounds, 334 N.C. 169, 432 S.E.2d 832 (1993).

Because misdemeanor charges were not included in an indictment, as required by G.S. 15A-922(g), a superior court did not have jurisdiction to try them under G.S. 7A-271. State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005).

Derivative Jurisdiction. — Jurisdiction of the superior court on appeal from a conviction in district court is derivative. State v. Joyner, 33 N.C. App. 361, 235 S.E.2d 107 (1977).

The jurisdiction of the superior court for the trial of a misdemeanor, unless a circumstance enumerated in subsection (a) of this section arises, is derivative and arises only upon appeal from a conviction of the misdemeanor in district court. State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981); State v. Martin, 97 N.C. App. 19, 387 S.E.2d 211 (1990).

Dismissal of Appeal for Failure to Show Jurisdiction. — The Court of Appeals did not abuse its discretion in denying defendant's motion to amend the record to show derivative jurisdiction of a misdemeanor in the superior court through appeal of a district court conviction and then dismissing defendant's appeal for failure of the record to show jurisdiction. State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981).

Where Court of Appeals orders that a new trial be held in a misdemeanor prosecution originally tried in a municipal court and then tried de novo in the superior court, the case on retrial maintains its status as a case pending in the superior court on appeal from a lower court, and defendant's motion to quash the indictment on the ground that the district court has jurisdiction of the case is properly denied. State v. Patton, 5 N.C. App. 164, 167 S.E.2d 821 (1969).

Effect of Issuing Second Warrant Charging Same Offense. — Where defendant was tried and convicted in district court, appealed to superior court, and subsequently moved to dismiss the charge pursuant to the former Speedy Trial Act, former G.S. 15A-701 through 15A-704, the court allowed defendant's motion and ordered dismissal of the case without prejudice; on that same day the magistrate issued a new warrant charging the same offense; and the trial judge, later during the same session, reopened the matter, heard additional evidence and arguments, and dismissed the case without prejudice to the State, the superior court was not divested of jurisdiction by the magistrate's issuing the second warrant, nor did the State, by securing the second warrant, waive whatever rights to appellate review it might have had. State v. Morehead, 46 N.C. App. 39, 264 S.E.2d 400, cert. denied, 300 N.C. 201, 269 S.E.2d 615 (1980).

Error for Superior Court to Instruct on Specific Misdemeanor Not Tried in District Court. — The trial judge, on trial de novo in the superior court, erred in instructing the jury on reckless driving under subsection (a) of G.S. 20-140 and should have instructed on former subsection (c) of G.S. 20-140, where the defendant had been charged in the district court with drunken driving under former G.S. 20-138 (see now G.S. 20-138.1) but was convicted of the lesser included offense under former subsection (c) of G.S. 20-140. State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979).

B. Charge Initiated by Presentment.

"Presentment" Defined. — In this jurisdiction, the accepted definition of the word "presentment" is as follows: "A presentment is an accusation of crime made by a grand jury on its own motion upon its own knowledge or observation, or upon information from others without any bill of indictment, but, since the enactment of former G.S. 15-137 (see now G.S. 15A-641), trials upon presentments have been abolished and a presentment amounts to nothing more than an instruction by the grand jury to the public prosecuting attorney to frame a bill of indictment." State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

"Initiated" Construed. — The term "initiated" refers to how the criminal process in superior court began, not to what the first criminal process of any kind in any court was. State v. Gunter, 111 N.C. App. 621, 433 S.E.2d 191, appeal dismissed, 335 N.C. 561, 439 S.E.2d 154 (1993).

Language of Presentment and Indictment May Differ. — Where the language of the presentment and that contained in the bills of indictment, while not identical, dealt with the same subject matter and the charges contained in the bills were in fact initiated by the presentment, the superior court had original jurisdiction under this section. State v. Cole, 294 N.C. 304, 240 S.E.2d 355 (1978).

Initiation Not Shown. — A prosecution for violation of former G.S. 20-105 governing unauthorized use of a conveyance was not "initiated by presentment" within the meaning of subdivision (a)(2). Although the prerequisites to conviction for the felony charged in the warrant and the misdemeanor charged in the indictment were different, the prosecution for the alleged criminal conduct of defendant in respect of the alleged unlawful taking of a car was initiated by warrant issued by the district court. It was not initiated in the superior court by presentment or otherwise. State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

The superior court had neither exclusive original jurisdiction of the misdemeanors under subdivisions (a)(1)-(5) of this section, nor derivative jurisdiction under subsection (b) where the record indicated that defendant's arrest sprang from indictments issued by the grand jury which originated in the superior court, and there was no indication in the record that a presentment preceded the indictments. State v. Petersilie, 105 N.C. App. 233, 414 S.E.2d 41 (1992), rev'd on other grounds, 334 N.C. 169, 432 S.E.2d 832 (1993).

Jurisdiction in Superior Court Shown. — This section grants jurisdiction to the superior court in any action already properly pending in the district court if the grand jury issues a presentment and that presentment is the first accusation of the offense within superior court. Therefore, defendant's driving while impaired (DWI) action was properly under the jurisdiction of the district court and not the superior court when the citation was issued, but as soon as the grand jury issued the presentment, the superior court acquired jurisdiction. State v. Gunter, 111 N.C. App. 621, 433 S.E.2d 191, appeal dismissed, 335 N.C. 561, 439 S.E.2d 154 (1993).

C. Consolidation with Felony.

A "driving under the influence" misdemeanor charge and a manslaughter felony charge were based on the same transaction within the meaning of subdivision (a)(3). And therefore the superior court had jurisdiction of both charges and had the right to proceed to the trial on the misdemeanor charge under the joinder exception of this section, the "original jurisdiction" of the district court having been lost after nolle prosequi was entered as to the misdemeanor in that court. State v. Karbas, 28 N.C. App. 372, 221 S.E.2d 98, cert. denied, 289 N.C. 618, 223 S.E.2d 394 (1976).

Death by Vehicle and Failure to Stop at Scene of Accident. — In a prosecution on separate bills of indictment for failing to stop an automobile at the scene of an accident in which an individual was killed (G.S. 20-166(a)) and death by vehicle (G.S. 20-141.4), where the two offenses were based on the same act or transaction, the superior court had jurisdiction of the misdemeanor offense of death by vehicle. State v. Fearing, 304 N.C. 471, 284 S.E.2d 487 (1981).

Consolidation Upheld. — Trial court properly consolidated charges of possession of cocaine and of possession of drug paraphernalia with murder charges. State v. Chavis, 134 N.C. App. 546, 518 S.E.2d 241 (1999).

D. Guilty Plea to Lesser Included or Related Charge.

Condition for Acceptance of Guilty Plea on Related Charge. — The acceptance of a plea of guilty by the superior court to a related charge in misdemeanor appeals from the district court is conditioned upon the requirement that the related charge be contained in a written information. State v. Craig, 21 N.C. App. 51, 203 S.E.2d 401 (1974).

No Jurisdiction to Accept Plea. — The superior court does not have jurisdiction to accept a plea of guilty to a charge of reckless driving when defendant is before the court on appeal from a conviction in the district court for operating a motor vehicle while under the influence of intoxicating liquor. State v. Craig, 21 N.C. App. 51, 203 S.E.2d 401 (1974).

E. Particular Misdemeanors.

Violation of G.S. 14-33 or G.S. 14-34. — The superior court has no original jurisdiction of a trial for the misdemeanor violation of either G.S. 14-33(b)(1) or G.S. 14-34, for one of which defendant was charged and for one of which he was convicted. Its jurisdiction of these offenses is derivative and arises only upon appeal from a conviction in district court of the misdemeanor for which he stands charged in superior court or the misdemeanor with respect to which the jury returned a guilty verdict in superior court. State v. Caldwell, 21 N.C. App. 723, 205 S.E.2d 322 (1974).

Violation of G.S. 20-28. — A superior court has no original jurisdiction in a case involving a violation of G.S. 20-28(b), a misdemeanor; the jurisdiction of the superior court in such cases is derivative, and where the record does not disclose that defendant was convicted and sentenced in district court for this offense, the superior court is without jurisdiction to try him, and the trial in the superior court for that charge upon the original warrant is a nullity. State v. Guffey, 283 N.C. 94, 194 S.E.2d 827 (1973).

Violation of Former G.S. 20-105. — The warrant on which defendant was arrested and bound over to superior court charged a felony, to wit, the larceny of an automobile valued at more than $200.00, and the indictment charged a misdemeanor, to wit, a violation of former G.S. 20-105, the "temporary larceny" statute. Since defendant, in the superior court, was not tried for or charged with any felony, subdivisions (a)(1), (a)(3), and (a)(4) of this section did not apply to the criminal prosecution for the violation of former G.S. 20-105. State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

OPINIONS OF ATTORNEY GENERAL

Jurisdiction over Misdemeanor Appeals. — See opinion of Attorney General to the Honorable Hubert E. May, Special Judge, Superior Court, 40 N.C.A.G. 145 (1969).

§ 7A-272. Jurisdiction of district court; concurrent jurisdiction in guilty or no contest pleas for certain felony offenses; appellate and appropriate relief procedures applicable.

(a) Except as provided in this Article, the district court has exclusive, original jurisdiction for the trial of criminal actions, including municipal ordinance violations, below the grade of felony, and the same are hereby declared to be petty misdemeanors.

(b) The district court has jurisdiction to conduct preliminary examinations and to bind the accused over for trial upon waiver of preliminary examination or upon a finding of probable cause, making appropriate orders as to bail or commitment.

(c) With the consent of the presiding district court judge, the prosecutor, and the defendant, the district court has jurisdiction to accept a defendant's plea of guilty or no contest to a Class H or I felony if:

(1) The defendant is charged with a felony in an information filed pursuant to G.S. 15A-644.1, the felony is pending in district court, and the defendant has not been indicted for the offense; or

(2) The defendant has been indicted for a criminal offense but the defendant's case is transferred from superior court to district court pursuant to G.S. 15A-1029.1.

(d) Provisions in Chapter 15A of the General Statutes apply to a plea authorized under subsection (c) of this section as if the plea had been entered in superior court, so that a district court judge is authorized to act in these matters in the same manner as a superior court judge would be authorized to act if the plea had been entered in superior court, and appeals that are authorized in these matters are to the appellate division. (1965, c. 310, s. 1; 1995 (Reg. Sess., 1996), c. 725, ss. 1, 2.)

Legal Periodicals. — For article on the North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

I. General Consideration.
II. Jurisdiction over Misdemeanors.
III. Preliminary Examinations.

I. GENERAL CONSIDERATION.

State Has Burden to Show Jurisdiction. — The question of jurisdiction of the courts in this State in a criminal case is not an independent, distinct, substantive matter of exemption, immunity or defense and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, when contested, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

When jurisdiction is challenged, in a criminal case, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused. Former cases holding that a challenge to the jurisdiction is an affirmative defense with the burden of persuasion on the accused are no longer authoritative. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

Construction with G.S. 15A-1347. — Appeals procedure in G.S. 7A-272(d) prevail over the general rule of G.S. 15A-1347; therefore, after defendant's felony probation was revoked in district court, defendant was allowed to appeal the case to the North Carolina Court of Appeals instead of a superior court. State v. Hooper, 158 N.C. App. 654, 582 S.E.2d 331, 2003 N.C. App. LEXIS 1223 (2003).

Jurisdiction over a District Court's Revocation of Probation. — When a district court revokes a defendant's probation, that defendant's appeal is to the superior court rather than the Court of Appeals of North Carolina; thus, G.S. 15A-1347, rather than G.S. 7A-272(d), governed defendant's appeal of a probation revocation and the court of appeals lacked jurisdiction to hear the appeal. State v. Hooper, 358 N.C. 122, 591 S.E.2d 514, 2004 N.C. LEXIS 12 (2004).

Applied in State v. Harrell, 279 N.C. 464, 183 S.E.2d 638 (1971); State v. Harris, 14 N.C. App. 268, 188 S.E.2d 1 (1972); State v. Martin, 16 N.C. App. 609, 192 S.E.2d 596 (1972); State v. Guffey, 283 N.C. 94, 194 S.E.2d 827 (1973); State v. Craig, 21 N.C. App. 51, 203 S.E.2d 401 (1974); State v. Cole, 294 N.C. 304, 240 S.E.2d 355 (1978); State v. Streath, 72 N.C. App. 685, 325 S.E.2d 315 (1985); State v. Preston, 73 N.C. App. 174, 325 S.E.2d 686 (1985); State v. Petersilie, 334 N.C. 169, 432 S.E.2d 832 (1993); McCormick v. Hanson Aggregates Southeast, Inc., 164 N.C. App. 459, 596 S.E.2d 431 (2004).

Cited in State v. Thompson, 2 N.C. App. 508, 163 S.E.2d 410 (1968); State v. Taylor, 8 N.C. App. 544, 174 S.E.2d 872 (1970); State v. Flynt, 8 N.C. App. 323, 174 S.E.2d 120 (1970); State v. Godwin, 13 N.C. App. 700, 187 S.E.2d 400 (1972); State v. Caldwell, 21 N.C. App. 723, 205 S.E.2d 322 (1974); State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979); State v. Felmet, 47 N.C. App. 201, 266 S.E.2d 721 (1980); State v. Tyner, 50 N.C. App. 206, 272 S.E.2d 626 (1980); State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981); State v. Fearing, 304 N.C. 471, 284 S.E.2d 487 (1981); State v. Surles, 55 N.C. App. 179, 284 S.E.2d 738 (1981); State v. Huff, 56 N.C. App. 721, 289 S.E.2d 604 (1982); State v. Killian, 61 N.C. App. 155, 300 S.E.2d 257 (1983); State v. Brown, 81 N.C. App. 281, 343 S.E.2d 553 (1986); State v. Birdsong, 325 N.C. 418, 384 S.E.2d 5 (1989); United States v. Alston, 717 F. Supp. 378 (M.D.N.C. 1989), aff'd, 902 F.2d 267 (4th Cir. 1990); State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374 (1992); State v. Lobohe, 143 N.C. App. 555, 547 S.E.2d 107, 2001 N.C. App. LEXIS 311 (2001); State v. McBride, 173 N.C. App. 101, 618 S.E.2d 754, 2005 N.C. App. LEXIS 1897 (2005).

II. JURISDICTION OVER MISDEMEANORS.

The district court has exclusive original jurisdiction of misdemeanors, including actions to determine liability of persons for the support of dependents in any criminal proceeding. Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969).

Where a prosecution was instituted under statutes which created misdemeanors, for which the district court had exclusive, original jurisdiction, until defendants were tried and convicted in the district court and appealed to the superior court for a trial de novo that court had no jurisdiction of the case. State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972).

It is fundamental that the district courts of this state have exclusive original jurisdiction of misdemeanors, and the jurisdiction of the superior court is derivative and arises only upon an appeal from a conviction of the misdemeanor in the district court. State v. McKoy, 44 N.C. App. 516, 261 S.E.2d 226, cert. denied, 299 N.C. 546, 265 S.E.2d 405 (1980).

But Court Is Without Jurisdiction to Impose Sentence for Felony. — District courts are without jurisdiction to impose sentences in felony cases. State v. Jackson, 14 N.C. App. 75, 187 S.E.2d 470 (1972).

What Jurisdictional Issues May Arise. — Because the General Assembly has given the District Court Division statewide jurisdiction to hear misdemeanors, jurisdictional issues should arise only to determine: (1) whether North Carolina courts can hear the case, and (2) which division of the General Court of Justice must first try the matter. State v. Bolt, 81 N.C. App. 133, 344 S.E.2d 51 (1986).

Derivative Jurisdiction of Superior Court over Misdemeanors. — The jurisdiction of the superior court over a misdemeanor, unless a circumstance enumerated in G.S. 7A-271(a) arises, is a derivative and arises only upon appeal from a conviction of the misdemeanor in district court. State v. Martin, 97 N.C. App. 19, 387 S.E.2d 211 (1990).

Generally, the superior court has no jurisdiction to try a defendant on a misdemeanor charge unless he was first tried, convicted and sentenced in district court and then appeals the judgment for a trial de novo in superior court. State v. Martin, 97 N.C. App. 19, 387 S.E.2d 211 (1990).

The constitutional right of a defendant charged with a misdemeanor to have a jury trial is not infringed by the fact that he has first to submit to trial without a jury in the district court and then appeal to superior court in order to obtain a jury trial. State v. Sherron, 4 N.C. App. 386, 166 S.E.2d 836 (1969).

Demand for Jury Trial Not Ground for Removal. — Where, upon defendant's demand for a jury trial on a charge of driving without an operator's license, the district court ordered defendant to appear at the next session of superior court, the district judge apparently being of opinion that the defendant by moving for a jury trial could avoid trial in the district court and have his case transferred forthwith for trial in the superior court, the district court acted under a misapprehension of the law and erred by failing to proceed to trial of defendant for this criminal offense in accordance with the accusation contained in the warrant. State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

Where Court of Appeals orders that a new trial be held in a misdemeanor prosecution originally tried in a municipal court and then tried de novo in the superior court, the case on retrial maintains its status as a case pending in the superior court on appeal from a lower court, and defendant's motion to quash the indictment on the ground that the district court has jurisdiction of the case is properly denied. State v. Patton, 5 N.C. App. 164, 167 S.E.2d 821 (1969).

Effect of Issuing Second Warrant Charging Same Offense. — Where defendant was tried and convicted in district court, appealed to superior court, and subsequently moved to dismiss the charge pursuant to the former Speedy Trial Act, former G.S. 15A-701 through 15A-704; the court allowed defendant's motion and ordered dismissal of the case without prejudice; on that same day the magistrate issued a new warrant charging the same offense; and the trial judge, later during the same session, reopened the matter, heard additional evidence and arguments and dismissed the case without prejudice to the State, the superior court was not divested of jurisdiction by the magistrate's issuing the second warrant, nor did the State, by securing the second warrant, waive whatever rights to appellate review it might have had. State v. Morehead, 46 N.C. App. 39, 264 S.E.2d 400, cert. denied, 300 N.C. 201, 269 S.E.2d 615 (1980).

Driving Under the Influence. — This section grants jurisdiction to the superior court in any action already properly pending in the district court if the grand jury issues a presentment and that presentment is the first accusation of the offense within superior court. Therefore, defendant's driving while impaired (DWI) action was properly under the jurisdiction of the district court and not the superior court when the citation was issued, but as soon as the grand jury issued the presentment, the superior court acquired jurisdiction. State v. Gunter, 111 N.C. App. 621, 433 S.E.2d 191, appeal dismissed, 335 N.C. 561, 439 S.E.2d 154 (1993).

A "driving under the influence" misdemeanor charge and a manslaughter felony charge were based on the same transaction within the meaning of G.S. 7A-271(a)(3), and therefore the superior court had jurisdiction of both charges and had the right to proceed to the trial on the misdemeanor charge under the joinder exception of G.S. 7A-271, the "original jurisdiction" of the district court having been lost after nolle prosequi was entered as to the misdemeanor in that court. State v. Karbas, 28 N.C. App. 372, 221 S.E.2d 98, cert. denied, 289 N.C. 618, 223 S.E.2d 394 (1976).

Violation of G.S. 20-7(a). — The district court had jurisdiction to try defendant on a warrant charging operation of an automobile without an operator's license in violation of G.S. 20-7(a). State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

III. PRELIMINARY EXAMINATIONS.

A preliminary hearing is not a trial, but is simply an inquiry into whether the accused should be discharged or whether, on the other hand, there is probable cause to submit the State's evidence to the grand jury and seek a bill of indictment to the end that the accused may be placed upon trial. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972); State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

Preliminary Hearing Not Required. — A preliminary hearing is not a necessary step in the prosecution of a person accused of crime, and an accused person is not entitled to a preliminary hearing as a matter of substantive right. State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

A preliminary hearing is not an essential prerequisite to the finding of a bill of indictment and it is proper to try the accused upon a bill of indictment without a preliminary hearing. State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

When performing his duties under subsection (b) of this section, the district judge sits only as an examining magistrate in all felony cases, because the trial of felonies is beyond the jurisdiction of the district court. State v. Bass, 280 N.C. 435, 186 S.E.2d 384 (1972); State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

In his capacity as examining magistrate, the district judge is concerned only with determining (1) whether a felonious offense has been committed, and (2) whether there is probable cause to charge the prisoner therewith. State v. Bass, 280 N.C. 435, 186 S.E.2d 384 (1972).

The district judge, in his capacity as committing magistrate, passes only on the narrow question of whether probable cause exists and, if so, the fixing of bail if the offense is bailable. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972).

District Judge Does Not Render a Verdict. — The district judge, when sitting as a committing magistrate as authorized by subsection (b) of this section, does not render a verdict; and a discharge of the accused is not an acquittal and does not bar a later indictment. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972); State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

Or Have Authority to Dismiss First-Degree Murder Charge. — A district judge sitting as a committing magistrate in a preliminary hearing has no authority to dismiss a first-degree murder charge. State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

OPINIONS OF ATTORNEY GENERAL

Jurisdiction over Offense of Failure to List Property for Taxation. — See opinion of Attorney General to Mr. Amsey A. Boyd, Tax Supervisor of Richmond County, 40 N.C.A.G. 776 (1969).

§ 7A-273. Powers of magistrates in infractions or criminal actions.

In criminal actions or infractions, any magistrate has power:

(1) In infraction cases in which the maximum penalty that can be imposed is not more than fifty dollars ($50.00), exclusive of costs, or in Class 3 misdemeanors, other than the types of infractions and misdemeanors specified in subdivision (2) of this section, to accept guilty pleas or admissions of responsibility and enter judgment;

(2) In misdemeanor or infraction cases involving alcohol offenses under Chapter 18B of the General Statutes, traffic offenses, hunting, fishing, State park and recreation area rule offenses under Chapter 113 of the General Statutes, boating offenses under Chapter 75A of the General Statutes, and littering offenses under G.S. 14-399(c) and G.S. 14-399(c1), to accept written appearances, waivers of trial or hearing and pleas of guilty or admissions of responsibility, in accordance with the schedule of offenses and fines or penalties promulgated by the Conference of Chief District Judges pursuant to G.S. 7A-148, and in such cases, to enter judgment and collect the fines or penalties and costs;

(2a) In misdemeanor cases involving the violation of a county ordinance authorized by law regulating the use of dune or beach buggies or other power-driven vehicles specified by the governing body of the county on the foreshore, beach strand, or the barrier dune system, to accept written appearances, waivers of trial or hearing, and pleas of guilty or admissions of responsibility, in accordance with the schedule of offenses and fines or penalties promulgated by the Conference of Chief District Court Judges pursuant to G.S. 7A-148, and in such cases, to enter judgment and collect the fines or penalties and costs;

(3) To issue arrest warrants valid throughout the State;

(4) To issue search warrants valid throughout the county;

(5) To grant bail before trial for any noncapital offense;

(6) Notwithstanding the provisions of subdivision (1) of this section, to hear and enter judgment as the chief district judge shall direct in all worthless check cases brought under G.S. 14-107, when the amount of the check is two thousand dollars ($2,000) or less. Provided, however, that under this section magistrates may not impose a prison sentence longer than 30 days;

(7) To conduct an initial appearance as provided in G.S. 15A-511; and

(8) To accept written appearances, waivers of trial and pleas of guilty in violations of G.S. 14-107 when the amount of the check is two thousand dollars ($2,000) or less, restitution, including service charges and processing fees allowed by G.S. 14-107, is made, and the warrant does not charge a fourth or subsequent violation of this statute, and in these cases to enter judgments as the chief district judge directs.

(9) Repealed by Session Laws 1991 (Regular Session, 1992), c. 900, s. 118(d). (1965, c. 310, s. 1; 1969, c. 876, s. 2; c. 1190, s. 25; 1973, c. 6; c. 503, s. 8; c. 1286, s. 7; 1975, c. 626, s. 4; 1977, c. 873, s. 1; 1979, c. 144, s. 3; 1981, c. 555, s. 3; 1983, c. 586, s. 5; 1985, c. 425, s. 4; c. 764, s. 16; 1985 (Reg. Sess., 1986), c. 852, s. 17; 1987, c. 355, ss. 1, 2; 1989, c. 343; c. 763; 1989 (Reg. Sess., 1990), c. 1041, s. 1; 1991, c. 520, s. 2; 1991 (Reg. Sess., 1992), c. 900, s. 118(d); 1993, c. 374, s. 4; c. 538, s. 35; 1994, Ex. Sess., c. 14, s. 1; c. 24, s. 14(b); 1999-80, s. 1; 2002-159, s. 1.)

Legal Periodicals. — For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

CASE NOTES

State Has Burden to Show Jurisdiction. — When jurisdiction is challenged, in a criminal case, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused. Former cases holding that a challenge to the jurisdiction is an affirmative defense with the burden of persuasion on the accused are no longer authoritative. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

The question of jurisdiction of the court in a criminal case is not an independent, distinct, substantive matter of exemption, immunity or defense and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, when contested, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

Judicial Immunity Granted. — Whether or not a magistrate's alleged comments made in connection with plaintiff's arrest regarding a domestic violence matter were appropriate, they were made in connection with judicial acts within the magistrate's jurisdiction; he was, therefore, entitled to immunity, and his motion to dismiss plaintiff's 42 U.S.C.S. § 1983 claim was granted. Cole v. Summey, 329 F. Supp. 2d 591, 2004 U.S. Dist. LEXIS 15840 (M.D.N.C. 2004).

Applied in State v. Warren, 59 N.C. App. 264, 296 S.E.2d 671 (1982).

Cited in Bradshaw v. Administrative Office of Courts, 320 N.C. 132, 357 S.E.2d 370 (1987).

§ 7A-274. Power of mayors, law-enforcement officers, etc., to issue warrants and set bail restricted.

The power of mayors, law-enforcement officers, and other persons not officers of the General Court of Justice to issue arrest, search, or peace warrants, or to set bail, is terminated in any district court district upon the establishment of a district court therein. (1965, c. 310, s. 1.)

Legal Periodicals. — For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

§ 7A-275: Repealed by Session Laws 1971, c. 377, s. 32.

§ 7A-276: Reserved for future codification purposes.

ARTICLE 22A.

Prohibited Orders.

§ 7A-276.1. Court orders prohibiting publication or broadcast of reports of open court proceedings or reports of public records banned.

No court shall make or issue any rule or order banning, prohibiting, or restricting the publication or broadcast of any report concerning any of the following: any evidence, testimony, argument, ruling, verdict, decision, judgment, or other matter occurring in open court in any hearing, trial, or other proceeding, civil or criminal; and no court shall issue any rule or order sealing, prohibiting, restricting the publication or broadcast of the contents of any public record as defined by any statute of this State, which is required to be open to public inspection under any valid statute, regulation, or rule of common law. If any rule or order is made or issued by any court in violation of the provisions of this statute, it shall be null and void and of no effect, and no person shall be punished for contempt for the violation of any such void rule or order. (1977, c. 711, s. 3.)

Legal Periodicals. — For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

CASE NOTES

Court May Shield Items Subject to Statutory and Constitutional Limitation. — This statute only prohibits a court from restricting the publication of reports regarding matter presented "in open court"; thus, although court records may generally be public records under G.S. 132-1, a trial court may shield portions of court proceedings and records from public view subject to statutory and constitutional limitation. Virmani v. Presbyterian Health Servs. Corp., 127 N.C. App. 629, 493 S.E.2d 310 (1997), aff'd in part and rev'd in part on other grounds, 350 N.C. 449, 515 S.E.2d 675 (1999).

ARTICLE 23.

Jurisdiction and Procedure Applicable to Children.

§§ 7A-277 through 7A-289: Repealed by Session Laws 1979, c. 815, s. 1.

Cross References. — As to the North Carolina Juvenile Code, see G.S. 7B-100 et seq.

ARTICLE 24.

Juvenile Services.

§§ 7A-289.1 through 7A-289.6: Repealed by Session Laws 1998-202, s. 1(a).

Cross References. — For the Juvenile Code, effective July 1, 1999, see now G.S. 7B-100 et seq.

§ 7A-289.7: Repealed by Session Laws 1979, c. 815, s. 1.

Cross References. — For present provisions relating to intake services in juvenile cases, see now G.S. 7B-1700.

§§ 7A-289.8 through 7A-289.12: Reserved for future codification purposes.

ARTICLE 24A.

Delinquency Prevention and Youth Services.

§§ 7A-289.13 through 7A-289.16: Repealed by Session Laws 1998-202, s. 1(a).

Cross References. — For the Juvenile Code, effective July 1, 1999, see now G.S. 7B-100 et seq.

Editor's Note. — G.S. 7A-289.13 was additionally repealed by Session Laws 1998-202, s. 5, effective July 1, 1999.

§§ 7A-289.17 through 7A-289.21: Reserved for future codification purposes.

ARTICLE 24B.

Termination of Parental Rights.

§§ 7A-289.22, 7A-289.23: Repealed by Session Laws 1998-202, s. 5.

Cross References. — For termination of parental rights under the Juvenile Code, effective July 1, 1999, see now G.S. 7B-1100 et seq.

§ 7A-289.23A: Recodified as § 7B-1102.

Editor's Note. — This section was enacted as G.S. 7A-289.23.1 and was redesignated as G.S. 7A-289.23A [see now G.S. 7B-1102] at the direction of the Revisor of Statutes.

Session Laws 1998-229, s. 9.1, enacted this section after Session Laws 1998-202, s. 5 repealed this Article effective July 1, 1999; thus, this section is not set out as repealed effective July 1, 1999 at the direction of the Revisor of Statutes.

Session Laws 1998-229, s. 29, made this section effective November 6, 1998 and s. 26.1

provides that this section be recodified as 7B-1101.1 (renumbered as 7B-1102 at the direction of the Revisor of Statutes), effective July 1, 1999.

§§ 7A-289.24 through 7A-289.35: Repealed by Session Laws 1998-202, s. 5.

Editor's Note. — Repealed G.S. 7A-289.35 was previously repealed by Session Laws 1983, c. 607, s. 4.

Article 25.

Jurisdiction and Procedure in Criminal Appeals from District Courts.

§ 7A-290. Appeals from district court in criminal cases; notice; appeal bond.

Any defendant convicted in district court before the magistrate may appeal to the district court for trial de novo before the district court judge. Any defendant convicted in district court before the judge may appeal to the superior court for trial de novo. Notice of appeal may be given orally in open court, or to the clerk in writing within 10 days of entry of judgment. Upon expiration of the 10-day period in which an appeal may be entered, if an appeal has been entered and not withdrawn, the clerk shall transfer the case to the district or superior court docket. The original bail shall stand pending appeal, unless the judge orders bail denied, increased, or reduced. (1965, c. 310, s. 1; 1967, c. 601, s. 1; 1969, c. 876, s. 3; c. 911, s. 5; c. 1190, s. 26; 1971, c. 377, s. 16.)

Editor's Note. — This section was formerly numbered G.S. 7A-288. It was renumbered G.S. 7A-290 by Session Laws 1969, c. 911, s. 5.

CASE NOTES

I. General Consideration.
II. Appeal to Superior Court.

I. GENERAL CONSIDERATION.

This section and G.S. 49-7, when properly construed together, are not inconsistent. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

Hence, the proviso in G.S. 49-7 was not repealed either expressly or by implication by enactment of this section. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

Purpose of State's de novo procedure is to provide all criminal defendants charged with misdemeanor violations the right to a "speedy trial" in the district court and to offer them an opportunity to learn about the State's case without revealing their own. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Validity of Trial Without Jury in Lower Court. — The fact that a right of appeal was given where the defendant was convicted in the lower court without the intervention of a jury has generally been regarded as a sufficient reason, in support of the validity of such trials without a jury in the inferior tribunal, as by appealing the defendant secures his right to a jury trial in the superior court, and therefore cannot justly complain that he has been deprived of his constitutional right. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Coats, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

Applied in State v. Golden, 40 N.C. App. 37, 251 S.E.2d 875 (1979); State v. Smith, 312 N.C. 361, 323 S.E.2d 316 (1984).

Cited in State v. Thompson, 2 N.C. App. 508, 163 S.E.2d 410 (1968); State v. Speights, 280 N.C. 137, 185 S.E.2d 152 (1971); Perry v. Blackledge, 453 F.2d 856 (4th Cir. 1971); State

v. Brunson, 327 N.C. 244, 393 S.E.2d 860 (1990); State v. Wilkins, 128 N.C. App. 315, 494 S.E.2d 611 (1998); State v. Bissette, 142 N.C. App. 669, 544 S.E.2d 266, 2001 N.C. App. LEXIS 183 (2001); N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888, 2004 N.C. LEXIS 909 (2004).

II. APPEAL TO SUPERIOR COURT.

Trial de novo in the superior court is a new trial from beginning to end, on both law and facts, disregarding completely the plea, trial, verdict and judgment below; and the superior court judgment entered upon conviction there is wholly independent of any judgment which was entered in the inferior court. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Coats, 17 N.C. App. 407, 194 S.E.2d 366 (1973); State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649, cert. denied, 297 N.C. 699, 259 S.E.2d 297 (1979).

And Lower Court Judgment Is Annulled. — When an appeal of right is taken to the superior court, in contemplation of law it is as if the case had been brought there originally and there had been no previous trial. The judgment appealed from is completely annulled and is not thereafter available for any purpose. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971); State v. Bryant, 11 N.C. App. 423, 181 S.E.2d 211 (1971); State v. Coats, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

And May Be Ignored Even Where Defendant Was Denied Constitutional Rights. — The superior court division, as the trial court upon appeal and trial de novo, is generally justified in disregarding completely the plea, trial, verdict and judgment below, even in those situations in which the inferior court has not granted the defendant his constitutional rights. State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649, cert. denied, 297 N.C. 699, 259 S.E.2d 297 (1979).

Defendants are entitled to a trial de novo in the superior court even though their trials in the inferior court were free from error. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Coats, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

Even After Guilty Plea. — An appeal from a conviction in an inferior court entitles the defendant to a trial de novo in the superior court as a matter of right, and this is true even when an accused pleads guilty in the inferior court. State v. Bryant, 11 N.C. App. 423, 181 S.E.2d 211 (1971).

An accused in a criminal case is entitled to a trial de novo as a matter of right on appeal to the superior court from an inferior court, even when the accused entered a guilty plea in the inferior court. State v. Fox, 34 N.C. App. 576, 239 S.E.2d 471 (1977).

But State Not Bound by Plea Bargain After Defendant Appeals. — Where a defendant originally charged with felonies entered guilty pleas to misdemeanors in the district court pursuant to a plea bargain with the State, but then appealed to the superior court for a trial de novo, the State was not bound by the agreement and could try the defendant upon the felony charges or any lesser included offenses. State v. Fox, 34 N.C. App. 576, 239 S.E.2d 471 (1977).

Waiver of Right of Appeal. — By acquiescing in the terms of the judgment of the district court by paying a fine and costs, defendant waived his statutory right of appeal to the superior court. State v. Vestal, 34 N.C. App. 610, 239 S.E.2d 275 (1977).

Transcript of District Court Proceedings Not Required. — State's de novo procedure has no requirement that a defendant purchase and provide the superior court with a transcript of the district court proceedings in order to secure full appellate review. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

There is no merit in the argument that a transcript of the district court proceedings is needed for an effective appeal for trial de novo in superior court. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Nor Is Indigent Entitled to Free Transcript. — There are no constitutional infirmities in the denial of a free transcript of the district court proceedings to an indigent defendant. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Correction of Clerical Error Is Not New Judgment. — Defendant's purported appeal was untimely because it was not made within 10 days of the original judgment in which the defendant was found guilty of attempted simple assault, simple assault and communicating threats; the district court's intervening correction of various errors on the sentencing form did not constitute a new judgment from which to start counting the ten days. State v. Linemann, 135 N.C. App. 734, 522 S.E.2d 781, 1999 N.C. App. LEXIS 1246 (1999).

Inquiry as to Failure to Testify Below. — In a superior court trial for driving under the influence, the State, by inquiring into defendant's failure to testify in district court, did more than attempt to impeach defendant with his prior silence, considering his allegedly belated attempt to establish a defense, but also adversely implicated defendant's right not to testify in district court. State v. Ferrell, 75 N.C. App. 156, 330 S.E.2d 225, cert. denied and appeal dismissed, 314 N.C. 333, 333 S.E.2d 492 (1985).

Sentence in Superior Court May Be Lighter or Heavier Than That Imposed by

District Court. — Inasmuch as the trial in the superior court is without regard to the proceedings in the district court, the judge of the superior court is necessarily required to enter his own independent judgment. His sentence may be lighter or heavier than that imposed by the inferior court, provided, of course, it does not exceed the maximum punishment which the inferior court could have imposed. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971).

In the sound discretion of the superior court judge, the defendant's sentence may be lighter or heavier than that imposed in the district court provided that it does not exceed the statutory maximum. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970).

And Heavier Sentence Does Not Violate Constitutional or Statutory Rights. — The fact that a defendant received a greater sentence in the superior court than he received in a recorder's court is no violation of his constitutional or statutory rights. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971); State v. Coats, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

The fact that defendants received a greater sentence in the superior court than they received in the district court is no violation of their constitutional rights. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970).

But Reasons for Imposing Heavier Sentence Must Affirmatively Appear. — Whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971).

Remand to District Court. — Where the appeal has been docketed in the superior court, the judge presiding, at term, has the authority, upon satisfactory cause shown and with the consent of the defendant, to remand the case to the inferior court for clarifying judgment or other proceedings. This would reinstate the case and revest the inferior court with jurisdiction. State v. Bryant, 11 N.C. App. 423, 181 S.E.2d 211 (1971).

Same — Cause or Consent of Defendant Required. — Where a defendant has appealed for trial de novo in superior court, a judge of that court has no authority, absent satisfactory cause shown or without the consent of the defendant, to dismiss the appeal and remand the case for compliance with the judgment of the district court. State v. Fox, 34 N.C. App. 576, 239 S.E.2d 471 (1977).

Failure to Appear in Court or Consent to Dismissal. — Where the defendant neither appears in court when his case is called nor consents to dismissal of his appeal, the trial judge is without authority to dismiss the appeal and remand the case to the district court for compliance with the judgment of that court. The defendant is entitled to a trial as if the case originated in the superior court. State v. Bryant, 11 N.C. App. 423, 181 S.E.2d 211 (1971).

Trial Court Erred Where Defendant Entitled to Arraignment in Superior Court. — By immediately proceeding to trial without defendant's consent on an appeal de novo from a district court, a superior court violated G.S. 15A-943(b), which defendant adequately invoked; as the superior court was not the court of original jurisdiction, the prosecutor never submitted a bill of indictment for defendant nor was defendant indicted, so there was no 21-day period from which defendant needed to file a written request for an arraignment. A trial de novo in the superior court was a new trial from the beginning to the end, disregarding completely the plea below, and, therefore, since defendant's plea from the district court was completely disregarded, defendant was entitled to an arraignment in superior court. State v. Vereen, 177 N.C. App. 233, 628 S.E.2d 408, 2006 N.C. App. LEXIS 847 (2006).

OPINIONS OF ATTORNEY GENERAL

Withdrawal of Appeal to Superior Court Not Allowed. — See opinion of Attorney General to Mr. Carroll R. Holmes, Attorney at Law, 40 N.C.A.G. 96 (1969).

Duty of Clerk in Event of Appeal in a Criminal Case. — See opinion of Attorney General to Mrs. Lena M. Leary, Clerk, Chowan County Superior Court, 40 N.C.A.G. 101 (1969).

ARTICLE 26.

Additional Powers of District Court Judges and Magistrates.

§ 7A-291. Additional powers of district court judges.

In addition to the jurisdiction and powers assigned in this Chapter, a district court judge has the following powers:

(1) To administer oaths;
(2) To punish for contempt;
(3) To compel the attendance of witnesses and the production of evidence;
(4) To set bail;
(5) To issue arrest warrants valid throughout the State, and search warrants valid throughout the district of issue; and
(6) To issue all process and orders necessary or proper in the exercise of his powers and authority, and to effectuate his lawful judgments and decrees. (1965, c. 310, s. 1; 1969, c. 1190, s. 27; 1973, c. 1286, s. 11.)

Legal Periodicals. — For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

CASE NOTES

No Power When No Action Pending. — Without an action pending before it, the district court was without jurisdiction to enter an order pursuant to G.S. 7A-291(6). In re Transp. of Juveniles, 102 N.C. App. 806, 403 S.E.2d 557 (1991).

This statute was not intended to give a district court judge the power to enter an order ex mero motu when no action is before the court. In re Transp. of Juveniles, 102 N.C. App. 806, 403 S.E.2d 557 (1991).

Cited in State v. Chase, 117 N.C. App. 686, 453 S.E.2d 195 (1995).

§ 7A-292. Additional powers of magistrates.

In addition to the jurisdiction and powers assigned in this Chapter to the magistrate in civil and criminal actions, each magistrate has the following additional powers:

(1) To administer oaths;
(2) To punish for direct criminal contempt subject to the limitations contained in Chapter 5A of the General Statutes of North Carolina;
(3) When authorized by the chief district judge, to take depositions and examinations before trial;
(4) To issue subpoenas and capiases valid throughout the county;
(5) To take affidavits for the verification of pleadings;
(6) To issue writs of habeas corpus ad testificandum, as provided in G.S. 17-41;
(7) To assign a year's allowance to the surviving spouse and a child's allowance to the children as provided in Chapter 30, Article 4, of the General Statutes;
(8) To take acknowledgments of instruments, as provided in G.S. 47-1;
(9) To perform the marriage ceremony, as provided in G.S. 51-1;
(10) To take acknowledgment of a written contract or separation agreement between husband and wife; and
(11) Repealed by Session Laws 1973, c. 503, s. 9.
(12) To assess contribution for damages or for work done on a dam, canal, or ditch, as provided in G.S. 156-15.
(13) Repealed by Session Laws 1973, c. 503, s. 9.

(14) To accept the filing of complaints and to issue summons pursuant to Article 4 of Chapter 42A of the General Statutes in expedited eviction proceedings when the office of the clerk of superior court is closed. (1965, c. 310, s. 1; 1967, c. 691, s. 25; 1971, c. 377, s. 17; 1973, c. 503, s. 9; 1977, c. 375, s. 4; 1979, 2nd Sess., c. 1080, s. 6; 1994, Ex. Sess., c. 4, s. 4; 1999-420, s. 4; 1999-456, s. 9(a), (b).)

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Cited in Bradshaw v. Administrative Office of Courts, 320 N.C. 132, 357 S.E.2d 370 (1987).

§ 7A-293. Special authority of a magistrate assigned to a municipality located in more than one county of a district court district.

A magistrate assigned to an incorporated municipality, the boundaries of which lie in more than one county of a district court district, may, in criminal matters, exercise the powers granted by G.S. 7A-273 as if the corporate limits plus the territory embraced within a distance of one mile in all directions therefrom were located wholly within the magistrate's county of residence. Appeals from a magistrate exercising the authority granted by this section shall be taken in the district court in the county in which the offense was committed. A magistrate exercising the special authority granted by this section shall transmit all records, reports, and monies collected to the clerk of the superior court of the county in which the offense was committed. In addition, if a magistrate is assigned to an incorporated municipality, the boundaries of which lie in two district court districts, the magistrate may exercise the powers described in this section as if both counties were in the same district court district, if the clerks of superior court and the chief district court judges serving both districts in which the municipality is located agree in writing that the exercise of this special authority would promote the administration of justice in the municipality and in both districts. (1967, c. 691, s. 26; 1989, c. 795, s. 23(c1).)

§§ 7A-294 through 7A-299: Reserved for future codification purposes.

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

ARTICLE 27.

Expenses of the Judicial Department.

§ 7A-300. Expenses paid from State funds.

(a) The operating expenses of the Judicial Department shall be paid from State funds, out of appropriations for this purpose made by the General Assembly, or from funds provided by local governments pursuant to G.S.

153A-212.1 and G.S. 160A-289.1. The Administrative Office of the Courts shall prepare budget estimates to cover these expenses, including therein the following items and such other items as are deemed necessary for the proper functioning of the Judicial Department:

(1) Salaries, departmental expense, printing and other costs of the appellate division;
(2) Salaries and expenses of superior court judges, district attorneys, assistant district attorneys, public defenders, and assistant public defenders, and fees and expenses of counsel assigned to represent indigents under the provisions of Subchapter IX of this Chapter;
(3) Salaries, travel expenses, departmental expense, printing and other costs of the Administrative Office of the Courts;
(4) Salaries and travel expenses of district judges, magistrates, and family court counselors;
(5) Salaries and travel expenses of clerks of superior court, their assistants, deputies, and other employees, and the expenses of their offices, including supplies and materials, postage, telephone and telegraph, bonds and insurance, equipment, and other necessary items;
(6) Fees and travel expenses of jurors, and of witnesses required to be paid by the State;
(7) Compensation and allowances of court reporters;
(8) Briefs for counsel and transcripts and other records for adequate appellate review when an appeal is taken by an indigent person;
(9) Transcripts of preliminary hearings in indigency cases and, in cases in which the defendant pays for a transcript of the preliminary hearing, a copy for the district attorney;
(10) Transcript of the evidence and trial court charge furnished the district attorney when a criminal action is appealed to the appellate division;
(11) All other expenses arising out of the operations of the Judicial Department which by law are made the responsibility of the State; and
(12) Operating expenses of the Judicial Council and the Judicial Standards Commission.

(b) Repealed by Session Laws 1971, c. 377, s. 32. (1965, c. 310, s. 1; 1967, c. 108, s. 9; c. 1049, s. 5; 1969, c. 1013, s. 2; 1971, c. 377, ss. 18, 21; 1973, c. 47, s. 2; c. 503, ss. 10, 11; 2000-67, s. 15.4(c).)

CASE NOTES

Application of Subchapter. — In cases which were instituted after the establishment of the district court, the costs, including a "facilities fee," shall be assessed according to G.S. 7A-300 through 7A-317.1. Blackwell v. Montague, 15 N.C. App. 564, 190 S.E.2d 384 (1972).

Facilities for Judicial System. — Our statutes obligate counties and cities to provide physical facilities for the judicial system operating within their boundaries. These facilities must be adequate to serve the functioning of the judiciary within the borders of those political subdivisions. In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991).

Cited in In re Dunlap, 66 N.C. App. 152, 310 S.E.2d 415 (1984).

§ 7A-301. Disbursement of expenses.

The salaries and expenses of all personnel in the Judicial Department and other operating expenses shall be paid out of the State treasury upon warrants duly drawn thereon, except that the Administrative Office of the Courts and the Department of Administration, with the approval of the State Auditor, may establish alternative procedures for the prompt payment of juror fees, witness fees, and other small expense items. (1965, c. 310, s. 1.)

§ 7A-302. (Effective until July 1, 2008) Counties and municipalities responsible for physical facilities.

In each county in which a district court has been established, courtrooms, office space for juvenile court counselors and support staff as assigned by the Department of Juvenile Justice and Delinquency Prevention, and related judicial facilities (including furniture), as defined in this Subchapter, shall be provided by the county, except that courtrooms and related judicial facilities may, with the approval of the administrative Officer of the Courts, after consultation with county and municipal authorities, be provided by a municipality in the county. To assist a county or municipality in meeting the expense of providing courtrooms and related judicial facilities, a part of the costs of court, known as the "facilities fee," collected for the State by the clerk of superior court, shall be remitted to the county or municipality providing the facilities. (1965, c. 310, s. 1; 1998-202, s. 15; 2000-137, s. 4(a).)

Section Set Out Twice. — The section above is effective until July 1, 2008. For this section as amended July 1, 2008, see the following section, also numbered G.S. 7A-302.

Legal Periodicals. — For article, "Local Governments and the Public Duty Doctrine after Wood v. Guilford," see 81 N.C.L. Rev. 2291 (2003).

CASE NOTES

Duty to Provide Physical Facilities for Judicial System. — Our statutes obligate counties and cities to provide physical facilities for the judicial system operating within their boundaries. These facilities must be adequate to serve the functioning of the judiciary within the borders of those political subdivisions. In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991).

Counties in which a district court has been established have an absolute statutory duty to provide judicial facilities. In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991).

Public Duty Doctrine Not Applicable. — In providing courtrooms, office space, and related judicial facilities, a county is not acting to provide police protection to the general public, and thus, the public duty doctrine is not applicable. Wood v. Guilford County, 143 N.C. App. 507, 546 S.E.2d 641, 2001 N.C. App. LEXIS 307 (2001).

County Liability for Injuries to State Employees on County Property. — County was not subjected to tort liability for claims arising from third-party criminal conduct when a state employee was sexually assaulted in a county courthouse, particularly since the county undertook security measures to protect the public from harm in the courthouse; further the county did not waive its protection under the public duty doctrine. Wood v. Guilford County, 355 N.C. 161, 558 S.E.2d 490, 2002 N.C. LEXIS 16 (2002).

Order to Inquire into Adequacy of Facilities Held Flawed. — A hearing ordered by a superior court judge to inquire into the adequacy of the Alamance County court facilities probes the scope of the court's inherent power to direct county commissioners to ameliorate such facilities and the proper means of effecting that end. Such power exists, but the order invoking it was procedurally and substantively flawed where the commissioners against whom the order was directed were not made parties to the action, the order was ex parte, and the order intruded on discretion that properly belonged to the commissioners. In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991).

Cited in Blackwell v. Montague, 15 N.C. App. 564, 190 S.E.2d 384 (1972); Leatherman v. Leatherman, 297 N.C. 618, 256 S.E.2d 793 (1979); In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991); Doe v. Jenkins, 144 N.C. App. 131, 547 S.E.2d 124, 2001 N.C. App. LEXIS 350 (2001).

§ 7A-302. (Effective July 1, 2008) Counties and municipalities responsible for physical facilities.

In each county in which a district court has been established, courtrooms, office space for juvenile court counselors and support staff as assigned by the Department of Juvenile Justice and Delinquency Prevention, and related judicial facilities (including furniture, properly functioning telephones that meet the specifications for Administrative Office of the Court telephones, and the equipment and infrastructure necessary to support those telephones), as defined in this Subchapter, shall be provided by the county, except that courtrooms and related judicial facilities may, with the approval of the Administrative Officer of the Courts, after consultation with county and municipal authorities, be provided by a municipality in the county. To assist a county or municipality in meeting the expense of providing courtrooms and related judicial facilities, a part of the costs of court, known as the "facilities fee," collected for the State by the clerk of superior court, shall be remitted to the county or municipality providing the facilities. (1965, c. 310, s. 1; 1998-202, s. 15; 2000-137, s. 4(a); 2007-323, s. 14.16(a).)

Section Set Out Twice. — The section above is effective July 1, 2008. For this section as effective until July 1, 2008, see the preceding section, also numbered G.S. 7A-302.

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 14.16(a), effective July 1, 2008, added "properly functioning telephones that meet the specifications for Administrative Office of the Court telephones, and the equipment and infrastructure necessary to support those telephones" in the middle of the first sentence.

§ 7A-303. Equipment and supplies in clerk's office.

Upon the establishment of the district court in any county, supplies and all equipment in the office of the clerk of superior court shall become the property of the State. (1965, c. 310, s. 1.)

Article 28.

Uniform Costs and Fees in the Trial Divisions.

§ 7A-304. Costs in criminal actions.

(a) In every criminal case in the superior or district court, wherein the defendant is convicted, or enters a plea of guilty or nolo contendere, or when costs are assessed against the prosecuting witness, the following costs shall be assessed and collected, except that when the judgment imposes an active prison sentence, costs shall be assessed and collected only when the judgment specifically so provides, and that no costs may be assessed when a case is dismissed.

(1) For each arrest or personal service of criminal process, including citations and subpoenas, the sum of five dollars ($5.00), to be remitted to the county wherein the arrest was made or process was served, except that in those cases in which the arrest was made or process served by a law-enforcement officer employed by a municipality, the fee shall be paid to the municipality employing the officer.

(2) For the use of the courtroom and related judicial facilities, the sum of twelve dollars ($12.00) in the district court, including cases before a

magistrate, and the sum of thirty dollars ($30.00) in superior court, to be remitted to the county in which the judgment is rendered. In all cases where the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used exclusively by the county or municipality for providing, maintaining, and constructing adequate courtroom and related judicial facilities, including: adequate space and furniture for judges, district attorneys, public defenders and other personnel of the Office of Indigent Defense Services, magistrates, juries, and other court related personnel; office space, furniture and vaults for the clerk; jail and juvenile detention facilities; free parking for jurors; and a law library (including books) if one has heretofore been established or if the governing body hereafter decides to establish one. In the event the funds derived from the facilities fees exceed what is needed for these purposes, the county or municipality may, with the approval of the Administrative Officer of the Courts as to the amount, use any or all of the excess to retire outstanding indebtedness incurred in the construction of the facilities, or to reimburse the county or municipality for funds expended in constructing or renovating the facilities (without incurring any indebtedness) within a period of two years before or after the date a district court is established in such county, or to supplement the operations of the General Court of Justice in the county.

(3) For the retirement and insurance benefits of both State and local government law-enforcement officers, the sum of six dollars and twenty-five cents ($6.25), to be remitted to the State Treasurer. Fifty cents (50¢) of this sum shall be administered as is provided in Article 12C of Chapter 143 of the General Statutes. Five dollars and seventy-five cents ($5.75) of this sum shall be administered as is provided in Article 12E of Chapter 143 of the General Statutes, with one dollar and twenty-five cents ($1.25) being administered in accordance with the provisions of G.S. 143-166.50(e).

(3a) For the supplemental pension benefits of sheriffs, the sum of one dollar twenty-five cents ($1.25) to be remitted to the Department of Justice and administered under the provisions of Article 12G of Chapter 143 of the General Statutes.

(4) For support of the General Court of Justice, the sum of ninety-five dollars and fifty cents ($95.50) in the district court, including cases before a magistrate, and the sum of one hundred two dollars and fifty cents ($102.50) in the superior court, to be remitted to the State Treasurer. For a person convicted of a felony in superior court who has made a first appearance in district court, both the district court and superior court fees shall be assessed. The State Treasurer shall remit the sum of two dollars and five cents ($2.05) of each fee collected under this subdivision to the North Carolina State Bar for the provision of services described in G.S. 7A-474.4, and ninety-five cents ($.95) of each fee collected under this subdivision to the North Carolina State Bar for the provision of services described in G.S. 7A-474.19.

(5) For using pretrial release services, the district or superior court judge shall, upon conviction, impose a fee of fifteen dollars ($15.00) to be remitted to the county providing the pretrial release services. This cost shall be assessed and collected only if the defendant had been accepted and released to the supervision of the agency providing the pretrial release services.

(6) For support of the General Court of Justice, the sum of one hundred dollars ($100.00) is payable by a defendant who fails to appear to

answer the charge as scheduled, unless within 20 days after the scheduled appearance, the person either appears in court to answer the charge or disposes of the charge pursuant to G.S. 7A-146. Upon a showing to the court that the defendant failed to appear because of an error or omission of a judicial official, a prosecutor, or a law-enforcement officer, the court shall waive this fee. This fee shall be remitted to the State Treasurer.

(7) For the services of the State Bureau of Investigation laboratory facilities, the district or superior court judge shall, upon conviction, order payment of the sum of three hundred dollars ($300.00) to be remitted to the Department of Justice for support of the State Bureau of Investigation. This cost shall be assessed only in cases in which, as part of the investigation leading to the defendant's conviction, the laboratories have performed DNA analysis of the crime, tests of bodily fluids of the defendant for the presence of alcohol or controlled substances, or analysis of any controlled substance possessed by the defendant or the defendant's agent. The court may waive or reduce the amount of the payment required by this subdivision upon a finding of just cause to grant such a waiver or reduction.

(8) For the services of any crime laboratory facility operated by a local government or group of local governments, the district or superior court judge shall, upon conviction, order payment of the sum of three hundred dollars ($300.00) to be remitted to the general fund of the local governmental unit that operates the laboratory to be used for law enforcement purposes. The cost shall be assessed only in cases in which, as part of the investigation leading to the defendant's conviction, the laboratory has performed DNA analysis of the crime, test of bodily fluids of the defendant for the presence of alcohol or controlled substances, or analysis of any controlled substance possessed by the defendant or the defendant's agent. The costs shall be assessed only if the court finds that the work performed at the local government's laboratory is the equivalent of the same kind of work performed by the State Bureau of Investigation under subdivision (7) of this subsection. The court may waive or reduce the amount of the payment required by this subdivision upon a finding of just cause to grant such a waiver or reduction.

(a1) Repealed by Session Laws 1997-475, s. 4.1.

(b) On appeal, costs are cumulative, and costs assessed before a magistrate shall be added to costs assessed in the district court, and costs assessed in the district court shall be added to costs assessed in the superior court, except that the fee for the Law-Enforcement Officers' Benefit and Retirement Fund and the Sheriffs' Supplemental Pension Fund and the fee for pretrial release services shall be assessed only once in each case. No superior court costs shall be assessed against a defendant who gives notice of appeal from the district court but withdraws it prior to the expiration of the 10-day period for entering notice of appeal. When a case is reversed on appeal, the defendant shall not be liable for costs, and the State shall be liable for the cost of printing records and briefs in the Appellate Division.

(c) Witness fees, expenses for blood tests and comparisons incurred by G.S. 8-50.1(a), jail fees and cost of necessary trial transcripts shall be assessed as provided by law in addition to other costs set out in this section. Nothing in this section shall limit the power or discretion of the judge in imposing fines or forfeitures or ordering restitution.

(d)(1) In any criminal case in which the liability for costs, fines, restitution, attorneys' fees, or any other lawful charge has been finally determined, the clerk of superior court shall, unless otherwise ordered by the presiding judge, disburse such funds when paid in accordance with the following priorities:

- a. Sums in restitution to the victim entitled thereto;
- b. Costs due the county;
- c. Costs due the city;
- d. Fines to the county school fund;
- e. Sums in restitution prorated among the persons other than the victim entitled thereto;
- f. Costs due the State;
- g. Attorney's fees, including appointment fees assessed pursuant to G.S. 7A-455.1.

(2) Sums in restitution received by the clerk of superior court shall be disbursed when:

- a. Complete restitution has been received; or
- b. When, in the opinion of the clerk, additional payments in restriction will not be collected; or
- c. Upon the request of the person or persons entitled thereto; and
- d. In any event, at least once each calendar year.

(e) Unless otherwise provided by law, the costs assessed pursuant to this section for criminal actions disposed of in the district court are also applicable to infractions disposed of in the district court. The costs assessed in superior court for criminal actions appealed from district court to superior court are also applicable to infractions appealed to superior court. If an infraction is disposed of in the superior court pursuant to G.S. 7A-271(d), costs applicable to the original charge are applicable to the infraction. (1965, c. 310, s. 1; 1967, c. 601, s. 2; c. 691, ss. 27-29; c. 1049, s. 5; 1969, c. 1013, s. 3; c. 1190, ss. 28, 29; 1971, c. 377, ss. 19-21; c. 1129; 1973, c. 47, s. 2; 1975, c. 558, ss. 1, 2; 1975, 2nd Sess., c. 980, s. 1; 1979, c. 576, s. 3; 1981, c. 369; c. 691, s. 1; c. 896, s. 2; c. 959, s. 1; 1983, c. 713, ss. 2, 3; 1983 (Reg. Sess., 1984), c. 1034, s. 249; 1985, c. 479, s. 196(a); c. 729, ss. 2-4; c. 764, s. 17; 1986, Ex. Sess., c. 5; 1985 (Reg. Sess., 1986), c. 852, s. 17; c. 1015, s. 1; 1989, c. 664, ss. 1, 2; c. 786, s. 1; 1989 (Reg. Sess., 1990), c. 1044, s. 1; 1991, c. 742, s. 15(a); 1991 (Reg. Sess., 1992), c. 811, s. 1; 1993, c. 313, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 22.13(a); 1997-475, s. 4.1; 1998-212, ss. 19.4(k), 29A.12(a); 2000-109, s. 4(a); 2000-144, s. 2; 2001-424, s. 22.14(a); 2002-126, ss. 29A.4(a), 29A.8(a), 29A.9(b); 2003-284, s. 30.19B(a); 2004-186, s. 4.4; 2005-250, s. 1; 2005-276, ss. 43.1(a), 29.30(b); 2005-363, s. 1; 2007-323, s. 30.8(a).)

Cross References. — As to items allowed as costs generally, see G.S. 6-1. For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Editor's Note. — The subdivisions in subsection (d), as amended by Session Laws 1998-212, s. 19.4(k), have been redesignated at the direction of the Revisor.

Session Laws 2001-424, s. 22.14(i), provides: "The Administrative Office of the Courts shall report by April 15 of each year to the Chairs of the House of Representatives and Senate Appropriations Committees and the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety on the amount remitted to the State Bar pursuant to the provisions of G.S. 7A-304(a)(4), G.S. 7A-305(a)(2), G.S. 7A-306(a)(2), and 7A-307(a)(2). Each report shall include the amount remitted year-to-date and the projected amount for the entire fiscal year."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5, is a severability clause.

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2002-126, s. 29A.4(c), provides: "Subsection (a) of this section [which amended subdivision (a)(4)] becomes effective October 1, 2002, and applies to all costs assessed or collected on or after that date, except that in misdemeanor or infraction cases disposed of on or after that date by written appearance, waiver of trial or hearing, and plea of guilt or admission of responsibility pursuant to G.S. 7A-180(4) or G.S. 7A-273(2), in which the citation or other criminal process was issued before that date, the cost shall be the lesser of those specified in G.S. 7A-304(a), as amended by subsection (a) of this section, or those specified in the notice portion of the defendant or respondent's copy of the citation or other criminal process, if any costs are specified in that notice."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6, is a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 29.30(c) provides: "Subsection (b) of this section becomes effective September 1, 2005, and applies to all costs assessed or collected on or after that date, except that in misdemeanor or infraction cases disposed of on or after that date by written appearance, waiver of trial or hearing, and plea of guilt or admission of responsibility pursuant to G.S. 7A-180(4) or G.S. 7A-273(2), in which the citation or other criminal process was issued before that date, the cost shall be the lesser of those specified in G.S. 7A-304(a), as amended by subsection (b) of this section, or those specified in the notice portion of the defendant's or respondent's copy of the citation or other criminal process, if any costs are specified in that notice. The remainder of this section becomes effective September 1, 2005."

Session Laws 2005-276, s. 43.1(h), provides: "Subsection (a) of this section becomes effective September 1, 2005, and applies to all costs assessed or collected on or after that date, except that in misdemeanor or infraction cases disposed of on or after that date by written appearance, waiver of trial or hearing, and plea of guilt or admission of responsibility pursuant to G.S. 7A-180(4) or G.S. 7A-273(2), in which the citation or other criminal process was issued before that date, the cost shall be the lesser of those specified in G.S. 7A-304(a), as amended by subsection (a) of this section, or those specified in the notice portion of the defendant or respondent's copy of the citation or other criminal process, if any costs are specified in that notice. The remainder of this section becomes effective September 1, 2005, and applies to all costs assessed or collected on or after that date."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2007-323, s. 30.8(l), provides that the 2007 amendment to this section applies to all costs assessed or collected on or after August 1, 2007, except that in misdemeanor or infraction cases disposed of on or after August 1, 2007 by written appearance, waiver of trial or hearing, and plea of guilt or admission of responsibility pursuant to G.S. 7A-180(4) or G.S. 7A-273(2), in which the citation or other criminal process was issued before August 1, 2007, the cost shall be the lesser of those specified in G.S. 7A-304(a), as amended by Session Laws 2007-323, s. 30.8(a), or those specified in the notice portion of the defendant's or respondent's copy of the citation or other criminal process, if any costs are specified in that notice.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 30.8(a), effective August 1, 2007, in subdivision (a)(4), in the first sentence, substituted "ninety-five dollars and fifty cents ($95.50)" for "eighty-five dollars and fifty cents ($85.50)" and substituted "one hundred two dollars and fifty cents ($102.50)" for "ninety two dollars and fifty cents ($92.50)," substituted "two dollars and five cents ($2.05)" for "one dollar and five cents ($1.05)" in the third sentence; and, in subdivision (a)(6), substituted "the sum of one hundred dollars ($100.00) is payable by a defendant who fails to appear to answer the charge as scheduled, unless within 20 days after the scheduled appearance, the person either appears in court to answer the charge or disposes of the charge pursuant to G.S. 7A-146" for "for the issuance by the clerk of a report to the Division of Motor Vehicles pursuant to G.S. 20-24.2 the sum of fifty dollars ($50.00), to be remitted to the State Treasurer" in the first sentence and added the last sentence. For applicability provision, see Editor's note.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 481.

CASE NOTES

Appointment Fee Under G.S. 7A-455.1. — G.S. 7A-455.1(b), which required payment of the appointment fee regardless of the outcome of the proceedings was severed in order to allow the State to assess the appointment fee against convicted defendants as constitutionally allowed under N.C. Const. art. I, § 23; G.S. 7A-455.1(a), requiring payment at the time of the appointment was also severed, as it was inconsistent with the ruling that the appointment fee was a cost, and as pursuant to G.S. 7A-304(a), costs, including the pretrial release services fee under § 7A-304(a)(5) and and the North Carolina State Bureau of Investigation laboratory fee under G.S. 7A-304(a)(7), were assessed only after a defendant was convicted or entered a plea of guilty or nolo contendere. State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

Portion of the appointment fee provided for by G.S. 7A-455.1(a) allocated to the North Carolina Court Information Technology Fund is effectively indistinguishable from the facilities fee imposed under G.S. 7A-304(a)(2); the appointment fee operates to supplement funds otherwise available to the North Carolina Judicial Department for court information technology and office automation needs, thus defraying expenses incurred by the State in the operation and maintenance of the court system under G.S. 7A-343.2, and it should be assessed in the same manner as the facilities fee and any other cost of prosecution — against convicted defendants only. State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

"Facilities Fee". — In cases which were instituted after the establishment of the district court, the costs, including a "facilities fee," shall be assessed according to G.S. 7A-300 through 7A-317.1. The "facilities fee" assessed in this classification of cases shall be disbursed monthly by the clerk of superior court to the county or municipality providing the facilities. Blackwell v. Montague, 15 N.C. App. 564, 190 S.E.2d 384 (1972).

Trial judges are authorized to tax court costs, and if the court misused its authority in taxing costs against pauper plaintiff, that error was waived by her failure to appeal therefrom. Schaffner v. Pantelakos, 98 N.C. App. 399, 391 S.E.2d 41 (1990).

Cited in In re Board of Comm'rs, 4 N.C. App. 626, 167 S.E.2d 488 (1969).

§ 7A-305. Costs in civil actions.

(a) In every civil action in the superior or district court, except for actions brought under Chapter 50B of the General Statutes, the following costs shall be assessed:

(1) For the use of the courtroom and related judicial facilities, the sum of twelve dollars ($12.00) in cases heard before a magistrate, and the sum of sixteen dollars ($16.00) in district and superior court, to be remitted to the county in which the judgment is rendered, except that in all cases in which the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(2) For support of the General Court of Justice, the sum of ninety-three dollars ($93.00) in the superior court, except that if a case is assigned to a special superior court judge as a complex business case under G.S. 7A-45.3, an additional two hundred dollars ($200.00) shall be paid upon its assignment, and the sum of seventy-three dollars ($73.00) in the district court except that if the case is assigned to a magistrate the sum shall be sixty-three dollars ($63.00). Sums collected under this subdivision shall be remitted to the State Treasurer. The State Treasurer shall remit the sum of two dollars and five cents ($2.05) of each fee collected under this subdivision to the North Carolina State Bar for the provision of services described in G.S. 7A-474.4, and ninety-five cents ($.95) of each fee collected under this subdivision to the North Carolina State Bar for the provision of services described in G.S. 7A-474.19.

(a1) Costs apply to any and all additional and subsequent actions filed by amendment to the original action brought under Chapter 50B of the General Statutes, unless such additional and subsequent amendment to the action is also brought under Chapter 50B of the General Statutes.

(a2) In every action for absolute divorce filed in the district court, a cost of fifty-five dollars ($55.00) shall be assessed against the person filing the divorce action. Costs collected by the clerk pursuant to this subsection shall be remitted to the State Treasurer for deposit to the North Carolina Fund for Displaced Homemakers established under G.S. 143B-394.10. Costs assessed under this subsection shall be in addition to any other costs assessed under this section.

(a3) An application or a petition for a limited driving privilege under Chapter 20 of the General Statutes is subject to the court costs assessed under subsection (a) of this section plus an additional processing fee of one hundred dollars ($100.00). The additional fee shall be remitted to the State Treasurer and used for support of the General Court of Justice.

(a4) A petition for a limited driving privilege under G.S. 20-20.1 is subject to the court costs assessed under subsection (a) of this section.

(b) On appeal, costs are cumulative, and when cases heard before a magistrate are appealed to the district court, the General Court of Justice fee and the facilities fee applicable in the district court shall be added to the fees assessed before the magistrate. When an order of the clerk of the superior court is appealed to either the district court or the superior court, no additional General Court of Justice fee or facilities fee shall be assessed.

(b1) When a defendant files an answer in an action filed as a small claim which requires the entire case to be withdrawn from a magistrate and transferred to the district court, the difference between the General Court of Justice fee and facilities fee applicable to the district court and the General Court of Justice fee and facilities fee applicable to cases heard by a magistrate shall be assessed. The defendant is responsible for paying the fee.

(c) The clerk of superior court, at the time of the filing of the papers initiating the action or the appeal, shall collect as advance court costs, the facilities fee, General Court of Justice fee, and the divorce fee imposed under subsection (a2) of this section, except in suits by an indigent. The clerk shall also collect the fee for discovery procedures under Rule 27(a) and (b) at the time of the filing of the verified petition.

(d) The following expenses, when incurred, are assessable or recoverable, as the case may be. The expenses set forth in this subsection are complete and exclusive and constitute a limit on the trial court's discretion to tax costs pursuant to G.S. 6-20:

(1) Witness fees, as provided by law.
(2) Jail fees, as provided by law.
(3) Counsel fees, as provided by law.
(4) Expense of service of process by certified mail and by publication.
(5) Costs on appeal to the superior court, or to the appellate division, as the case may be, of the original transcript of testimony, if any, insofar as essential to the appeal.
(6) Fees for personal service and civil process and other sheriff's fees, as provided by law. Fees for personal service by a private process server may be recoverable in an amount equal to the actual cost of such service or fifty dollars ($50.00), whichever is less, unless the court finds that due to difficulty of service a greater amount is appropriate.
(7) Fees of mediators appointed by the court, mediators agreed upon by the parties, guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fee of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.

(8) Fees of interpreters, when authorized and approved by the court.

(9) Premiums for surety bonds for prosecution, as authorized by G.S. 1-109.

(10) Reasonable and necessary expenses for stenographic and videographic assistance directly related to the taking of depositions and for the cost of deposition transcripts.

(11) Reasonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings.

Nothing in this subsection or in G.S. 6-20 shall be construed to limit the trial court's authority to award fees and expenses in connection with pretrial discovery matters as provided in Rule 26(b) or Rule 37 of the Rules of Civil Procedure, and no award of costs made pursuant to this section or pursuant to G.S. 6-20 shall reverse or modify any such orders entered in connection with pretrial discovery.

(e) Nothing in this section shall affect the liability of the respective parties for costs as provided by law. (1965, c. 310, s. 1; 1967, c. 108, s. 10; c. 691, s. 30; 1971, c. 377, ss. 23, 24; c. 1181, s. 1; 1973, c. 503, ss. 12-14; c. 1267, s. 3; 1975, c. 558, s. 3; 1975, 2nd Sess., c. 980, ss. 2, 3; 1979, 2nd Sess., c. 1234, s. 1; 1981, c. 555, s. 6; c. 691, s. 2; 1983, c. 713, ss. 4-6; 1989, c. 786, s. 2; 1991, c. 742, s. 15(b); 1991 (Reg. Sess., 1992), c. 811, s. 2; 1993, c. 435, s. 6; 1995, c. 275, s. 2; 1998-212, s. 29A.12(b); 1998-219, ss. 2, 3; 2000-109, s. 4(b); 2001-424, s. 22.14(b); 2002-126, ss. 29A.4(b), 29A.6(e); 2004-186, s. 4.3; 2005-276, s. 43.1(b); 2005-405, s. 5; 2005-425, s. 1.2; 2007-212, s. 3; 2007-293, s. 2; 2007-323, ss. 30.8(b), 30.10(a), 30.11(a), (c); 2007-345, ss. 9.1(a), (c).)

Editor's Note. — Rule 27 of the Rules of Civil Procedure, referred to in subsection (c) of this section, is codified as G.S. 1A-1, Rule 27.

Session Laws 2007-293, s. 2, enacted a subsection (a3), but Session Laws 2007-323, s. 30.11(c) purported to repeal Session Laws 2007-293, s. 2. Session Laws 2007-345, s. 9.1(c), likewise repealed Session Laws 2007-323, s. 30.11(c), and then amended G.S. 7A-305 as enacted by Session Laws 2007-293, s. 2. Subsection (a3) as enacted by Session Laws 2007-293, s. 2, as amended by Session Laws 2007-345, s. 9.1(a), was redesignated subsection (a4) at the direction of the Revisor of Statutes.

Session Laws 2001-424, s. 22.14(i), provides: "The Administrative Office of the Courts shall report by April 15 of each year to the Chairs of the House of Representatives and Senate Appropriations Committees and the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety on the amount remitted to the State Bar pursuant to the provisions of G.S. 7A-304(a)(4), G.S. 7A-305(a)(2), G.S. 7A-306(a)(2), and 7A-307(a)(2). Each report shall include the amount remitted year-to-date and the projected amount for the entire fiscal year."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5, contains a severability clause.

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2002-126, s. 29A.4(c), provides: "Subsection (b) of this section [which amended subdivision (a)(2)] becomes effective October 1, 2002, and applies to all costs assessed or collected on or after that date."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6, contains a severability clause.

Session Laws 2006-248, ss. 12.1 through 12.5, provide: "12.1. A House of Representatives Task Force on the Recovery of Costs in Civil Cases is established to review and recommend a resolution to the conflict in North Carolina law regarding the recovery of costs in a civil case. Specifically, the Task Force on the Recovery of Costs in Civil Cases shall study the conflict that exists between G.S. 6-20 and G.S. 7A-305, and the appellate cases interpreting those statutes, and recommend revisions to one or both statutes to resolve that conflict.

"12.2. The Speaker of the House of Representatives shall appoint to serve on the Task Force six members of the House of Representatives and three public members: one member of the North Carolina Academy of Trial Lawyers, one member of the North Carolina Association of Defense Attorneys, and one member of the North Carolina Bar Association. The Speaker shall appoint a chair from the Task Force membership. The Task Force shall meet upon the call of its chair. A quorum of the Committee shall be a majority of its members.

"12.3. Members of the Task Force shall receive per diem, subsistence, and travel allowances in accordance with G.S. 120-3.1, 138-5, or 138-6, as appropriate. Upon the prior approval of the Legislative Services Commission, the Legislative Services Officer shall assign professional and clerical staff to the Task Force to aid in its work. The Task Force may contract for professional, clerical, or consultant services as provided by G.S. 120-32.02. The Task Force may meet at various locations around the State to promote greater public participation in its deliberations. Subject to the approval of the Legislative Services Commission, the Task Force may meet in the Legislative Building or the Legislative Office Building. The Task Force, while in the discharge of its official duties, may exercise all the powers provided under the provisions of G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4, including the power to request all officers, agents, agencies, and departments of the State to provide any information, data, or documents within their possession, ascertainable from their records, or otherwise available to them and the power to subpoena witnesses.

"12.4. The Task Force shall report the results of its review and its recommended resolution to the conflict to the Speaker of the House of Representatives by December 31, 2006.

"12.5. From funds appropriated to the General Assembly, the Legislative Services Commission shall allocate funds for the purpose of conducting the study provided for in this Part."

Session Laws 2007-323, s. 30.11(c), effective December 1, 2007, provides: "If Senate Bill 758, 2007 General Assembly, becomes law, the Section 2 of Senate Bill 758 is repealed."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-425, s. 1.2, effective January 1, 2006, and applicable to fees assessed or collected on or after that date, inserted "except that if a case is assigned to a special superior court judge as a complex business case under G.S. 7A-45.3, an additional two hundred dollars ($200.00) shall be paid upon its assignment" in the first sentence of subdivision (a)(2).

Session Laws 2007-212, s. 3, effective August 1, 2007, and applicable to all motions for costs filed on or after that date, in subsection (d), deleted "also" preceding "assessable or recoverable" in the first sentence and added the second sentence of the introductory paragraph; inserted "mediators appointed by the court, mediators agreed upon by the parties" in subdivision (d)(7); added subdivisions (d)(10), (d)(11), and added the concluding paragraph of subsection (d).

Session Laws 2007-293, s. 2, effective December 1, 2007, and applicable to revocations that occur before, on, or after December 1, 2007, added subsection (a3).

Session Laws 2007-323, ss. 30.8(b), 30.10(a), and 30.11(a), effective August 1, 2007, and applicable to all costs assessed or collected on or after August 1, 2007, in subdivision (a)(2), in the first sentence, substituted "ninety-three dollars ($93.00)" for "seventy-nine dollars ($79.00)," substituted "seventy-three dollars ($73.00)" for "sixty-four dollars ($64.00)" and substituted "sixty-three dollars" for "fifty-three dollars ($53.00)," and substituted "two dollars and five cents ($2.05)" for "one dollar and five cents ($1.05)" in the last sentence; added subsection (a1); and added subsection (a3).

Session Laws 2007-345, s. 9.1(a), effective December 1, 2007, deleted "plus an additional filing fee of one hundred dollars ($100.00). The additional filing fee must be remitted to the State Treasurer and used for support of the General Court of Justice" from subsection (a3).

CASE NOTES

Authority to Tax Costs Under G.S. 6-20. — Under this section, which specifies in subsection (d) the costs recoverable in civil actions, and also provides in subsection (e) that nothing in this section shall affect the liability of the respective parties for costs as provided by law, the authority of trial courts to tax deposition expenses as costs pursuant to G.S. 6-20 remains undisturbed, regardless of the language of G.S. 7A-320. Alsup v. Pitman, 98 N.C. App. 389, 390 S.E.2d 750 (1990).

Since the trial court's costs ruling was governed by G.S. 6-20, and thus could be allowed at the discretion of the court, and the doctors had not alleged, and there appeared to the appellate court to be no abuse of discretion in the denial of their request to be reimbursed for the expert witness fees where the verdict was in their favor, the judgment was affirmed. Smith v. Cregan, 178 N.C. App. 519, 632 S.E.2d 206, 2006 N.C. App. LEXIS 1568 (2006).

In North Carolina costs are taxed on the basis of statutory authority, etc. Estate of Smith ex rel. Smith v. Underwood, 127 N.C. App. 1, 487 S.E.2d 807 (1997), cert. denied, 347 N.C. 398, 494 S.E.2d 410 (1997).

In a condemnation action, the trial court correctly found that it had no authority to grant a landowner's motion to tax appraisal fees, map costs, and trial exhibit costs against a non-prevailing condemning authority, since under North Carolina Supreme Court precedent, only costs specifically allowed by statute could be taxed against the authority, and G.S. 7A-305(d), which delineated generally recoverable costs, did not mention these costs. DOT v. Charlotte Area Manufactured Hous., Inc., 160 N.C. App. 461, 586 S.E.2d 780, 2003 N.C. App. LEXIS 1822 (2003).

Costs Not Enumerated Were Allowed. — The trial court rightly exercised its discretion and allowed costs for trial exhibits to be taxed to the appellant patient where the appellee doctor did not receive notice of his voluntary dismissal until the day of trial; the costs were reasonable and necessary pursuant to G.S. 6-20 although trial exhibit costs are not enumerated in subsection (d) of this section. Lewis v. Setty, 140 N.C. App. 536, 537 S.E.2d 505, 2000 N.C. App. LEXIS 1216 (2000).

Expenses Not Enumerated or Otherwise Provided by Law. — The expenses incurred in a fraud action for assembling records and court appearances were not assessable costs enumerated under this section or otherwise provided by law. Sara Lee Corp. v. Carter, 129 N.C. App. 464, 500 S.E.2d 732 (1998), rev'd on other grounds, 351 N.C. 27, 519 S.E.2d 308 (1999).

In a condemnation action, the prevailing landowner's map expenses were not taxable as costs against the opposing condemning authority because G.S. 7A-305(d) did not mention maps, and G.S. 6-20 did not, on its face, make map expenses taxable. DOT v. Charlotte Area Manufactured Hous., Inc., 160 N.C. App. 461, 586 S.E.2d 780, 2003 N.C. App. LEXIS 1822 (2003).

Costs recoverable following a voluntary dismissal under G.S. 1A-1, Rule 41, are the costs enumerated in G.S. 7A-305(d); therefore, since a defendant requested costs not enumerated in that statute, a motion for costs following plaintiff's voluntary dismissal was properly denied. Pharmaresearch Corp. v. Mash, 163 N.C. App. 419, 594 S.E.2d 148, 2004 N.C. App. LEXIS 410 (2004), cert. denied and dismissed, 358 N.C. 733, 601 S.E.2d 858 (2004).

In a negligence case, a trial court improperly awarded the cost of trial exhibits because they were not either set forth in G.S. 7A-305 or recoverable under common law; moreover, the cost of obtaining medical records was not recoverable for the same reason. Morgan v. Steiner, 173 N.C. App. 577, 619 S.E.2d 516, 2005 N.C. App. LEXIS 2105 (2005).

Costs and attorney fees were awarded to a property owner in error as G.S. 7A-305(d)(3) did not specifically grant the courts the authority to award attorney fees. Watts v. N.C. Dep't of Env't & Natural Res., — N.C. App. —, 641 S.E.2d 811, 2007 N.C. App. LEXIS 595 (2007).

Subsection (c) of this section clearly permits suits in forma pauperis on appeal. To construe the statute otherwise would be constitutionally suspect, thwart the intent of the legislature, and render an injustice to the people of this State, who frequently utilize the services of the district court division for the resolution of disputes. Atlantic Ins. & Realty Co. v. Davidson, 320 N.C. 159, 357 S.E.2d 668 (1987).

A party, plaintiff or defendant, may petition to appear in forma pauperis in trial de novo of cases appealed to the district court judge from judgments of a magistrate in small claims actions. Atlantic Ins. & Realty Co. v. Davidson, 320 N.C. 159, 357 S.E.2d 668 (1987).

It is not required that a litigant deprive himself of the daily necessities of life to qualify to appear in forma pauperis. Atlantic Ins. & Realty Co. v. Davidson, 320 N.C. 159, 357 S.E.2d 668 (1987).

Defendant Entitled to Appear in Forma Pauperis. — Trial judge erred in entering order denying petition to appear in forma pauperis of defendant who owned a home valued at $27,150 and other unencumbered personal property, in view of abundant evidence as to defendant's age, health, income, living expenses, inability to work or borrow, indebtedness, and the unreasonableness of selling her house. Atlantic Ins. & Realty Co. v. Davidson, 320 N.C. 159, 357 S.E.2d 668 (1987).

Appealing Party Not Prejudiced by Failure of Clerk to Collect Costs. — Under the provisions of subsection (c) of this section, it is clear that the duty of collecting the additional costs at the time of the filing of the papers initiating an appeal is imposed upon the clerk. But a failure of the clerk to perform his duty in this respect should not operate to prejudice the appealing party. Porter v. Cahill, 1 N.C. App. 579, 162 S.E.2d 128 (1968).

Unable to Recover Litigation Costs or Attorney's Fees. — Inmate, who had obtained a verdict against a deputy sheriff with regard to an assault and battery suit, was unable to

recover litigation costs or attorney's fees, because no statutory authority existed allowing such recovery to a prevailing party in a civil assault case. Cunningham v. Riley, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 511 (Mar. 15, 2005).

Deposition Expenses. — The expenses for taking depositions, traveling for depositions, videotaping depositions, obtaining copies of depositions from a reporting service, and court reporting services for taking depositions are included within the scope of "deposition expenses." Sealey v. Grine, 115 N.C. App. 343, 444 S.E.2d 632 (1994).

Award of costs made to an engineering firm, after a trial court granted the firm a directed verdict, was modified to remove the award of deposition costs because, while G.S. 7A-305 permitted the court to award the firm costs for mediation fees, expert witness fees, and service of process fees for trial subpoenas, it did not grant the court statutory authority to award the deposition costs. Handex of the Carolinas, Inc. v. County of Haywood, 168 N.C. App. 1, 607 S.E.2d 25, 2005 N.C. App. LEXIS 148 (2005).

In a medical malpractice case, although deposition costs were recoverable under G.S. 7A-305, defendants did not argue in their brief that the trial court abused its discretion in refusing to award this item as costs, nor was there evidence of an abuse of discretion. Miller v. Forsyth Mem'l Hosp., Inc., 173 N.C. App. 385, 618 S.E.2d 838, 2005 N.C. App. LEXIS 2040 (2005).

Expert Witness Fees. — The trial court did not abuse its discretion and violate this section in taxing the expert witness fees to appellant patient pursuant to G.S. 6-20 after he voluntarily dismissed his negligence suit pursuant to G.S. 1A-1, Rule 41 on the day of trial; costs which are to be taxed under Rule 41(d) include those costs enumerated in subsection (d) of this section, and this section does not preclude liability for other costs such as those outlined in G.S. 6-20. Lewis v. Setty, 140 N.C. App. 536, 537 S.E.2d 505, 2000 N.C. App. LEXIS 1216 (2000).

In a negligence case, the expert witness fees of two witnesses were taxable under G.S. 7A-314, but fees associated with a third witness testifying on the same issue were not recoverable; in addition, the cost of reviewing records and consulting was not recoverable. Morgan v. Steiner, 173 N.C. App. 577, 619 S.E.2d 516, 2005 N.C. App. LEXIS 2105 (2005).

In a medical malpractice case, a trial court did not err by refusing to award expert witness fees because none of the witnesses were under subpoena. Miller v. Forsyth Mem'l Hosp., Inc., 173 N.C. App. 385, 618 S.E.2d 838, 2005 N.C. App. LEXIS 2040 (2005).

Fees of Court-Appointed Mediator Are Assessable Costs. — The fees of court-appointed mediators are an assessable cost under this section. Sara Lee Corp. v. Carter, 129 N.C. App. 464, 500 S.E.2d 732 (1998), rev'd on other grounds, 351 N.C. 27, 519 S.E.2d 308 (1999).

In a negligence case, a trial court improperly awarded the cost of lunch provided during a mediated settlement conference because, although the mediator's fees was covered under G.S. 7A-305, the lunch associated therewith was not. Morgan v. Steiner, 173 N.C. App. 577, 619 S.E.2d 516, 2005 N.C. App. LEXIS 2105 (2005).

Mediation Costs. — In a medical malpractice case, trial court erred in denying motion seeking to recover mediation costs because mediation was ordered in all civil actions, and the cost was recoverable under G. S. 7A-305(d)(7). Miller v. Forsyth Mem'l Hosp., Inc., 173 N.C. App. 385, 618 S.E.2d 838, 2005 N.C. App. LEXIS 2040 (2005).

Arbitration Fee. — Costs were properly allowed to a successful driver even though the driver's insurer paid all of his costs, as: (1) the judgment was entered for the driver and the costs award did not violate G.S. 6-1; (2) the driver incurred the expenses; (3) the award of an arbitration fee was specifically allowed in G.S. 7A-305(d)(7); (4) it was not an abuse of discretion under G.S. 6-20 to award the deposition fee; and (5) the preparation time fees of a driver's reconstruct expert were properly allowed. Hoffman v. Oakley, — N.C. App. —, 647 S.E.2d 117, 2007 N.C. App. LEXIS 1628 (2007).

Cost of an Independent Appraiser's Valuation Report. — The trial court acted within its discretion when it taxed the entire cost of an independent appraiser's valuation report to the defendants/majority stockholders of a closely-held corporation and ignored or effectually amended the court's pre-trial case management order, in which the court stated that appraisal costs would be shared by both parties. Royals v. Piedmont Elec. Repair Co., 137 N.C. App. 700, 529 S.E.2d 515, 2000 N.C. App. LEXIS 497 (2000).

In a condemnation action, there was no statutory authority for taxing a prevailing landowner's appraisal fees as costs against the opposing condemning authority, as G.S. 7A-305(d), which delineated generally recoverable costs, did not mention appraisal fees, and G.S. 136-119, which dealt with highway condemnation costs, did not authorize the taxing of appraisal fees under the facts. DOT v. Charlotte Area Manufactured Hous., Inc., 160 N.C. App. 461, 586 S.E.2d 780, 2003 N.C. App. LEXIS 1822 (2003).

Costs in Personal Injury Action. — Trial court erred in awarding numerous costs not authorized for medical reports, deposition costs, filing fees, travel costs, trial exhibits, color copies, and photocopies; there was statutory authority, however, for the following awards: mediation fees pursuant to G.S. 7A-

305(d)(7); expert witness fees pursuant to G.S. 7A-305(d)(1); and service of process fees pursuant to G.S. 7A-305(d)(6). Oakes v. Wooten, 173 N.C. App. 506, 620 S.E.2d 39, 2005 N.C. App. LEXIS 2100 (2005).

Fees of Guardian Ad Litem. — Having properly appointed guardian ad litem, the trial court was within its discretion to assess as an item of costs the fees of the guardian ad litem and to tax those fees to either party or apportion them between the parties. Van Every v. McGuire, 125 N.C. App. 578, 481 S.E.2d 377 (1997), aff'd, 348 N.C. 58, 497 S.E.2d 689 (1998).

Photographs, Photocopies, Telephone Calls, Trial Diagrams and Exhibits, and Medical Reports and Records. — Although the trial court did not err when it awarded over $32,000 in attorneys' fees to a pedestrian who was awarded $7,000 in damages after he was struck by a truck, it did err when it granted the pedestrian's request for reimbursement of costs he incurred to make photocopies, telephone calls, photographs, trial diagrams and exhibits, and to obtain medical reports and records, because those expenses were not recoverable as costs, pursuant to G.S. 7A-305. Overton v. Purvis, 162 N.C. App. 241, 591 S.E.2d 18, 2004 N.C. App. LEXIS 120 (2004).

Costs of Exhibits Not Recoverable. — Costs associated with trial exhibits were not recoverable under G.S. 7A-305(d), and the refusal to award such costs in a medical malpractice action did not constitute error. Miller v. Forsyth Mem'l Hosp., Inc., 173 N.C. App. 385, 618 S.E.2d 838, 2005 N.C. App. LEXIS 2040 (2005).

In an action for ejectment, G.S. 6-19 of the General Statutes was applicable, and therefore, the list of costs recoverable by a prevailing party in a civil action under this section was controlling. Minton v. Lowe's Food Stores, 121 N.C. App. 675, 468 S.E.2d 513 (1996).

Where Original Plaintiff Voluntarily Dismisses Action. — Third party defendants were entitled to recover costs against the original plaintiff in a civil suit, who had voluntarily dismissed its action against the original defendant. Lord v. Customized Consulting Specialty, Inc., 164 N.C. App. 730, 596 S.E.2d 891, 2004 N.C. App. LEXIS 1144 (2004).

Applied in Small v. Britt, 64 N.C. App. 533, 307 S.E.2d 771 (1983); Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc., 143 N.C. App. 1, 545 S.E.2d 745, 2001 N.C. App. LEXIS 228 (2001); Coffman v. Roberson, 153 N.C. App. 618, 571 S.E.2d 255 (2002), cert. denied, 356 N.C. 668, 577 S.E.2d 111 (2003); Cosentino v. Weeks, 160 N.C. App. 511, 586 S.E.2d 787, 2003 N.C. App. LEXIS 1830 (2003); Tillman v. Commer. Credit Loans, Inc., 177 N.C. App. 568, 629 S.E.2d 865, 2006 N.C. App. LEXIS 1186 (2006).

Cited in In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981); Lowe v. Tarble, 313 N.C. 460, 329 S.E.2d 648 (1985); Brown v. Rhyne Floral Supply Mfg. Co., 89 N.C. App. 717, 366 S.E.2d 894 (1988); Principal Mut. Life Ins. Co. v. Burnup & Sims, Inc., 114 N.C. App. 494, 442 S.E.2d 85 (1994); Harborgate Property Owners Ass'n v. Mountain Lake Shores Dev. Corp., 145 N.C. App. 290, 551 S.E.2d 207, 2001 N.C. App. LEXIS 647 (2001); Cail v. Cerwin, — N.C. App. —, 648 S.E.2d 510, 2007 N.C. App. LEXIS 1684 (2007).

§ 7A-305.1. Discovery, fee on filing verified petition.

When discovery procedures under Rule 27 of the Rules of Civil Procedure are utilized, the sum of twenty dollars ($20.00) shall be assessed and collected by the clerk at the time of the filing of the verified petition. If a civil action is subsequently initiated, the twenty dollars ($20.00) shall be credited against costs in the civil action. (1971, c. 377, s. 22.)

Editor's Note. — Rule 27 of the Rules of Civil Procedure, referred to in this section, is codified as G.S. 1A-1, Rule 27.

§ 7A-306. Costs in special proceedings.

(a) In every special proceeding in the superior court, the following costs shall be assessed:

(1) For the use of the courtroom and related judicial facilities, the sum of ten dollars ($10.00) to be remitted to the county. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(2) For support of the General Court of Justice the sum of forty dollars ($40.00). In addition, in proceedings involving land, except boundary disputes, if the fair market value of the land involved is over one hundred dollars ($100.00), there shall be an additional sum of thirty cents (30¢) per one hundred dollars ($100.00) of value, or major fraction thereof, not to exceed a maximum additional sum of two hundred dollars ($200.00). Fair market value is determined by the sale price if there is a sale, the appraiser's valuation if there is no sale, or the appraised value from the property tax records if there is neither a sale nor an appraiser's valuation. Sums collected under this subdivision shall be remitted to the State Treasurer. The State Treasurer shall remit the sum of two dollars and five cents ($2.05) of each forty-dollar ($40.00) General Court of Justice fee collected under this subdivision to the North Carolina State Bar for the provision of services described in G.S. 7A-474.4.

(b) The facilities fee and thirty dollars ($30.00) of the General Court of Justice fee are payable at the time the proceeding is initiated.

(c) The following additional expenses, when incurred, are assessable or recoverable, as the case may be:

(1) Witness fees, as provided by law.

(2) Counsel fees, as provided by law.

(3) Costs on appeal, of the original transcript of testimony, if any, insofar as essential to the appeal.

(4) Fees for personal service of civil process, and other sheriff's fees, and for service by publication, as provided by law.

(5) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fees of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.

(d) Costs assessed before the clerk shall be added to costs assessable on appeal to the judge or upon transfer to the civil issue docket.

(e) Nothing in this section shall affect the liability of the respective parties for costs, as provided by law.

(f) This section does not apply to a foreclosure under power of sale in a deed of trust or mortgage. (1965, c. 310, s. 1; 1967, c. 24, s. 2; 1971, c. 377, s. 25; c. 1181, s. 1; 1973, c. 503, s. 15; 1981, c. 691, s. 3; 1983, c. 713, ss. 7-9; c. 881, s. 4; 1985, c. 511, s. 1; 1989, c. 646, s. 1; 1991 (Reg. Sess., 1992), c. 811, s. 3; 1998-212, s. 29A.12(c); 2000-109, s. 4(c); 2001-424, s. 22.14(c); 2002-135, s. 1; 2005-276, s. 43.1(c); 2007-323, s. 30.8(c).)

Editor's Note. — Session Laws 2001-424, s. 22.14(i), provides: "The Administrative Office of the Courts shall report by April 15 of each year to the Chairs of the House of Representatives and Senate Appropriations Committees and the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety on the amount remitted to the State Bar pursuant to the provisions of G.S. 7A-304(a)(4), G.S. 7A-305(a)(2), G.S. 7A-306(a)(2), and 7A-307(a)(2). Each report shall include the amount remitted year-to-date and the projected amount for the entire fiscal year."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5, is a severability clause.

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 30.8(c), effective August 1, 2007, and applicable to all costs assessed or collect on or after that date, substituted "two dollars and five cents ($2.05)" for "one dollar and five cents ($1.05)" near the middle of the last sentence of subdivision (a)(2).

CASE NOTES

Fees of Guardian in Defense of Petition for Advancement. — Where petitioner entered a voluntary dismissal of a special proceeding to obtain an advancement from the estate of her incompetent father, the trial court had no authority to order that legal fees incurred by the incompetent's guardian in defending the petition for advancement be charged as part of the costs of the proceeding to be paid by petitioner. In re North Carolina Nat'l Bank, 52 N.C. App. 353, 278 S.E.2d 330, cert. denied, 303 N.C. 544, 281 S.E.2d 393 (1981).

Guardian's Fees Where Clerk Attempted to Remove Administratrix. — Where the clerk, upon his own motion, sought to have administratrix of estate removed, minor heirs clearly had a vested interest and the right of appeal from the clerk's determination. Thus, clerk took the appropriate and proper step of appointing a guardian ad litem to protect their interests, and the clerk could compel the payment of the necessary expenses from the estate to which the heirs would potentially benefit, including the costs of the guardian ad litem's attorneys' fees. Estate of Sturman, 93 N.C. App. 473, 378 S.E.2d 204 (1989).

Cited in In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

§ 7A-307. Costs in administration of estates.

(a) In the administration of the estates of decedents, minors, incompetents, of missing persons, and of trusts under wills and under powers of attorney, in trust proceedings under G.S. 36A-23.1, and in collections of personal property by affidavit, the following costs shall be assessed:

(1) For the use of the courtroom and related judicial facilities, the sum of ten dollars ($10.00), to be remitted to the county. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(2) For support of the General Court of Justice, the sum of fifty dollars ($50.00), plus an additional forty cents (40¢) per one hundred dollars ($100.00), or major fraction thereof, of the gross estate, not to exceed six thousand dollars ($6,000). Gross estate shall include the fair market value of all personalty when received, and all proceeds from the sale of realty coming into the hands of the fiduciary, but shall not include the value of realty. In collections of personal property by affidavit, the fee based on the gross estate shall be computed from the information in the final affidavit of collection made pursuant to G.S. 28A-25-3 and shall be paid when that affidavit is filed. In all other cases, this fee shall be computed from the information reported in the inventory and shall be paid when the inventory is filed with the clerk. If additional gross estate, including income, comes into the hands of the fiduciary after the filing of the inventory, the fee for such additional value shall be assessed and paid upon the filing of any account or report disclosing such additional value. For each filing the minimum fee shall be fifteen dollars ($15.00). Sums collected under this subdivision shall be remitted to the State Treasurer. The State Treasurer shall remit the sum of two dollars and five cents ($2.05) of each fifty-dollar ($50.00) General Court of Justice fee collected under this subdivision to the North Carolina State Bar for the provision of services described in G.S. 7A-474.4.

(2a) Notwithstanding subdivision (2) of this subsection, the fee of forty cents (40¢) per one hundred dollars ($100.00), or major fraction, of the gross estate, not to exceed six thousand dollars ($6,000), shall not be assessed on personalty received by a trust under a will when the estate of the decedent was administered under Chapters 28 or 28A of the General Statutes. Instead, a fee of twenty dollars ($20.00) shall be assessed on the filing of each annual and final account. However, the fee shall be assessed only on newly contributed or acquired assets, all interest or other income that accrues or is earned on or with respect to any existing or newly contributed or acquired assets, and realized gains on the sale of any and all trust assets. Newly contributed or acquired assets do not include assets acquired by the sale, transfer, exchange, or otherwise of the amount of trust property on which fees were previously assessed.

(2b) Notwithstanding subdivisions (1) and (2) of this subsection, no costs shall be assessed when the estate is administered or settled pursuant to G.S. 28A-25-6.

(2c) Notwithstanding subdivision (2) of this subsection, the fee of forty cents (40¢) per one hundred dollars ($100.00), or major fraction, of the gross estate shall not be assessed on the gross estate of a trust that is the subject of a proceeding under G.S. 36A-23.1 if there is no requirement in the trust that accountings be filed with the clerk.

(3) For probate of a will without qualification of a personal representative, the clerk shall assess a facilities fee as provided in subdivision (1) of this subsection and shall assess for support of the General Court of Justice, the sum of twenty dollars ($20.00).

(b) In collections of personal property by affidavit, the facilities fee and thirty dollars ($30.00) of the General Court of Justice fee shall be paid at the time of filing the qualifying affidavit pursuant to G.S. 28A-25-1. In all other cases, these fees shall be paid at the time of filing of the first inventory. If the sole asset of the estate is a cause of action, these fees shall be paid at the time of the qualification of the fiduciary.

(b1) The clerk shall assess the following miscellaneous fees:

(1) Filing and indexing a will with no probate	
— first page	$ 1.00
— each additional page or fraction thereof	.25
(2) Issuing letters to fiduciaries, per letter over five letters issued	1.00
(3) Inventory of safe deposits of a decedent, per box, per day	15.00
(4) Taking a deposition	10.00
(5) Docketing and indexing a will probated in another county in the State	
— first page	6.00
— each additional page or fraction thereof	.25
(6) Hearing petition for year's allowance to surviving spouse or child, in cases not assigned to a magistrate, and allotting the same	8.00

(c) The following additional expenses, when incurred, are also assessable or recoverable, as the case may be:

(1) Witness fees, as provided by law.
(2) Counsel fees, as provided by law.
(3) Costs on appeal, of the original transcript of testimony, if any, insofar as essential to the appeal.
(4) Fees for personal service of civil process, and other sheriff's fees, as provided by law.
(5) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law.

(d) Costs assessed before the clerk shall be added to costs assessable on appeal to the judge or upon transfer to the civil issue docket.

(e) Nothing in this section shall affect the liability of the respective parties for costs, as provided by law. (1965, c. 310, s. 1; 1967, c. 691, s. 31; 1969, c. 1190,

s. 30; 1971, c. 1181, s. 1; 1973, c. 1335, s. 1; 1981, c. 691, s. 4; 1983, c. 713, ss. 10-17; 1985, c. 481, ss. 1-5; 1985 (Reg. Sess., 1986), c. 855; 1987, c. 837; 1989, c. 719; 1991 (Reg. Sess., 1992), c. 811, ss. 4, 5; 1997-310, s. 4; 1998-212, s. 29A.12(d); 2000-109, s. 4(d); 2001-413, s. 1.2; 2001-424, s. 22.14(d); 2002-135, ss. 2, 3; 2005-276, s. 43.1(d); 2007-323, ss. 30.8(d), 30.10(b).)

Editor's Note. — Session Laws 2001-424, s. 22.14(i), provides: "The Administrative Office of the Courts shall report by April 15 of each year to the Chairs of the House of Representatives and Senate Appropriations Committees and the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety on the amount remitted to the State Bar pursuant to the provisions of G.S. 7A-304(a)(4), G.S. 7A-305(a)(2), G.S. 7A-306(a)(2), and 7A-307(a)(2). Each report shall include the amount remitted year-to-date and the projected amount for the entire fiscal year."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5, is a severability clause.

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, ss. 30.8(d) and 30.10(a), effective August 1, 2007, and applicable to all costs assessed or collected on or after that date, in subdivision (a)(2), substituted "fifty dollars ($50.00)" for "forty dollars ($40.00)" in the first sentence and, in the last sentence, substituted "two dollars and five cents ($2.05)" for "one dollar and five cents ($1.05)" and substituted "fifty-dollar ($50.00)" for "forty dollars ($40.00)"; and added the last two sentences in subdivision (a)(2a).

CASE NOTES

Costs in Trust and Estate Proceedings Initiated Prior to August 1, 1983. — The legislature intended that the word "action," in the directive of Session Laws 1983, c. 713, s. 109 stating that the amendment to subdivision (a)(2) of this section "shall become effective August 1, 1983, and shall apply to all actions initiated on and after that date," include estate proceedings in this limited instance. In re King, 79 N.C. App. 139, 339 S.E.2d 87 (1986).

Proceedings regarding estate administration were "initiated" prior to August 1, 1983, where estate was opened for probate on October 23, 1980. In re King, 79 N.C. App. 139, 339 S.E.2d 87 (1986), holding that costs to be assessed against estate were governed by subdivision (a)(2) of this section as it existed prior to amendment by Session Laws 1983, c. 713.

Any action or proceeding relating to trusts was "initiated" prior to August 1, 1983, where letters of trusteeship for each of the trusts were issued on July 23, 1981. In re King, 79 N.C. App. 139, 339 S.E.2d 87 (1986), holding that costs to be assessed against estate and trusts were governed by subdivision (a)(2) of this section as it existed prior to amendment by Session Laws 1983, c. 713.

Proceeds recovered for the wrongful death of a decedent are not subject to the assessment of costs in the administration of estates of decedents provided for under subdivision (a)(2) of this section, since the proceeds recovered under the wrongful death statute are not a part of the decedent's estate. In re Below, 12 N.C. App. 657, 184 S.E.2d 378 (1971).

Guardian's Fees Where Clerk Attempted to Remove Administratrix. — Where clerk, upon his own motion, sought to have administratrix of estate removed, minor heirs clearly had a vested interest and the right of appeal from the clerk's determination. Thus, clerk took the appropriate and proper step of appointing a guardian ad litem to protect their interests, and the clerk could compel the payment of the necessary expenses from the estate to which the heirs would potentially benefit, including the costs of the guardian ad litem's attorneys' fees. In re Estate of Sturman, 93 N.C. App. 473, 378 S.E.2d 204 (1989).

§ 7A-308. Miscellaneous fees and commissions.

(a) The following miscellaneous fees and commissions shall be collected by the clerk of superior court and remitted to the State for the support of the General Court of Justice:

(1)	Foreclosure under power of sale in deed of trust or mortgage	$75.00
	If the property is sold under the power of sale, an additional amount will be charged, determined by the following formula: forty-five cents (.45) per one hundred dollars ($100.00), or major fraction thereof, of the final sale price. If the amount determined by the formula is less than ten dollars ($10.00), a minimum ten dollar ($10.00) fee will be collected. If the amount determined by the formula is more than five hundred dollars ($500.00), a maximum five hundred-dollar ($500.00) fee will be collected.	
(2)	Proceeding supplemental to execution	30.00
(3)	Confession of judgment	25.00
(4)	Taking a deposition	10.00
(5)	Execution	25.00
(6)	Notice of resumption of former name	10.00
(7)	Taking an acknowledgment or administering an oath, or both, with or without seal, each certificate (except that oaths of office shall be administered to public officials without charge)	$2.00
(8)	Bond, taking justification or approving	10.00
(9)	Certificate, under seal	3.00
(10)	Exemplification of records	10.00
(11)	Recording or docketing (including indexing) any document	
	— first page	6.00
	— each additional page or fraction thereof	.25
(12)	Preparation of copies	
	— first page (of each document copied)	2.00
	— each additional page or fraction thereof	.25
(13)	Preparation and docketing of transcript of judgment	10.00
(14)	Substitution of trustee in deed of trust	10.00
(15)	Execution of passport application — the amount allowed by federal law	
(16)	Repealed by Session Laws 1989, c. 783, s. 2.	
(17)	Criminal record search except if search is requested by an agency of the State or any of its political subdivisions or by an agency of the United States or by a petitioner in a proceeding under Article 2 of General Statutes Chapter 20	15.00
(18)	Filing the affirmations, acknowledgments, agreements and resulting orders entered into under the provisions of G.S. 110-132 and G.S. 110-133	6.00
(19)	Repealed by Session Laws 1989, c. 783, s. 3.	
(20)	Filing a motion to assert a right of access under G.S. 1-72.1	30.00.

(b) The fees and commissions set forth in this section are not chargeable when the service is performed as a part of the regular disposition of any action or special proceeding or the administration of an estate. When a transaction involves more than one of the services set forth in this section, only the greater service fee shall be charged. The Director of the Administrative Office of the courts shall issue guidelines pursuant to G.S. 7A-343(3) to be followed in administering this subsection.

(b1) The fees set forth in subdivision (12) of subsection (a) of this section are not chargeable when copies are requested by an attorney who has been appointed to represent an indigent person at State expense, if the request is made in connection with the appointed case and during the duration of the appointment.

(c) A person who participates in a program for the collection of worthless checks under G.S. 14-107.2 must pay a fee of sixty dollars ($60.00). The fee collected under this subsection must be remitted to the State by the clerk of the court in the county in which the program is established and credited to the Collection of Worthless Checks Fund. The Collection of Worthless Checks Fund is created as a special revenue fund. Revenue in the Fund does not revert at the end of the fiscal year, and interest and other investment income earned by the Fund accrues to the Fund. The money in the Fund is subject to appropriation by the General Assembly and may be used solely for the expenses of the programs established under G.S. 14-107.2 for the collection of worthless checks, including personnel, equipment, and other costs of district attorneys' offices that are attributable to the provision of these programs. (1965, c. 310, s. 1; 1967, c. 691, ss. 32, 33; 1969, c. 1190, s. 31; 1971, c. 956, s. 2; 1973, c. 503, s. 16; c. 886; 1975, c. 829; 1981, c. 313, s. 1; 1983, c. 713, s. 18; 1985, c. 475, ss. 2, 3; c. 481, ss. 6-8; c. 511, s. 2; 1989, c. 783, ss. 2-4; c. 786, ss. 1, 3; 1997-114, s. 1; 1997-443, s. 18.22(a); 1998-23, s. 11; 1998-212, s. 16.3; 1999-237, s. 17.7; 2000-67, s. 15.3A(a); 2000-109, s. 4(e); 2001-516, s. 2; 2002-126, ss. 29A.7(a), 29A.13.1(a); 2002-135, s. 4; 2003-284, s. 36A.2; 2005-251, s. 1; 2007-323, ss. 30.8(e), (f), 30.10(c).)

Cross References. — As to program for the collection of worthless check cases, see G.S. 14-107.2.

Editor's Note. — Session Laws 1997-443, s. 18.22(a), added subsection (c). Initially, Session Laws 1997-443, s. 18.22(d) provided that s. 18.22(a) would apply to Columbus, Durham and Rockingham Counties only, and s. 18.22(e) provided that the act would become effective October 1, 1997, and would expire June 30, 1998. Session Laws 1998-23, s. 11(a) amended Session Laws 1997-443, s. 18.22(e) to provide that s. 18.22 would expire when the 1998 Appropriations Act became law; however, this provision was repealed by Session Laws 1998-212, s. 16.3(d). Section 16.3(a) of Session Laws 1998-212 provided that Session Laws 1997-443, s. 18.22 would expire June 30, 1999, and s. 16.3(d) of that act added Wake to the list of counties to which Session Laws 1997-443, s. 18.22 was applicable. Session Laws 1999-237, s. 17.7(a) deleted the sunset for Session Laws 1997-443, s. 18.22, as amended, and added Brunswick, Bladen, New Hanover, and Pender to the list of counties. Session Laws 2000-67, s. 15.3A, added Cumberland, Edgecombe, Nash, Onslow, and Wilson to the list of counties. The provisions of Session Laws 1997-443, s. 18.22(a) have been codified as subsection (c) of this section at the direction of the Revisor of Statutes.

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 13.2, as amended by Session Laws 2004-124, s. 14.2, provides: "Notwithstanding the provisions of G.S. 7A-308(c), the Judicial Department may use any balance remaining in the Collection of Worthless Checks Fund on June 30, 2004, for the purchase or repair of office or information technology equipment during the 2003-2005 biennium. Prior to using any funds under this section, the Judicial Department shall report to the Joint Legislative Commission on Governmental Operations and the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety on the equipment to be purchased or repaired and the reasons for the purchases.

"The Judicial Department may use up to the sum of five hundred thousand dollars ($500,000) in receipts collected from the Worthless Check Program during the 2004-2005 fiscal year to create up to 10 positions in, and to provide equipment for, district attorney's offices that are establishing or expanding programs for the collection of worthless checks. The Judicial Department shall report by March 1, 2005, to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety on the prosecutorial districts in which expansion has been implemented."

For similar prior provisions, see Session Laws 2001-424, s. 22.7.

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5, contains a severability clause.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 14.3, provides: "Notwithstanding the provisions of G.S. 7A-308(c) and except as otherwise provided in this act, the Judicial Department may use any balance remaining in the Collection of Worthless Checks Fund on June 30, 2005, for the purchase or repair of office or information technology equipment during the 2005-2006 fiscal year. Prior to using any funds under this section, the Judicial Department shall report to the Joint Legislative Commission on Governmental Operations and the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety on the equipment to be purchased or repaired and the reasons for the purchases."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 14.1, provides: "Notwithstanding the provisions of G.S. 7A-308(c), the Judicial Department may use any balance remaining in the Collection of Worthless Checks Fund on June 30, 2006, for the purchase or repair of office or information technology equipment during the 2006-2007 fiscal year. Prior to using any funds under this section, the Judicial Department shall report to the Joint Legislative Commission on Governmental Operations and the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety on the equipment to be purchased or repaired and the reasons for the purchases."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-323, s. 14.8, provides: "Notwithstanding the provisions of G.S. 7A-308(c), the Judicial Department may use any balance remaining in the Collection of Worthless Checks Fund on June 30, 2007, for the purchase or repair of office or information technology equipment during the 2007-2008 fiscal year. Prior to using any funds under this section, the Judicial Department shall report to the Joint Legislative Commission on Governmental Operations and the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety on the equipment to be purchased or repaired and the reasons for the purchases."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, ss. 30.8(e), (f), and 30.10(c), effective August 1, 2007, and applicable to all costs assessed or collected on or after that date, in subdivision (a)(1), substituted "$75.00" for "$60.00" and twice substituted "five hundred dollars ($500.00)" for "three hundred dollars ($300.00)"; inserted "(of each document copied)" in subdivision (a)(12); and substituted "15.00" for "10.00" in subdivision (a)(17).

CASE NOTES

Assessment of Subdivision (a)(1) Tax Held Not to Violate Permanent Injunction Against Collection Against United States or Its Agencies. — Where power of sale clauses enforced were not in deeds of trust of United States or even of its agencies but were in deeds of trust of lending institutions, terms of consent permanent injunction against collection of tax provided in subdivision (1)(a) of this section (entered into in United States of America v. State of North Carolina, No. 83-1576-CIV-5) did not apply. Whitley v. Griffin, 737 F. Supp. 345 (E.D.N.C. 1990).

Where at foreclosure sale the lender was the highest bidder and purchaser; a federal agency was named in the foreclosure deed only through assignment of lender's bid; and trustee was required by G.S. 45-21.31(a) to pay foreclosure tax (which is simply an obligation of trustee that must be paid from proceeds of foreclosure sale), ultimate burden of paying tax did not fall upon United States or its agencies. Thus the tax was collectible. Whitley v. Griffin, 737 F. Supp. 345 (E.D.N.C. 1990).

Assessing Subdivision (a)(1) Tax Held Not to Violate Supremacy Clause of U.S. Constitution. — Foreclosure tax of subdivision (a)(1) of this section is a nondiscriminatory tax; all trustees who sell real property under power of sale provisions of a deed of trust must pay the tax from sale proceeds. The only exception arises from the terms of the Consent Permanent Injunction entered into in United States of America v. State of North Carolina No. 83-1576-CIV-5; the tax is not unconstitutionally imposed upon proceeds of foreclosure sale but is indiscriminately imposed upon every trustee who sells under power of sale provisions of a deed of trust. The fact that lender is entitled to reimbursement from HUD for two-thirds of foreclosure costs does not alter conclusion that ultimate burden of paying tax is not on federal agency; a portion of the tax is not reimbursed and to allow trustee to avoid the tax on entire purchase price simply because federal agency has a contractual obligation to repay tax would deprive state of collecting one-third of revenues. Whitley v. Griffin, 737 F. Supp. 345 (E.D.N.C. 1990).

Since foreclosure tax provided for in subdivision (a)(1) of this section is not imposed upon seller (lender), purchaser (borrower) or purchaser's assignee (federal agency) but is levied upon proceeds held by trustee and must be paid by the trustee the fact that the federal government sets forth many requirements and reimburses lender for part of foreclosure costs does not make the foreclosure sale a governmental activity. Therefore, state is not constitutionally prohibited from collecting the tax. Whitley v. Griffin, 737 F. Supp. 345 (E.D.N.C. 1990).

OPINIONS OF ATTORNEY GENERAL

Commission by clerk of superior court on interest earned by posted cash bond is deductible. Form of order setting bond precludes deduction of commission from principal. See opinion of Attorney General to Honorable Frank W. Snepp, 41 N.C.A.G. 470 (1971).

§ 7A-308.1. Fees on deposits and investments.

On all funds received by the clerk by virtue or color of his office and deposited pursuant to G.S. 7A-112.1 or invested pursuant to G.S. 7A-112, one or both of the fees provided for in this section shall be assessed and collected as follows:

(1) On all funds deposited by the clerk in an interest bearing checking account pursuant to G.S. 7A-112.1, a fee of four percent (4%) of each principal amount so deposited shall be assessed and collected, subject to the following conditions:
  a. The fee shall be collected from interest earnings only and shall not exceed the amount of the interest earnings on any principal amount so deposited, or seven hundred fifty dollars ($750.00), whichever is less;
  b. All fees collected pursuant to this subsection shall be paid to the county as court facilities fees and used as prescribed in G.S. 7A-304(a)(2);
  c. All interest earnings in excess of the prescribed fee shall be remitted to the beneficial owner or owners of any principal amount when that amount is withdrawn and distributed by the clerk; and

d. If any principal amount is withdrawn from the checking account and invested pursuant to G.S. 7A-112, any interest in excess of the prescribed clerk's fee which is invested with the principal amount shall be included in the fund upon which the fee provided for in subdivision (2) is computed.

(2) On all funds to be invested by the clerk pursuant to G.S. 7A-112, a fee equal to five percent (5%) of each fund shall be assessed and collected, subject to the following conditions:
  a. The fee shall be charged and deducted from each fund before the fund is invested, and only the balance shall be invested;
  b. Over the life of an account, the fees charged on the initial funds and all funds subsequently placed with the clerk for that account shall not exceed the investment earnings on the account or one thousand dollars ($1,000), whichever is less;
  c. All fees collected pursuant to this subsection shall be remitted to the State Treasurer for the support of the General Court of Justice; and
  d. Any fees charged in excess of the cumulative investment earnings on an account shall be refunded and all investment earnings in excess of the prescribed fee shall be remitted to the beneficial owner or owners when all funds in that account are finally withdrawn and distributed by the clerk. (1989, c. 783, s. 5.)

§ 7A-309. Magistrate's special fees.

The following special fees shall be collected by the magistrate and remitted to the clerk of superior court for the use of the State in support of the General Court of Justice:

(1) Performing marriage ceremony	$20.00
(2) Hearing petition for year's allowance to surviving spouse or child, issuing notices to commissioners, allotting the same, and making return	8.00
(3) Taking a deposition	10.00
(4) Proof of execution or acknowledgment of any instrument	2.00
(5) Performing any other statutory function not incident to a civil or criminal action	$2.00.

(1965, c. 310, s. 1; 1973, c. 503, s. 17; 1983, c. 713, s. 19; 2002-126, s. 29A.10(a).)

§ 7A-310. Fees of commissioners and assessors appointed by magistrate.

Any person appointed by a magistrate as a commissioner or assessor, and who shall serve, shall be paid the sum of two dollars ($2.00), to be taxed as a part of the bill of costs of the proceeding. (1965, c. 310, s. 1.)

§ 7A-311. Uniform civil process fees.

(a) In a civil action or special proceeding, except for actions brought under Chapter 50B of the General Statutes, the following fees and commissions shall be assessed, collected, and remitted to the county:

(1)a. For each item of civil process served, including summons, subpoenas, notices, motions, orders, writs and pleadings, the sum of fifteen dollars ($15.00). When two or more items of civil process are served simultaneously on one party, only one fifteen-dollar ($15.00) fee shall be charged.
  b. When an item of civil process is served on two or more persons or organizations, a separate service charge shall be made for each

person or organization. The process fee shall be remitted to the county. This subsection shall not apply to service of summons to jurors.

c. At least fifty percent (50%) of the fees collected pursuant to this subdivision shall be used by the county to ensure the timely service of process within the county, which may include the hiring of additional law enforcement personnel upon the recommendation of the sheriff.

(2) For the seizure of personal property and its care after seizure, all necessary expenses, in addition to any fees for service of process.

(3) For all sales by the sheriff of property, either real or personal, or for funds collected by the sheriff under any judgment, five percent (5%) on the first five hundred dollars ($500.00), and two and one-half percent (2 ½%) on all sums over five hundred dollars ($500.00), plus necessary expenses of sale. Whenever an execution is issued to the sheriff, and subsequently while the execution is in force and outstanding, and after the sheriff has served or attempted to serve such execution, the judgment, or any part thereof, is paid directly or indirectly to the judgment creditor, the fee herein is payable to the sheriff on the amount so paid. The judgment creditor shall be responsible for collecting and paying all execution fees on amounts paid directly to the judgment creditor.

(4) For execution of a judgment of ejectment, all necessary expenses, in addition to any fees for service of process.

(5) For necessary transportation of individuals to or from State institutions or another state, the same mileage and subsistence allowances as are provided for State employees.

(b) All fees that are required to be assessed, collected, and remitted under subsection (a) of this section shall be collected in advance (except in suits in forma pauperis) except those contingent on expenses or sales prices. When the fee is not collected in advance or at the time of assessment, a lien shall exist in favor of the county on all property of the party owing the fee. If the fee remains unpaid it shall be entered as a judgment against the debtor and shall be docketed in the judgment docket in the office of the clerk of superior court.

(c) The process fees and commissions set forth in this section are complete and exclusive and in lieu of any and all other process fees and commissions in civil actions and special proceedings. (1965, c. 310, s. 1; 1967, c. 691, s. 34; 1969, c. 1190, s. 31 1/2; 1973, c. 417, ss. 1, 2; c. 503, s. 18; c. 1139; 1979, c. 801, s. 2; 1989 (Reg. Sess., 1990), c. 1044, s. 2; 1998-212, s. 29A.12(e); 2002-126, ss. 29A.6(f), 29A.6(g); 2004-113, s. 1.)

OPINIONS OF ATTORNEY GENERAL

Subdivision (a)(1) of this section requires civil process fees to be assessed, collected and remitted when the law enforcement officer serves or attempts to serve civil process. See opinion of Attorney General to Mr. Larry J. McGlothlin, Cumberland County Sheriff's Attorney, 49 N.C.A.G. 47 (1979).

§ 7A-312. Uniform fees for jurors; meals.

(a) A juror in the General Court of Justice including a petit juror, or a coroner's juror, but excluding a grand juror, shall receive twelve dollars ($12.00) for the first day of service and twenty dollars ($20.00) per day afterwards, except that if any person serves as a juror for more than five days in any 24-month period, the juror shall receive forty dollars ($40.00) per day for each day of service in excess of five days. A grand juror shall receive twenty dollars ($20.00) per day. A juror required to remain overnight at the site of the trial shall be furnished adequate accommodations and subsistence. If required by the presiding judge to remain in a body during the trial of a case, meals shall be furnished the jurors during the period of sequestration. Jurors from out of the county summoned to sit on a special venire shall receive mileage at the same rate as State employees.

(b) Notwithstanding subsection (a) of this section, the Administrative Office of the Courts may select a judicial district to operate a pilot program in which a juror may waive payment of the per diem fees provided for in that subsection. A juror waiving the fee may designate that the fee be used for any of the following services, if such services are provided in the district: (i) client treatment and service programs associated with a drug treatment or DWI treatment court program; (ii) courthouse self-help centers; (iii) courthouse child care centers; (iv) legal aid programs operated by a nonprofit corporation operating within the district; and (v) the Crime Victims Compensation Fund. If no such services are provided within the district, then waived fees are transferred to the Crime Victims Compensation Fund. (1965, c. 310, s. 1; 1967, c. 1169; 1969, c. 1190, s. 32; 1971, c. 377, s. 26; 1973, c. 503, s. 19; 1979, c. 985; 1983, c. 881, ss. 2, 3; 1989, c. 646, s. 2; 1995, c. 324, ss. 21.1(a), (c); 2006-66, s. 14.17; 2006-187, s. 9; 2007-393, s. 16.)

Editor's Note. — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 14.17(b), as added by Session Laws 2006-187, s. 9, provides: "This section applies to persons summoned to serve as jurors on or after August 7, 2006."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 14.17, as amended by Session Laws 2006-187, s. 9, effective July 1, 2006, and applicable to persons summoned to serve as jurors on or after August 27, 2006, in the first sentence, substituted "for the first day of service and twenty dollars ($20.00) per day afterwards" for "per day" and "forty dollars ($40.00)" for "thirty dollars ($30.00)"; and in the second sentence, substituted "twenty dollars ($20.00)" for "twelve dollars ($12.00)." For applicability provisions, see Editor's note.

Session Laws 2007-393, s. 16, effective October 1, 2007, added subsection (b).

CASE NOTES

Applied in State v. Setzer, 42 N.C. App. 98, 256 S.E.2d 485 (1979).

§ 7A-313. Uniform jail fees.

Persons who are lawfully confined in jail awaiting trial shall be liable to the county or municipality maintaining the jail in the sum of five dollars ($5.00) for each 24 hours' confinement, or fraction thereof, except that a person so confined shall not be liable for this fee if the case or proceeding against him is dismissed, or if acquitted, or if judgment is arrested, or if probable cause is not found, or if the grand jury fails to return a true bill.

Persons who are ordered to pay jail fees pursuant to a probationary sentence shall be liable to the county or municipality maintaining the jail at the same per diem rate paid by the Department of Correction to local jails for maintaining a prisoner, as set by the General Assembly in its appropriations acts. (1965, c. 310, s. 1; 1969, c. 1190, s. 33; 1973, c. 503, s. 20; 1975, c. 444; 1989, c. 733, s. 1; 2000-109, s. 5; 2000-140, s. 104.)

CASE NOTES

Cited in In re Dunlap, 66 N.C. App. 152, 310 S.E.2d 415 (1984).

§ 7A-314. Uniform fees for witnesses; experts; limit on number.

(a) A witness under subpoena, bound over, or recognized, other than a salaried State, county, or municipal law-enforcement officer, or an out-of-state witness in a criminal case, whether to testify before the court, Judicial Standards Commission, jury of view, magistrate, clerk, referee, commissioner, appraiser, or arbitrator shall be entitled to receive five dollars ($5.00) per day, or fraction thereof, during his attendance, which, except as to witnesses before the Judicial Standards Commission, must be certified to the clerk of superior court.

(b) A witness entitled to the fee set forth in subsection (a) of this section, and a law-enforcement officer who qualifies as a witness, shall be entitled to receive reimbursement for travel expenses as follows:

(1) A witness whose residence is outside the county of appearance but within 75 miles of the place of appearance shall be entitled to receive mileage reimbursement at the rate currently authorized for State employees, for each mile necessarily traveled from his place of resident to the place of appearance and return, each day.

(2) A witness whose residence is outside the county of appearance and more than 75 miles from the place of appearance shall be entitled to receive mileage reimbursement at the rate currently authorized State employees for one round-trip from his place of residence to the place of appearance. A witness required to appear more than one day shall be entitled to receive reimbursement for actual expenses incurred for lodging and meals not to exceed the maximum currently authorized for State employees, in lieu of daily mileage.

(c) A witness who resides in a state other than North Carolina and who appears for the purpose of testifying in a criminal action and proves his attendance may be compensated at the rate allowed to State officers and employees by subdivisions (1) and (2) of G.S. 138-6(a) for one round-trip from his place of residence to the place of appearance, and five dollars ($5.00) for each day that he is required to travel and attend as a witness, upon order of the court based upon a finding that the person was a necessary witness. If such a witness is required to appear more than one day, he is also entitled to reimbursement for actual expenses incurred for lodging and meals, not to exceed the maximum currently authorized for State employees.

(d) An expert witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion, may authorize. A law-enforcement officer who appears as an expert witness shall receive reimbursement for travel expenses only, as provided in subsection (b) of this section. Compensation of experts provided under G.S. 7A-454 shall be in accordance with rules established by the Office of Indigent Defense Services.

(e) If more than two witnesses are subpoenaed, bound over, or recognized, to prove a single material fact, the expense of the additional witnesses shall be borne by the party issuing or requesting the subpoena.

(f) In any case in which the Judicial Department is bearing the costs of representation for a party and that party or a witness for that party does not speak or understand the English language, and the court appoints a foreign language interpreter to assist that party or witness, the reasonable fee for the interpreter's services is payable from funds appropriated to the Administrative Office of the Courts. In order to facilitate the disposition of criminal or Chapter 50B cases, the court may authorize the use of a court interpreter, paid from funds appropriated to the Administrative Office of the Courts, in cases in which an interpreter is necessary to assist the court in the efficient transaction of business. The appointment and payment shall be made in accordance with G.S. 7A-343(9c). (1965, c. 310, s. 1; 1969, c. 1190, s. 34; 1971, c. 377, s. 27; 1973, c. 503, ss. 21, 22; 1983, c. 713, s. 20; 1998-212, s. 16.25(a); 2000-144, s. 3; 2006-187, s. 5(a); 2007-323, s. 14.23.)

Cross References. — As to items allowed as costs generally, see G.S. 6-1. As to proof of attendance by witness, see G.S. 6-53. For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-187, s. 5(a), effective August 3, 2006, rewrote subsection (f).

Session Laws 2007-323, s. 14.23, effective July 1, 2007, added the second sentence of subsection (f).

CASE NOTES

The court's power to tax costs is entirely dependent upon statutory authorization. State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972).

Subsections (a) and (d) of this section must be considered together. State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972).

As to expert witnesses, subsection (d) modifies subsection (a) by permitting the court, in its discretion, to increase their compensation and allowances, but the modification relates only to the amount of an expert witness's fee; it does not abrogate the requirement that all witnesses must be subpoenaed before they are entitled to compensation. State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972).

Unless an expert witness is subpoenaed, the witness' fees are not generally recognized as costs. Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260, cert. denied, 313 N.C. 612, 330 S.E.2d 616 (1985).

Award of Expert Witness Fees Was Proper. — Trial court did not err in awarding expert witness fees to two doctors where both expert witnesses were subpoenaed to testify and provided testimony on the injured person's condition, and where the trial court found that the testimony of both expert witnesses was clear, strong, and convincing and reasonably necessary in the case. Oakes v. Wooten, 173 N.C. App. 506, 620 S.E.2d 39, 2005 N.C. App. LEXIS 2100 (2005).

Experts Must Be Subpoenaed. — Where one expert was not served with a subpoena and another was unsure as to what a subpoena was, the trial court did not have the authority to order defendants to pay expert witness expenses as costs. Rogers v. Sportsworld of Rocky Mount, Inc., 134 N.C. App. 709, 518 S.E.2d 551 (1999).

It is error for a trial court to tax an expert witness fee as part of the costs when the expert has not testified pursuant to a subpoena. Craven v. Chambers, 56 N.C. App. 151, 287 S.E.2d 905 (1982), overruled on other grounds, Johnson v. Ruark Ob. & Gyn. Assocs., 327 N.C. 283, 395 S.E.2d 85 (1990).

Trial court properly allowed expert witness fees under subsection (d) since defendant deposed the experts pursuant to a subpoena. Town of Chapel Hill v. Fox, 120 N.C. App. 630, 463 S.E.2d 421 (1995).

Trial court erred in awarding expert witness fees under G.S. 113A-66(c) of the North Carolina Sedimentation Pollution Control Act of 1973, G.S. 113A-50 et seq., where there was no showing that the expert witnesses appeared under subpoena. Whiteside Estates, Inc. v. Highlands Cove, L.L.C., 146 N.C. App. 449, 553 S.E.2d 431, 2001 N.C. App. LEXIS 970 (2001).

Trial court erred by granting a pedestrian's request for reimbursement of payments he made to expert witnesses without finding that the pedestrian's expert witnesses were subpoenaed. Overton v. Purvis, 162 N.C. App. 241, 591 S.E.2d 18, 2004 N.C. App. LEXIS 120 (2004).

In a medical malpractice case, a trial court did not err by refusing to award expert witness fees because none of the witnesses were under subpoena. Miller v. Forsyth Mem'l Hosp., Inc., 173 N.C. App. 385, 618 S.E.2d 838, 2005 N.C. App. LEXIS 2040 (2005).

Witness Must Be Subpoenaed. — While the trial court may award or decline to award witness fees as an exercise of discretion, it may not decline to exercise its discretion by making this determination as a matter of law; this rule does not apply where the witness was not subpoenaed. Holtman v. Reese, 119 N.C. App. 747, 460 S.E.2d 338 (1995).

Trial Court's Discretion Supersedes Even the Issuance of Subpoenas. — But trial court's denial of plaintiff's request for expert witness fees, even if subpoenas were issued, was not an abuse of its discretion. Blackmon v. Bumgardner, 135 N.C. App. 125, 519 S.E.2d 335 (1999).

Since the trial court's costs ruling was governed by G.S. 6-20, and thus could be allowed at the discretion of the court, and the doctors had not alleged, and there appeared to the appellate court to be no abuse of discretion in the denial of their request to be reimbursed for the expert witness fees where the verdict was in their favor, the judgment was affirmed. Smith v. Cregan, 178 N.C. App. 519, 632 S.E.2d 206, 2006 N.C. App. LEXIS 1568 (2006).

Where witnesses did not testify in obedience to a subpoena, the trial court was without authority to allow them expert fees or to tax the losing party with the costs of their attendance. State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972); Couch v. Couch, 18 N.C. App. 108, 196 S.E.2d 64 (1973); Brandenburg Land Co. v. Champion Int'l Corp., 107 N.C. App. 102, 418 S.E.2d 526 (1992).

Third witness fees denied. — In a negligence case, the expert witness fees of two witnesses were taxable under G.S. 7A-314, but fees associated with a third witness testifying on the same issue were not recoverable; in addition, the cost of reviewing records and consulting was not recoverable. Morgan v. Steiner, 173 N.C. App. 577, 619 S.E.2d 516, 2005 N.C. App. LEXIS 2105 (2005).

Jurisdiction of Trial Court to Award. — Pursuant to G.S. 1-294, a trial court did not have jurisdiction to decide the issue of attorney fees after a county and its board of commissioners had filed their notice of appeal from the judgment in favor of a chairman of a county airport authority who had been improperly removed from his position; an exception did not apply, as the award of attorney fees under G.S. 6-1, G.S. 6-20, G.S. 6-19.1, G.S. 7A-314, and G.S. 143-318.16B was based upon the chairman being the prevailing party. McClure v. County of Jackson, — N.C. App. —, 648 S.E.2d 546, 2007 N.C. App. LEXIS 1814 (2007).

Applied in Wright v. American Gen. Life Ins. Co., 59 N.C. App. 591, 297 S.E.2d 910 (1982); Williams v. Boylan-Pearce, Inc., 69 N.C. App. 315, 317 S.E.2d 17 (1984); Kinlaw v. North Carolina Farm Bureau Mut. Ins. Co., 98 N.C. App. 13, 389 S.E.2d 840 (1990); Lord v. Customized Consulting Specialty, Inc., 164 N.C. App. 730, 596 S.E.2d 891, 2004 N.C. App. LEXIS 1144 (2004).

Cited in Siedlecki v. Powell, 36 N.C. App. 690, 245 S.E.2d 417 (1978); State v. Tedder, 62 N.C. App. 12, 302 S.E.2d 318 (1983); Ollo v. Mills, 136 N.C. App. 618, 525 S.E.2d 213, 2000 N.C. App. LEXIS 110 (2000); Coffman v. Roberson, 153 N.C. App. 618, 571 S.E.2d 255 (2002), cert. denied, 356 N.C. 668, 577 S.E.2d 111 (2003).

§ 7A-314.1. Family court fees.

(a) The Administrative Office of the Courts may charge a uniform fee of not more than thirty dollars ($30.00) per hour to persons receiving the services of a supervised visitation and exchange center through a family court program. The fees collected under this section may be used by the Director of the Administrative Office of the Courts to support the continued operation of supervised visitation and exchange centers which provide services to family court clients regarding domestic violence, substance abuse, mental illness, parental alienation, and other issues.

(b) The Director of the Administrative Office of the Courts may establish a procedure for persons to apply for a reduction in the fee, based upon the person's ability to pay as a result of indigence, status as a victim of domestic violence, or other circumstances. (2004-110, s. 7.1.)

Editor's Note. — Session Laws 2004-110, s. 7.2, made this section effective July 17, 2004.

Session Laws 2004-110, s. 8.1, provides: "This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this act before the effective date of its amendment or repeal; nor does this act affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

§ 7A-315. Liability of State for witness fees in criminal cases when defendant not liable.

In a criminal action, if no prosecuting witness is designated by the court as liable for the costs, and the defendant is acquitted, or convicted and unable to pay, or a nolle prosequi is entered, or judgment is arrested, or probable cause is not found, or the grand jury fails to return a true bill, the State shall be liable for the witness fees allowed per G.S. 7A-314 and any expenses for blood tests and comparisons incurred per G.S. 8-50.1(a). (1965, c. 310, s. 1; 1979, c. 576, s. 4.)

§ 7A-316. Payment of witness fees in criminal actions.

A witness in a criminal action who is entitled to a witness fee and who proves his attendance prior to assessment of the bill of costs shall be paid by the clerk from State funds and the amount disbursed shall be assessed in the bill of costs. When the State is liable for the fee, a witness who proves his attendance not later than the last day of court in the week in which the trial was completed shall be paid by the clerk from State funds. If more than two witnesses shall be subpoenaed, bound over, or recognized, to prove a single material fact, disbursements to such additional witnesses shall be charged against the party issuing or requesting the subpoena. (1965, c. 310, s. 1; 1971, c. 377, s. 28.)

§ 7A-317. (Effective until July 1, 2008) Counties and municipalities not required to advance certain fees.

Counties and municipalities are not required to advance costs for the facilities fee, the General Court of Justice fee, the miscellaneous fees enumerated in G.S. 7A-308, or the civil process fees enumerated in G.S. 7A-311. (1967, c. 691, s. 35.)

Section Set Out Twice. — The section above is effective until July 1, 2008. For the section as amended effective July 1, 2008, see the following section, also numbered G.S. 7A-317.

Editor's Note. — Former G.S. 7A-317 was renumbered as G.S. 7A-318 by Session Laws 1967, c. 691, s. 35, which added this section.

OPINIONS OF ATTORNEY GENERAL

County hospital is within exemption of county from advance costs. See opinion of Attorney General to Mr. William L. Mills, Jr., Attorney for Cabarrus Memorial Hospital, 41 N.C.A.G. 232 (1971).

§ 7A-317. (Effective July 1, 2008) Counties and municipalities not required to advance certain fees.

Counties and municipalities are not required to advance the civil process fees enumerated in G.S. 7A-311. (1967, c. 691, s. 35; 2007-323, s. 30.10(d).)

Section Set Out Twice. — The section above is effective July 1, 2008. For the section as in effect until July 1, 2008, see the preceding section, also numbered G.S. 7A-317.

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 30.10(d), effective July 1, 2008, deleted "costs for the facilities fee, the General Court of Justice fee, the miscellaneous fees enumerated in G.S. 7A-308, or" following "to advance" in the middle of this section.

§ 7A-317.1. Disposition of fees in counties with unincorporated seats of court.

Notwithstanding any other provision of this Article, if a municipality listed in G.S. 7A-133 as an additional seat of district court is not incorporated, the arrest, facilities, and jail fees which would ordinarily accrue thereto, shall instead accrue to the county in which the unincorporated municipality is located. (1969, c. 1190, s. 341/2.)

§ 7A-318. Determination and disbursement of costs on and after date district court established.

(a) On and after the date that the district court is established in a judicial district, costs in every action, proceeding or other matter pending in the General Court of Justice in that district, shall be assessed as provided in this Article, unless costs have been finally assessed according to prior law. In computing costs as provided in this section, the parties shall be given credit for any fees, costs, and commissions paid in the pending action, proceeding or other matter, before the district court was established in the district, except that no refunds are authorized.

(b) In the administration of estates, costs shall be considered finally assessed according to prior law when they have been assessed at the time of the filing of any inventory, account, or other report. Costs at any filing on or after the date the district court is established in a judicial district shall be assessed as provided in this Article.

(c) When the General Court of Justice fee and the facilities fee are assessed as provided in this Article and credit is given for fees, costs, and commissions paid before the district court was established in the district, the actual amount thereafter received by the clerk shall be remitted to the State for the support of the General Court of Justice.

(d) When costs have been finally assessed according to prior law, but come into the hands of the clerk after the district court is established in the district, funds so received shall be disbursed according to prior law.

(e) Cost funds in the hands of the clerk at the time the district court is established shall be disbursed according to prior law. (1965, c. 310, s. 1; 1967, c. 691, s. 35.)

Editor's Note. — This section is former G.S. 7A-317, as renumbered by Session Laws 1967, c. 691, s. 35. Former G.S. 7A-318 was renumbered as G.S. 7A-319 by Session Laws 1967, c. 691, s. 35 and repealed by Session Laws 1971, c. 377, s. 32.

CASE NOTES

Assessment of Costs in Cases Pending When District Court Is Established. — This section clearly provides that in cases pending at the time of the establishment of the district court, in which costs have not been finally assessed according to prior law, the costs shall be assessed as provided in Article 27 of this Chapter. Blackwell v. Montague, 15 N.C. App. 564, 190 S.E.2d 384 (1972).

General Court of Justice Fee and Facilities Fee to Be Remitted to State. — This section clearly provides that the General Court of Justice fee and the "facilities fee" assessed in the class of pending cases shall be remitted to the State for the support of the General Court of Justice. The requirement of the statute is unambiguous and requires no interpretation. Blackwell v. Montague, 15 N.C. App. 564, 190 S.E.2d 384 (1972).

§ 7A-319: Repealed by Session Laws 1971, c. 377, s. 32.

§ 7A-320. Costs are exclusive.

The costs set forth in this Article are complete and exclusive, and in lieu of any other costs and fees. (1983, c. 713, s. 1.)

CASE NOTES

Authority to Tax Costs Under G.S. 6-20. — Under G.S. 7A-305, which specifies in subsection (d) the costs recoverable in civil actions, and also provides in subsection (e) that nothing in this section shall affect the liability of the respective parties for costs as provided by law, the authority of trial courts to tax deposition expenses as costs pursuant to G.S. 6-20 remains undisturbed, regardless of the language of G.S. 7A-320. Alsup v. Pitman, 98 N.C. App. 389, 390 S.E.2d 750 (1990).

Plain meaning of G.S. 7A-320, 6-1, and 6-20, precluded a finding that any reasonable and necessary litigation expenses could be taxed as costs against a non-prevailing opposing party; pursuant to North Carolina Supreme Court precedent, the only expenses which could be taxed as costs were those specifically authorized by statute. DOT v. Charlotte Area Manufactured Hous., Inc., 160 N.C. App. 461, 586 S.E.2d 780, 2003 N.C. App. LEXIS 1822 (2003).

No Statutory Authority to Recover Litigation Costs or Attorney's Fees. — Inmate, who had obtained a verdict against a deputy sheriff with regard to an assault and battery suit, was unable to recover litigation costs or attorney's fees, because no statutory authority existed allowing such recovery to a prevailing party in a civil assault case. Cunningham v. Riley, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 511 (Mar. 15, 2005).

Deposition fees. — In a negligence case, deposition costs were recoverable as trial expenses under G.S. 6-20 because they were established by case law prior to the enactment of G.S. 7A-320 in 1983. Morgan v. Steiner, 173 N.C. App. 577, 619 S.E.2d 516, 2005 N.C. App. LEXIS 2105 (2005).

Cited in Sara Lee Corp. v. Carter, 129 N.C. App. 464, 500 S.E.2d 732 (1998), rev'd on other grounds, 351 N.C. 27, 519 S.E.2d 308 (1999); Cosentino v. Weeks, 160 N.C. App. 511, 586 S.E.2d 787, 2003 N.C. App. LEXIS 1830 (2003); Overton v. Purvis, 162 N.C. App. 241, 591 S.E.2d 18, 2004 N.C. App. LEXIS 120 (2004).

§ 7A-321. Collection of offender fines and fees assessed by the court.

(a) The Judicial Department may, in lieu of payment by cash or check, accept payment by credit card, charge card, or debit card for the fines, fees, and costs owed to the courts by offenders.

(b) In attempting to collect the fines, fees, and costs owed by offenders not sentenced to supervised probation, the Department may:

(1) Assess a collection assistance fee if an amount due remains unpaid for 30 days after the time period allotted by the court. The amount of the collection assistance fee shall not exceed the average cost of collecting the debt or twenty percent (20%) of the amount past due, whichever is less.

(2) Enter into contracts with a collection agency or agencies to collect unpaid fines, fees, and costs owed by offenders not sentenced to supervised probation.

(3) Intercept tax refund checks under Chapter 105A of the General Statutes, the Setoff Debt Collection Act.

(c) Should the Judicial Department use any method listed in subdivision (b)(1) or (2) of this section to collect fines, fees, and costs owed by offenders not sentenced to supervised probation, the department may not charge any additional cost of collection pursuant to G.S. 115C-437. (2006-187, s. 1(a); 2007-323, s. 30.9(a).)

Editor's Note. — Session Laws 2006-187, s. 13, made this section effective August 3, 2006.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 30.9(a), effective August 1, 2007, and applicable to cases adjudicated on or after that date, designated the existing provisions as subsection (a), and added subsections (b) and (c).

§§ 7A-322 through 7A-339: Reserved for future codification purposes.

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

Article 29.

Administrative Office of the Courts.

§ 7A-340. Administrative Office of the Courts; establishment; officers.

There is hereby established a State office to be known as the Administrative Office of the Courts. It shall be supervised by a Director, assisted by an assistant director. (1965, c. 310, s. 1.)

Cross References. — As to reports on vacant positions in the Judicial Department, see G.S. 120-12.1. As to authorization for the Legislative Services Commission and the Administrative Office of the Courts to establish safety and health programs for their employees, see G.S. 143-589.

Mental Health Treatment Courts — Pilot Program. — Session Laws 2004-124, ss. 10.27(a)-(f), provides: "(a) The Administrative Office of the Courts shall establish pilot programs in judicial districts 15B, 26, and 28 that add a mental health treatment component to the existing drug treatment courts in those districts, thereby expanding those courts into therapeutic court programs aimed at providing treatment to repeat adult offenders with needs for either mental health or substance abuse services. The purpose of the mental health treatment component of the pilot programs is to facilitate cooperation between the State mental health system, mental health service providers, and the judicial system in order for the State mental health system to provide repeat adult offenders that need mental health services with treatment and other mental health services aimed at improving their ability to function in the community, thereby reducing recidivism and easing the workload of the courts.

"In expanding the drug treatment courts in these districts into therapeutic courts under this section, the Administrative Office of the Courts and the Department of Health and Human Services, Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, shall collaborate on a plan for the structure of the court process, treatment services provided by area authorities or county programs and other appropriate mental health service providers, and administration of the pilot programs. Treatment services provided under the mental health treatment court component shall use best treatment practices approved by the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services. The collaborative effort required under this section shall also include consideration of the effectiveness and efficiency of the mental health treatment court component to determine feasibility of the statewide expansion of drug treatment courts into therapeutic courts."

"(b) The Administrative Office of the Courts shall report to the Chairs of the Senate and House Appropriations Committees, the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety, and the Chairs of the Senate and House Appropriations Subcommittees on Health and Human Services by March 1, 2005, on the implementation of the therapeutic treatment court pilot programs provided for in this section, including an evaluation of the effectiveness of the new mental health treatment component of those programs and recommendations on the feasibility and desirability of expanding the existing drug treatment court program into a statewide therapeutic court program.

"(c) There is appropriated from the Trust

Fund for Mental Health, Developmental Disabilities, and Substance Abuse Services and Bridge Funding Needs to the Judicial Department the sum of thirty-six thousand one hundred sixty-one dollars ($36,161) for the 2004-2005 fiscal year. These funds shall be used for administrative costs associated with expanding the Drug Treatment Court to serve adult repeat offenders who are within the targeted population for mental health, developmental disabilities, and substance abuse services as defined in G.S. 122C-3(38).

"(d) There is appropriated from the Trust Fund for Mental Health, Developmental Disabilities, and Substance Abuse Services and Bridge Funding Needs to the Department of Health and Human Services, Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, the sum of one hundred thirty-seven thousand nine hundred forty dollars ($137,940) for the 2004-2005 fiscal year. These funds shall be used for mental health treatment services to repeat adult offenders within the targeted population for mental health, developmental disabilities, and substance abuse services as defined in G.S. 122C-3(38).

"(e) Of the funds appropriated in this act to the Judicial Department, the sum of twenty thousand dollars ($20,000) for the 2004-2005 fiscal year shall be used to obtain an independent evaluation of the effectiveness of the pilot programs authorized under this section.

"(f) A county may appropriate county or other non-State funds to expand mental health services to adult repeat offenders served by the pilot programs for mental health treatment established under subsection (a) of this section. No State funds appropriated for this section shall be used to provide mental health services to nontargeted population adult repeat offenders."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5 contains a severability clause.

Federal Grant Reporting. — Session Laws 2005-276, s. 17.1, provides: "The Department of Correction, the Department of Justice, the Department of Crime Control and Public Safety, the Judicial Department, and the Department of Juvenile Justice and Delinquency Prevention shall report by May 1 of each year to the Joint Legislative Commission on Governmental Operations, the Chairs of the Senate and House of Representatives Appropriations Committees, and the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety on federal grant funds received or preapproved for receipt by those departments. The report shall include information on the amount of grant funds received or preapproved for receipt by each department, the use of the funds, the State match expended to receive the funds, and the period to be covered by each grant. If the department intends to continue the program beyond the end of the grant period, the department shall report on the proposed method for continuing the funding of the program at the end of the grant period. Each department shall also report on any information it may have indicating that the State will be requested to provide future funding for a program presently supported by a local grant."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2007-323, s. 17.5, provides: "The Department of Correction, the Department of Justice, the Department of Crime Control and Public Safety, the Judicial Department, and the Department of Juvenile Justice and Delinquency Prevention shall report by May 1 of each year to the Joint Legislative Commission on Governmental Operations, the Chairs of the House of Representatives and Senate Appropriations Committees, and the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety on federal grant funds received or preapproved for receipt by those departments. The report shall include information on the amount of grant funds received or preapproved for receipt by each department, the use of the funds, the State match expended to receive the funds, and the period to be covered by each grant. If the department intends to continue the program beyond the end of the grant period, the department shall report on the proposed method for continuing the funding of the program at the end of the grant period. Each department shall also report on any information it may have indicating that the State will be requested to provide future funding for a program presently supported by a local grant."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

CASE NOTES

The holder of office under the authority of this section is an officer of the General Court of Justice assisting the Chief Justice, and serving at his pleasure. He is a servant of the General Court of Justice and the Chief Justice. As such, he acts as an extension of the judicial personality of the Chief Justice. He is considered by North Carolina to be among its judicial personnel and is equivalent to service as a judge of the Superior Court Division of the General Court of Justice in certain instances. His position entitles him to the judicial immunity held by other judicial personnel. Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972), aff'd, 478 F.2d 694 (4th Cir. 1973).

§ 7A-341. Appointment and compensation of Director.

The Director shall be appointed by the Chief Justice of the Supreme Court, to serve at his pleasure. He shall receive the annual salary provided in the Current Operations Appropriations Act, payable monthly, and reimbursement for travel and subsistence expenses at the same rate as State employees generally and longevity pay at the rates and for the service designated in G.S. 7A-44(b) for a judge of the superior court. Service as Director shall be equivalent to service as a superior court judge for the purposes of entitlement to retirement pay or to retirement for disability. (1965, c. 310, s. 1; 1967, c. 691, s. 36; 1983 (Reg. Sess., 1984), c. 1034, s. 165; 1987 (Reg. Sess., 1988), c. 1100, s. 15(a).)

School-Based Child and Family Team Initiative. — Session Laws 2005-276, s. 6.24, provides for the development and implementation of a School-Based Child and Family Team Initiative. See note at G.S. 115C-105.20.

OPINIONS OF ATTORNEY GENERAL

Longevity Pay. — Upon taking office as an Associate Justice of the North Carolina Supreme Court, a justice was entitled to have his service as Director and Assistant Director of the Administrative Office of the Courts to be taken into account in calculating his service for longevity purposes, but his service as assistant district attorney could not be taken into account. See opinion of Attorney General to The Honorable Thomas W. Ross, Director, The Administrative Office of the Courts, 1999 N.C. AG LEXIS 28 (9/28/99).

CASE NOTES

Cited in Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972).

§ 7A-342. Appointment and compensation of assistant director and other employees.

The assistant director shall also be appointed by the Chief Justice, to serve at his pleasure. The assistant director shall receive the annual salary provided in the Current Operations Appropriations Act, payable monthly, and reimbursement for travel and subsistence expenses at the same rate as State employees generally and longevity pay at the rates and for the service designated in G.S. 7A-144(b) for a judge of the district court.

The Director may appoint such other assistant and employees as are necessary to enable him to perform the duties of his office. (1965, c. 310, s. 1; 1967, c. 691, s. 37; 1983 (Reg. Sess., 1984), c. 1034, s. 165; 1987 (Reg. Sess., 1988), c. 1100, s. 15(b).)

§ 7A-343. Duties of Director.

The Director is the Administrative Officer of the Courts, and the Director's duties include all of the following:

(1) Collect and compile statistical data and other information on the judicial and financial operation of the courts and on the operation of other offices directly related to and serving the courts.

(2) Determine the state of the dockets and evaluate the practices and procedures of the courts, and make recommendations concerning the number of judges, district attorneys, and magistrates required for the efficient administration of justice.

(3) Prescribe uniform administrative and business methods, systems, forms and records to be used in the offices of the clerks of superior court.

(4) Prepare and submit budget estimates of State appropriations necessary for the maintenance and operation of the Judicial Department, and authorize expenditures from funds appropriated for these purposes.

(5) Investigate, make recommendations concerning, and assist in the securing of adequate physical accommodations for the General Court of Justice.

(6) Procure, distribute, exchange, transfer, and assign such equipment, books, forms and supplies as are to be acquired with State funds for the General Court of Justice.

(7) Make recommendations for the improvement of the operations of the Judicial Department.

(8) Prepare and submit an annual report on the work of the Judicial Department to the Chief Justice, and transmit a copy to each member of the General Assembly.

(9) Assist the Chief Justice in performing his duties relating to the transfer of district court judges for temporary or specialized duty.

(9a) Establish and operate systems and services that provide for electronic filing in the court system and further provide electronic transaction processing and access to court information systems pursuant to G.S. 7A-343.2.

(9b) Enter into contracts with one or more private vendors to provide for the payment of fines, fees, and costs due to the court by credit, charge, or debit cards; such contracts may provide for the assessment of a convenience or transaction fee by the vendor to cover the costs of providing this service.

(9c) Prescribe policies and procedures for the appointment and payment of foreign language interpreters in those cases specified in G.S. 7A-314(f). These policies and procedures shall be applied uniformly throughout the General Court of Justice. After consultation with the Joint Legislative Commission on Governmental Operations, the Director may also convert contractual foreign language interpreter positions to permanent State positions when the Director determines that it is more cost-effective to do so.

(9d) Analyze the use of contractual positions in the Judicial Department and, after consultation with the Joint Legislative Commission on

Governmental Operations, convert contractual positions to permanent State positions when the Director determines it is in the best interests of the Judicial Department to do so.

(10) Perform such additional duties and exercise such additional powers as may be prescribed by statute or assigned by the Chief Justice. (1965, c. 310, s. 1; 1967, c. 1049, s. 5; 1973, c. 47, s. 2; 1999-237, s. 17.15(a); 2006-187, ss. 1(b), 2(b), 5(b); 2007-393, s. 11.)

Editor's Note. — Session Laws 2006-187, s. 13, provides in part: "Section 2 of this act is effective when it becomes law and applies to all matters filed with the courts on or after the date that the Supreme Court adopts rules for electronic filing as authorized by that section."

Subdivision (9b), as enacted by Session Laws 2006-187, s. 5(b), was redesignated as subdivision (9c) at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2006-187, ss. 1(b), 2(b), and 5(b), effective August 3, 2006, in subdivision (9a), added "provide for electronic filing in the court system and further"; and added subdivisions (9b) and (9c). For applicability provisions, see Editor's note.

Session Laws 2007-393, s. 11, effective October 1, 2007, added subdivision (9d); and made minor stylistic changes throughout.

CASE NOTES

Cited in Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972).

§ 7A-343.1. Distribution of copies of the appellate division reports.

The Administrative Officer of the Courts shall, at the State's expense distribute such number of copies of the appellate division reports to federal, State departments and agencies, and to educational institutions of instruction, as follows:

Governor, Office of the	1
Lieutenant Governor, Office of the	1
Secretary of State, Department of the	2
State Auditor, Department of the	1
Treasurer, Department of the State	1
Superintendent of Public Instruction	1
Office of the Attorney General	11
State Bureau of Investigation	1
Agriculture and Consumer Services, Department of	1
Labor, Department of	1
Insurance, Department of	1
Budget Bureau, Department of Administration	1
Property Control, Department of Administration	1
State Planning, Department of Administration	1
Environment and Natural Resources, Department of	1
Revenue, Department of	1
Health and Human Services, Department of	1
Juvenile Justice and Delinquency Prevention, Department of	1
Commission for the Blind	1
Transportation, Department of	1
Motor Vehicles, Division of	1
Utilities Commission	8
Industrial Commission	11
State Personnel Commission	1

Office of State Personnel	1
Office of Administrative Hearings	2
Community Colleges, Department of	38
Employment Security Commission	1
Commission of Correction	1
Parole Commission	1
Archives and History, Division of	1
Crime Control and Public Safety, Department of	2
Cultural Resources, Department of	3
Legislative Building Library	2
Justices of the Supreme Court	1 ea.
Judges of the Court of Appeals	1 ea.
Judges of the Superior Court	1 ea.
Clerks of the Superior Court	1 ea.
District Attorneys	1 ea.
Emergency and Special Judges of the Superior Court	1 ea.
Supreme Court Library	AS MANY AS REQUESTED
Appellate Division Reporter	1
University of North Carolina, Chapel Hill	71
University of North Carolina, Charlotte	1
University of North Carolina, Greensboro	1
University of North Carolina, Asheville	1
North Carolina State University, Raleigh	1
Appalachian State University	1
East Carolina University	1
Fayetteville State University	1
North Carolina Central University	17
Western Carolina University	1
Duke University	17
Davidson College	2
Wake Forest University	25
Lenoir Rhyne College	1
Elon College	1
Campbell University	25
Federal, Out-of-State and Foreign Secretary of State	1
Secretary of Defense	1
Secretary of Health, Education and Welfare	1
Secretary of Housing and Urban Development	1
Secretary of Transportation	1
Attorney General	1
Department of Justice	1
Internal Revenue Service	1
Veterans' Administration	1
Library of Congress	5
Federal Judges resident in North Carolina	1 ea.
Marshal of the United States Supreme Court	1
Federal District Attorneys resident in North Carolina	1 ea.
Federal Clerks of Court resident in North Carolina	1 ea.
Supreme Court Library exchange list	1
Cherokee Supreme Court, Eastern Band of Cherokee Indians	1

Each justice of the Supreme Court and judge of the Court of Appeals shall receive for private use, one complete and up-to-date set of the appellate division reports. The copies of reports furnished each justice or judge as set out in the table above may be retained personally to enable the justice or judge to keep up-to-date the personal set of reports. (1973, c. 476, s. 84; 1977, c. 379, s.

2; c. 771, s. 4; 1979, c. 899, s. 1; 1979, 2nd Sess., c. 1278; 1985 (Reg. Sess., 1986), c. 1022, s. 2; 1987, c. 877, s. 1; 1989, c. 727, s. 218(1); 1993, c. 257, s. 19; 1995, c. 166, s. 1; c. 509, s. 4; 1997-261, s. 109; 1997-443, s. 11A.7; 1998-202, s. 4(a); 2000-137, s. 4(b); 2001-280, s. 1.)

§ 7A-343.2. Court Information Technology Fund.

The Court Information Technology Fund is established within the Judicial Department as a nonreverting, interest-bearing special revenue account. Accordingly, revenue in the Fund at the end of a fiscal year does not revert and interest and other investment income earned by the Fund shall be credited to it. All moneys collected by the Director pursuant to G.S. 7A-109(d) and G.S. 7A-49.5 shall be remitted to the State Treasurer and held in this Fund. Moneys in the Fund shall be used to supplement funds otherwise available to the Judicial Department for court information technology and office automation needs. The Director shall report by August 1 and February 1 of each year to the Joint Legislative Commission on Governmental Operations, the Chairs of the Senate and House Appropriations Committees, and the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety on all moneys collected and deposited in the Fund and on the proposed expenditure of those funds collected during the preceding six months. (1999-237, s. 17.15(b); 2000-67, s. 15.1; 2006-187, s. 2(d).)

Editor's Note. — Session Laws 2006-187, s. 13, provides in part: "Section 2 of this act is effective when it becomes law and applies to all matters filed with the courts on or after the date that the Supreme Court adopts rules for electronic filing as authorized by that section."

Effect of Amendments. — Session Laws 2006-187, s. 2(d), effective August 3, 2006, inserted "and G.S. 7A-49.5" in the third sentence. For applicability provisions, see Editor's note.

CASE NOTES

Portion of the appointment fee provided for by G.S. 7A-455.1(a) allocated to the North Carolina Court Information Technology Fund is effectively indistinguishable from the facilities fee imposed under G.S. 7A-304(a)(2); the appointment fee operates to supplement funds otherwise available to the North Carolina Judicial Department for court information technology and office automation needs, thus defraying expenses incurred by the State in the operation and maintenance of the court system under G.S. 7A-343.2, and it should be assessed in the same manner as the facilities fee and any other cost of prosecution—against convicted defendants only. State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

§ 7A-343.3. Appellate Courts Printing and Computer Operations Fund.

The Appellate Courts Printing and Computer Operations Fund is established within the Judicial Department as a nonreverting, interest-bearing special revenue account. Accordingly, interest and other investment income earned by the Fund shall be credited to it. All moneys collected through charges to litigants for the reproduction of appellate records and briefs under G.S. 7A-11 and G.S. 7A-20(b) shall be remitted to the State Treasurer and held in this Fund. Moneys in the Fund shall be used to support the print shop operations of the Supreme Court and the Court of Appeals, including personnel, maintenance, and capital costs. The Judicial Department may create and maintain receipt-supported positions for these purposes but shall report to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety prior to creating such new positions.

The Judicial Department shall report to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety by January 1 of each year on all receipts and expenditures of the Fund. (2002-126, s. 14.12.)

§ 7A-344: Repealed by Session Laws 2000-144, s. 4, effective July 1, 2001.

Editor's Note. — The above section was inserted by Session Laws 1969, c. 1013. The section formerly numbered G.S. 7A-344 was renumbered G.S. 7A-345 by the 1969 act.

§ 7A-345. Duties of assistant director.

The assistant director is the administrative assistant to the Chief Justice, and his duties include the following:

(1) Assist the Chief Justice in performing his duties relating to the assignment of superior court judges;
(2) Assist the Supreme Court in preparing calendars of superior court trial sessions; and
(3) Performing such additional functions as may be assigned by the Chief Justice or the Director of the Administrative Office. (1965, c. 310, s. 1; 1969, c. 1013, s. 4.)

Editor's Note. — Before the enactment of Session Laws 1969, c. 1013, the above section was numbered G.S. 7A-344. The 1969 act added a new section numbered G.S. 7A-344 and renumbered former G.S. 7A-344 and 7A-345 as 7A-345 and 7A-346.

CASE NOTES

Cited in State v. Morehead, 46 N.C. App. 39, 264 S.E.2d 400 (1980); State v. Eley, 326 N.C. 759, 392 S.E.2d 394 (1990).

§ 7A-346. Information to be furnished to Administrative Officer.

All judges, district attorneys, public defenders, magistrates, clerks of superior court and other officers or employees of the courts and of offices directly related to and serving the courts shall on request furnish to the Administrative Officer information and statistical data relative to the work of the courts and of such offices and relative to the receipt and expenditure of public moneys for the operation thereof. (1965, c. 310, s. 1; 1967, c. 1049, s. 5; 1969, c. 1013, ss. 4, 5; 1973, c. 47, s. 2.)

Editor's Note. — Before the enactment of Session Laws 1969, c. 1013, the above section was G.S. 7A-345. Session Laws 1969, c. 1013, s. 4 added a new section numbered G.S. 7A-344 and renumbered former G.S. 7A-344 and 7A-345 as 7A-345 and 7A-346.

CASE NOTES

Applied in State v. Wright, 290 N.C. 45, 224 S.E.2d 624 (1976).

§ 7A-346.1: Repealed by Session Laws 2000-67, s. 15(b), effective July 1, 2000.

§ 7A-346.2. Various reports to General Assembly.

(a) The Administrative Office of the Courts and the Office of Indigent Defense Services shall report by March 1 of each year to the Chairs of the House of Representatives and Senate Appropriations Committees, to the Chairs of the House of Representatives Subcommittee on Justice and Public Safety, and to the Chairs of the Senate Appropriations Committee on Justice and Public Safety on contracts entered into with local governments for the provision of the services of assistant district attorneys, assistant public defenders, judicial secretaries, and employees in the office of the Clerk of Superior Court. The report shall include the number of applications made to the Administrative Office of the Courts or the Office of Indigent Defense Services for these contracts, the number of contracts entered for provision of these positions, and the dollar amounts of each contract.

(b) The Administrative Office of the Courts shall report by April 1 of each odd-numbered year to the Chairs of the Senate and House Appropriations Committees and the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety on the economic viability of the worthless check collection programs established by district attorneys pursuant to G.S. 14-107.2, including an assessment of whether any adjustments need to be made to ensure that the programs, on a statewide basis, are self-supporting. (1999-237, s. 17.7(c); 2000-67, ss. 15.3A(b), 15.4(h); 2001-61, s. 2; 2001-424, s. 22.11(g); 2003-377, s. 4.)

Cross References. — For contracts entered into for the provision of secretarial and clerical help, see G.S. 7A-44.1. For contracts entered into for the provision of assistant and deputy clerks, see G.S. 7A-102. For contracts entered into for the provision of assistant public defenders, see G.S. 7A-467. As to the program for the collection of worthless check cases, see G.S. 14-107.2.

Editor's Note. — Session Laws 2000-67, s. 15.4(h), effective July 1, 2000, was codified as subsection (a) of this section, and Session Laws 1997-237, s. 17.7(c), effective July 1, 1999, as amended by Session Laws 2000-67, s. 15.3A(b), effective July 1, 2000, was codified as subsection (b) of this section, at the direction of the Revisor of Statutes.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Session Laws 2003-284, s. 16.1, provides: "The Department of Correction, the Department of Justice, the Department of Crime Control and Public Safety, the Judicial Department, and the Department of Juvenile Justice and Delinquency Prevention shall report by May 1 of each year to the Joint Legislative Commission on Governmental Operations, the Chairs of the Senate and House of Representatives Appropriations Committees, and the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety on federal grant funds received or preapproved for receipt by those departments. The report shall include information on the amount of grant funds received or preapproved for receipt by each department, the use of the funds, the State match expended to receive the funds, and the period to be covered by each grant. If the department intends to continue the program beyond the end of the grant period, the department shall report on the proposed method for continuing the funding of the program at the end of the grant period. Each department shall also report on any information it may have indicating that the State will be requested to provide future funding for a program presently supported by a local grant."

Session Laws 2003-284, s. 1.2, provides "This act shall be known as the "Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides:

"Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5, is a severability clause.

Session Laws 2003-377, s. 4 [5], provides: "As soon as practicable, the Administrative Office of the Courts shall determine the economic feasibility of establishing a worthless check collection program in Prosecutorial Districts 1, 3A, 18, 25, 28, and 29. The Administrative Office of the Courts shall authorize the establishment of a worthless check collection program in any or all of the prosecutorial districts identified in this section that are determined to be economically feasible before it authorizes a worthless check collection program in any other prosecutorial district."

Session Laws 2005-356, s. 2, provides: "The Administrative Office of the Courts, in consultation with the Department of Correction, Division of Community Corrections, shall study and review programs in this State, and other states, that utilize Global Positioning Satellite (GPS) technology to track criminal offenders. Based upon the study and review, the Administrative Office of the Courts shall make written recommendations to the Joint Legislative Committee on Domestic Violence and the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee no later than July 1, 2006, for a pilot GPS program as a condition for pretrial release pursuant to G.S. 15A-534.1. The recommendations shall include whether the alleged victim of the charged offense should have a receiver for immediate and direct notification of a GPS tracking violation by the defendant."

Session Laws 2005-356, s. 3, provides: "The Department of Correction, Division of Community Corrections, shall make a written report no later than January 1, 2007, to the Joint Legislative Committee on Domestic Violence and the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee on measures the Division is undertaking to address the issue of supervising domestic violence offenders."

Session Laws 2005-356, s. 4, provides: "The Administrative Office of the Courts shall expand the Family Court Model to additional jurisdictions of the State, as resources allow, shall study the elements of the model that might be adopted without additional funding, and implement those elements in jurisdictions where possible. The Administrative Office of the Courts shall also study the automation of court records to allow queries on civil, criminal, and juvenile matters.

"The Administrative Office of the Courts shall report to the Joint Legislative Committee on Domestic Violence and the North Carolina Courts Commission no later than January 1, 2007, on the results of the studies, the recommendations of the Administrative Office of the Courts, and any steps requiring legislative action to implement the recommendations."

Session Laws 2006-187, s. 10, provides: "The Administrative Office of Courts, in conjunction with the North Carolina Equal Access to Justice Commission, North Carolina Bar Association, North Carolina Legal Services Planning Council, Legal Aid of North Carolina, Inc., North Carolina Justice Center, and Pisgah Legal Services, Inc., shall study the most effective way to address the increasing numbers of persons who either cannot afford representation or choose to represent themselves in family law matters and in some civil litigation, and report the results of the study to the Joint Appropriations Subcommittee on Justice and Public Safety no later than December 31, 2007."

Session Laws 2007-323, s. 14.18, provides: "The Administrative Office of the Courts shall develop and implement a system to measure the impact of the funding provided in this act on the operation of the courts. The system shall include uniform performance measures and standards for caseload management and resource allocation, including funding, personnel, technology, and equipment at district and county levels. The Administrative Office of the Courts shall submit an interim status report on the development and implementation of the performance measurement system to the Joint Legislative Commission on Governmental Operations and the Chairs of the Senate and House Appropriations Committees no later than December 31, 2007, and shall submit a final report no later than May 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 7A-346.3. (Contingent effective date — see editor's note) Impaired driving integrated data system report.

The information compiled by G.S. 7A-109.2 shall be maintained in an Administrative Office of the Courts database. By March 1, the Administrative Office of the Courts shall provide an annual report of the previous calendar year to the Joint Legislative Commission on Governmental Operations and the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee. The annual report shall show the types of dispositions for the entire State by county, by judge, by prosecutor, and by defense attorney. This report shall also include the amount of fines, costs, and fees ordered at the disposition of the charge, the amount of any subsequent reduction, amount collected, and the amount still owed, and compliance with sanctions of community service, jail, substance abuse assessment, treatment, and education. The Administrative Office of the Courts shall facilitate public access to the information collected under this section by posting this information on the court's Internet page in a manner accessible to the public and shall make reports of any information collected under this section available to the public upon request and without charge. (2006-253, s. 20.2.)

Editor's Note. — Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

Session Laws 2006-253, s. 33, provides in part: "Sections 20.1, 20.2, and the requirement that the Administrative Office of the Courts electronically record certain data contained in subsection (c) of G.S. 20-138.4, as amended by Section 19 of this act, become effective after the next rewrite of the superior court clerks system by the Administrative Office of the Courts." The rewrite of the superior court clerks system has not been completed.

§ 7A-347. Assistants for administrative and victim and witness services.

Assistant for administrative and victim and witness services positions are established under the district attorneys' offices. Each prosecutorial district is allocated at least one assistant for administrative and victim and witness services to be employed by the district attorney. The Administrative Office of the Courts shall allocate additional assistants to prosecutorial districts on the basis of need and within available appropriations. Each district attorney may also use any volunteer or other personnel to assist the assistant. The assistant is responsible for coordinating efforts of the law-enforcement and judicial systems to assure that each victim and witness is provided fair treatment under Article 45 of Chapter 15A, Fair Treatment for Victims and Witnesses and shall also provide administrative and legal support to the district attorney's office. (1985 (Reg. Sess., 1986), c. 998, s. 2; 1997-443, s. 18.7(c).)

§ 7A-348. Training and supervision of assistants for administrative and victim and witness services.

Pursuant to the provisions of G.S. 7A-413, the Conference of District Attorneys shall:

(1) Assist in establishing uniform statewide training for assistants for administrative and victim and witness services; and

(2) Assist in the implementation and supervision of this program. (1985 (Reg. Sess., 1986), c. 998, s. 2; 1997-443, s. 18.7(d); 2001-424, s. 22.6(a).)

§ 7A-349. Criminal history record check; denial of employment, contract, or volunteer opportunity.

The Judicial Department may deny employment, a contract, or a volunteer opportunity to any person who refuses to consent to a criminal history check authorized under G.S. 114-19.19 and may dismiss a current employee, terminate a contractor, or terminate a volunteer relationship if that employee, contractor, or volunteer refuses to consent to a criminal history record check authorized under G.S. 114-19.19. (2006-187, s. 3(b).)

Editor's Note. — Session Laws 2006-187, s. 13, made this section effective October 1, 2006.

§§ 7A-350 through 7A-354: Reserved for future codification purposes.

ARTICLE 29A.

Trial Court Administrators.

§ 7A-355. Trial court administrators.

The following districts or sets of districts as defined in G.S. 7A-41.1(a) shall have trial court administrators: Set of districts 10A, 10B, 10C, 10D; District 22 and District 28, and such other districts or sets of districts as may be designated by the Administrative Office of the Courts. (1979, c. 1072, s. 10; 1987 (Reg. Sess., 1988), c. 1037, s. 27.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 7A-356. Duties.

The duties of each trial court administrator shall be to assist in managing civil dockets, to improve jury utilization and to perform such duties as may be assigned by the senior resident superior court judge of his district or set of districts as defined in G.S. 7A-41.1(a) or by other judges designated by that senior resident superior court judge. (1979, c. 1072, s. 10; 1987 (Reg. Sess., 1988), c. 1037, s. 28.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§§ 7A-357 through 7A-374: Reserved for future codification purposes.

ARTICLE 30.

Judicial Standards Commission.

§ 7A-374.1. Purpose.

The purpose of this Article is to provide for the investigation and resolution of inquiries concerning the qualification or conduct of any judge or justice of the

General Court of Justice. The procedure for discipline of any judge or justice of the General Court of Justice shall be in accordance with this Article. Nothing in this Article shall affect the impeachment of judges under the North Carolina Constitution, Article IV, Sections 4 and 17. (2006-187, s. 11.)

Editor's Note. — Session Laws 2006-187, s. 13, made this section effective January 1, 2007.

§ 7A-374.2. Definitions.

Unless the context clearly requires otherwise, the definitions in this section shall apply throughout this Article:

(1) "Censure" means a finding by the Supreme Court, based upon a written recommendation by the Commission, that a judge has willfully engaged in misconduct prejudicial to the administration of justice that brings the judicial office into disrepute, but which does not warrant the suspension of the judge from the judge's judicial duties or the removal of the judge from judicial office. A censure may require that the judge follow a corrective course of action. Unless otherwise ordered by the Supreme Court, the judge shall personally appear in the Supreme Court to receive a censure.

(2) "Commission" means the North Carolina Judicial Standards Commission.

(3) "Incapacity" means any physical, mental, or emotional condition that seriously interferes with the ability of a judge to perform the duties of judicial office.

(4) "Investigation" means the gathering of information with respect to alleged misconduct or disability.

(5) "Judge" means any justice or judge of the General Court of Justice of North Carolina, including any retired justice or judge who is recalled for service as an emergency judge of any division of the General Court of Justice.

(6) "Letter of caution" means a written action of the Commission that cautions a judge not to engage in certain conduct that violates the Code of Judicial Conduct as adopted by the Supreme Court.

(7) "Public reprimand" means a written action of the Commission issued upon a finding by the Commission that a judge has violated the Code of Judicial Conduct and has engaged in conduct prejudicial to the administration of justice, but that misconduct is minor and does not warrant a recommendation by the Commission that the judge be disciplined by the Supreme Court. A public reprimand may require that the judge follow a corrective course of action.

(8) "Remove" or "removal" means a finding by the Supreme Court, based upon a written recommendation by the Commission, that a judge should be relieved of all duties of the judge's office and disqualified from holding further judicial office.

(9) "Suspend" or "suspension" means a finding by the Supreme Court, based upon a written recommendation by the Commission, that a judge should be relieved of the duties of the judge's office for a period of time, and upon conditions, including those regarding treatment and compensation, as may be specified by the Supreme Court. (2006-187, s. 11.)

Editor's Note. — Session Laws 2006-187, s. 13, made this section effective January 1, 2007.

§ 7A-375. Judicial Standards Commission.

(a) The Judicial Standards Commission shall consist of the following residents of North Carolina: one Court of Appeals judge, two superior court judges, and two district court judges, each appointed by the Chief Justice of the Supreme Court; four members of the State Bar who have actively practiced in the courts of the State for at least 10 years, elected by the State Bar Council; and four citizens who are not judges, active or retired, nor members of the State Bar, two appointed by the Governor, and two appointed by the General Assembly in accordance with G.S. 120-121, one upon recommendation of the President Pro Tempore of the Senate and one upon recommendation of the Speaker of the House of Representatives. The Court of Appeals judge shall act as chair of the Commission.

(b) The Court of Appeals judge shall serve at the pleasure of the Chief Justice. Terms of other Commission members shall be for six years. No member who has served a full six-year term is eligible for reappointment. If a member ceases to have the qualifications required for the member's appointment, that person ceases to be a member. Vacancies of members, other than those appointed by the General Assembly, are filled in the same manner as the original appointment, for the remainder of the term. Vacancies of members appointed by the General Assembly are filled as provided under G.S. 120-122. Members who are not judges are entitled to per diem and all members are entitled to reimbursement for travel and subsistence expenses at the rate applicable to members of State boards and commissions generally, for each day engaged in official business.

(c) If a member of the Commission who is a judge becomes disabled, or becomes a respondent before the Commission, the Chief Justice shall appoint an alternate member to serve during the period of disability or disqualification. The alternate member shall be from the same division of the General Court of Justice as the judge whose place the alternate member takes. If a member of the Commission who is not a judge becomes disabled, the Governor, if he appointed the disabled member, shall appoint, or the State Bar Council, if it elected the disabled member, shall elect, an alternate member to serve during the period of disability. If a member of the Commission who is not a judge and who was appointed by the General Assembly becomes disabled, an alternate member shall be appointed to serve during the period of disability in the same manner as if there were a vacancy to be filled under G.S. 120-122. In a particular case, if a member becomes disqualified, or is successfully challenged for cause, the member's seat for that case shall be filled by an alternate member selected as provided in this subsection.

(d) A member may serve after expiration of the member's term only to participate until the conclusion of a disciplinary proceeding begun before expiration of the member's term. Such participation shall not prevent the successor from taking office, but the successor may not participate in the proceeding for which the predecessor's term was extended. This subsection shall apply also to any judicial member whose membership on the Commission is automatically terminated by retirement or resignation from judicial office, or expiration of the term of judicial office.

(e) Members of the Commission and its employees are immune from civil suit for all conduct undertaken in the course of their official duties.

(f) The chair of the Commission may employ, if funds are appropriated for that purpose, an executive director, Commission counsel, investigator, and any support staff as may be necessary to assist the Commission in carrying out its duties. With the approval of the Chief Justice, for specific cases, the chair also may employ special counsel or call upon the Attorney General to furnish counsel. In addition, with the approval of the Chief Justice, for specific cases, the chair or executive director also may call upon the Director of the State Bureau of Investigation to furnish an investigator who shall serve under the supervision of the executive director. While performing duties for the Commission, the executive director, counsel, and investigator have authority throughout the State to serve subpoenas or other process issued by the Commission in the same manner and with the same effect as an officer authorized to serve process of the General Court of Justice.

(g) The Commission may adopt, and may amend from time to time, its own rules of procedure for the performance of the duties and responsibilities prescribed by this Article, subject to the approval of the Supreme Court. (1971, c. 590, s. 1; 1973, c. 50; 1975, c. 956, s. 13; 1997-72, s. 1; 2006-187, s. 11.)

Editor's Note. — Former Article 30, Transitional Matters, comprising G.S. 7A-400 and 7A-401, was enacted by Session Laws 1965, c. 310, s. 1, and repealed by Session Laws 1971, c. 377, s. 32, effective Oct. 1, 1971. Sections numbered 7A-400 and 7A-401 were enacted as part of new Article 31 by Session Laws 1971, c. 377, s. 1.1, which article was repealed by Session Laws 1983, c. 774, s. 1.

Session Laws 1971, c. 590, which enacted this Article, was made effective upon the condition that the amendment to N.C. Const., Art. IV, § 17, proposed by Session Laws 1971, c. 560 was approved by the voters. The amendment was approved at the general election held Nov. 2, 1972.

Session Laws 2006-187, s. 12, as amended by Session Laws 2006-259, s. 44(b), provides: "In order to provide for an orderly transition in membership to the Judicial Standards Commission to the six-year terms specified in G.S. 7A-375(b), as amended by Section 11 of this act, and notwithstanding G.S. 7A-375(b), as amended by Section 11 of this act, the following provisions apply:

"(1) The initial terms of the new district court judge, of one new member of the North Carolina Bar, and of one citizen upon recommendation of the Speaker of the House of Representatives, appointed to the Commission effective January 1, 2007, shall be two-year terms.

"(2) The initial terms of all other new members appointed to the Commission effective January 1, 2007, shall be five-year terms."

Effect of Amendments. — Session Laws 2006-187, s. 11, effective January 1, 2007, rewrote the section.

Legal Periodicals. — For note on the Judicial Standards Commission, see 54 N.C.L. Rev. 1074 (1976).

For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

For survey of 1977 law on professional responsibility and the administration of justice, see 56 N.C.L. Rev. 871 (1978).

For note discussing the power of the North Carolina Supreme Court to remove state judges in the context of In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978), see 14 Wake Forest L. Rev. 1187 (1978).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For article, "The Discipline and Removal of Judges in North Carolina," see 4 Campbell L. Rev. 1 (1981).

For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

CASE NOTES

This Article is not unconstitutional because enacted in advance of the ratification of N.C. Const., Art. IV, § 17, since the General Assembly has power to enact a statute not authorized by the present Constitution where the statute is passed in anticipation of an amendment authorizing it, or provides that it shall take effect upon the adoption of such an amendment. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Article Is Not Unconstitutional Delegation of Authority. — In view of the constitutional mandate in N.C. Const., Art. IV, § 17(2) that the General Assembly shall prescribe a procedure for the censure and removal of judges in addition to impeachment and address as provided in N.C. Const., Art. IV, § 17(1), respondent's contention that the General Assembly in enacting this Article abrogated its legislative duties by unconstitutionally delegating them to the Judicial Standards Commission, a creature of the General Assembly, was without merit. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

The Judicial Standards Commission Act, this Article, is constitutional and, under this Article, the Supreme Court is vested with jurisdiction to act in a case involving the removal from office of a judge. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

No Violation of Doctrine of Separation of Powers. — By accepting and acting upon the original jurisdiction authorized by the people under N.C. Const., Art. IV, § 17(2) and conferred by the legislature, the Supreme Court does not usurp power constitutionally reserved to another branch of government. Thus, the exercise of such jurisdiction does not violate the constitutional doctrine of separation of powers. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

Intent of Article. — By enacting this Article it was the intent of the General Assembly to provide the machinery and prescribe the procedure for the censure and removal of justices and judges for willful misconduct in office or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

Function of Commission. — The Judicial Standards Commission's function is to investigate complaints against sitting judges and candidates for judicial office and to recommend to the Supreme Court what, if any, disciplinary action should be taken. In re Renfer, 345 N.C. 632, 482 S.E.2d 540 (1997).

Combination of Investigative and Judicial Functions Within Commission Comports with Due Process. — The combination of investigative and judicial functions within the Commission does not violate a respondent's due process rights. An agency which has only the power to recommend penalties is not required to establish an independent investigatory and adjudicatory staff. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Powers of Commission. — The Judicial Standards Commission is empowered by G.S. 7A-377 to investigate complaints, compel the attendance of witnesses and the production of evidence, conduct hearings which afford due process of law, and make recommendations to the Supreme Court about what disciplinary action, if any, should be taken. In re Renfer, 345 N.C. 632, 482 S.E.2d 540 (1997).

The Commission can neither censure nor remove. It functions as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

The recommendations of the Commission are not binding upon the Supreme Court, which will consider the evidence on both sides and exercise its independent judgment as to whether it should censure, remove, or decline to do either. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

Applied in In re Greene, 306 N.C. 376, 297 S.E.2d 379 (1982).

Cited in In re Hayes, 353 N.C. 511, 546 S.E.2d 376, 2001 N.C. LEXIS 532 (2001); In re Hayes, 356 N.C. 389, 584 S.E.2d 260, 2002 N.C. LEXIS 1104 (2002).

§ 7A-376. Grounds for discipline by Commission; censure, suspension, or removal by the Supreme Court.

(a) The Commission, upon a determination that any judge has engaged in conduct that violates the North Carolina Code of Judicial Conduct as adopted by the Supreme Court but that is not of such a nature as would warrant a recommendation of censure, suspension, or removal, may issue to the judge a private letter of caution or may issue to the judge a public reprimand.

(b) Upon recommendation of the Commission, the Supreme Court may censure, suspend, or remove any judge for willful misconduct in office, willful and persistent failure to perform the judge's duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. A judge who is suspended for any of the foregoing reasons shall receive no compensation during the period of that suspension. A judge who is removed for any of the foregoing reasons shall receive no retirement compensation and is disqualified from holding further judicial office.

(c) Upon recommendation of the Commission, the Supreme Court may suspend, for a period of time the Supreme Court deems necessary, any judge for temporary physical or mental incapacity interfering with the performance of the judge's duties, and may remove any judge for physical or mental incapacity interfering with the performance of the judge's duties which is, or is likely to become, permanent. A judge who is suspended for temporary incapacity shall continue to receive compensation during the period of the suspension. A judge removed for mental or physical incapacity is entitled to retirement compensation if the judge has accumulated the years of creditable service required for incapacity or disability retirement under any provision of State law, but he shall not sit as an emergency justice or judge. (1971, c. 590, s. 1; 1979, c. 486, s. 2; 2006-187, s. 11.)

Cross References. — As to censure or removal of a justice of the Supreme Court, see G.S. 7A-378.

Effect of Amendments. — Session Laws 2006-187, s. 11, effective January 1, 2007, substituted "Grounds for discipline by Commission; censure, suspension, or removal by the Supreme Court" for "Grounds for censure or removal" in the section heading; and rewrote the section.

Legal Periodicals. — For note on the Judicial Standards Commission, see 54 N.C.L. Rev. 1074 (1976).

For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

For a survey of 1977 law on professional responsibility and the administration of justice, see 56 N.C.L. Rev. 871 (1978).

For a note discussing the power of the North Carolina Supreme Court to remove state judges in the context of In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978), see 14 Wake Forest L. Rev. 1187 (1978).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For article, "The Discipline and Removal of Judges in North Carolina," see 4 Campbell L. Rev. 1 (1981).

CASE NOTES

I. General Consideration.
II. Willful Misconduct.
III. Conduct Prejudicial to Administration of Justice.
IV. Illustrative Cases.
V. Censure and Removal.
VI. Disqualification from Office.
VII. Loss of Retirement Benefits.
VIII. Function of Commission.

I. GENERAL CONSIDERATION.

Terms Not Vague or Overbroad. — The phrases "willful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" are not unconstitutionally vague or overbroad. In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976).

Nor Too Nebulous or Subjective. — The phrases, "willful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" are no more nebulous or less objective than the reasonable and prudent man test which has been a part of State negligence law for centuries. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Due Process Requirements Are Met Under This Section. — An adjudication of guilt under this section meets the requirements of due process since the judge's misconduct must be proved by "clear and convincing evidence." In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

This Section and G.S. 7A-377 Are in Pari Materia. — The provisions of this section and G.S. 7A-377 are parts of the same enactment, relate to the same class of persons and are aimed at suppression of the same evil. The statutes are therefore in pari materia and must be construed accordingly. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

When this section and G.S. 7A-377 are read together properly, they provide that upon recommendation of the Judicial Standards Commission the Supreme Court may censure or remove any justice or judge, may approve or reject the recommendation of the Commission, or may remand the matter for further proceedings. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

This section and G.S. 7A-173 are not irreconcilably in conflict with G.S. 14-230. State v. Greer, 308 N.C. 515, 302 S.E.2d 774 (1983).

And the legislature did not intend to exempt magistrates from indictment and criminal prosecution under G.S. 14-230 when it included magistrates under the sanctions of G.S. 7A-173 and this section. Section 14-230 applies to misconduct in office unless another statute provides for the "indictment" of the officer, but neither G.S. 7A-173 nor this section provide for criminal charges to be brought against a magistrate who is guilty of misconduct in office. State v. Greer, 308 N.C. 515, 302 S.E.2d 774 (1983).

Proceeding Neither Civil Nor Criminal. — A proceeding instituted by the Judicial Standards Commission, like a removal proceeding under N.C. Const., Art. IV, § 4, is neither civil nor criminal in nature. A judge removed by impeachment or by the Supreme Court pursuant to the recommendation of the Commission may still be prosecuted in a criminal court. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Supreme Court Sits as Court of Original Jurisdiction. — In proceedings authorized by this section, the Supreme Court sits not as an appellate court but rather as a court of original jurisdiction. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

In proceedings pursuant to G.S. 7A-376, regarding censure or removal of a judge, the North Carolina Supreme Court acts as a court of original jurisdiction, rather than in its usual capacity as an appellate court. In re Brown, 356 N.C. 278, 570 S.E.2d 102, 2002 N.C. LEXIS 941 (2002).

Code of Judicial Conduct Is Guide. — The General Assembly intended the North Carolina Code of Judicial Conduct to be a guide to the meaning of this section. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Distinction Between Removal for Misconduct and for Mental or Physical Incapacity. — The sections of the North Carolina Constitution providing for the removal of judges by impeachment or joint resolution make a careful distinction between judges removed for misconduct and those removed for "mental or physical incapacity." In following the constitutional mandate to "prescribe a procedure in addition to impeachment and address," the legislature made the same distinction in this section. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Effect of Resignation of Judge. — The resignation of a district judge following the filing of a complaint against him by the Commission and service upon him of the verified complaint neither divested the Commission of jurisdiction over him nor rendered the question of his removal from office moot. It was immaterial that the judge, by reason of his resignation, was no longer a district court judge at the time the Commission filed its findings of fact and recommendation that he be removed from office. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Assuming that a judge's resignation has been or will be accepted by the Governor, but its effective date has not yet arrived, it does not deprive the Supreme Court of its jurisdiction over a proceeding for the removal of a judge for misconduct and conduct prejudicial to administration of justice. When a resignation specifies the time at which it will take effect, the resignation is not complete until that date arrives. Nor is the case rendered moot by the resignation. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Remedies Not Mooted by Resignation. — If this section limited the sanctions for willful misconduct in office to censure or removal, the resignation of a judge would render the proceedings moot. The statute, however, envisions not one but three remedies against a judge who engages in serious misconduct justifying his removal: loss of present office, disqualification from future judicial office, and loss of retirement benefits. Only the first of these is rendered moot by resignation. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Not every intemperate outburst of a judge, especially when it is an isolated, single event, occurring in the privacy of the judge's office and brought on by what the judge might reasonably have perceived to be some provocation, amounts to conduct deserving of discipline. In re Bullock, 324 N.C. 320, 377 S.E.2d 743 (1989).

Resignation Did Not Deprive Judicial Standards Committee of Jurisdiction over Question of Misconduct. — Fact that judge who had entered a plea of guilty to charge of felony possession of cocaine and possession of drug paraphernalia and marijuana tendered his resignation from his judicial office did not deprive the Judicial Standards Commission or Supreme Court of jurisdiction over question of whether his conduct was in violation of this section, where prior to the tender of his resignation, the Commission had notified him that formal proceedings had been instituted against him, and he had been served personally with that notice and a copy of the verified complaint specifying the charges against him; the issues raised in this disciplinary proceeding did not become moot by reason of the tender of his resignation. In re Sherrill, 328 N.C. 719, 403 S.E.2d 255 (1991).

Grounds for suspension or removal of a magistrate are the same as for a judge of the General Court of Justice. In re Kiser, 126 N.C. App. 206, 484 S.E.2d 441 (1997).

Applied in In re Greene, 306 N.C. 376, 297 S.E.2d 379 (1982); In re Hunt, 308 N.C. 328, 302 S.E.2d 235 (1983); In re Cornelius, 335 N.C. 198, 436 S.E.2d 836 (1993); In re Stephenson, 354 N.C. 201, 552 S.E.2d 137, 2001 N.C. LEXIS 939 (2001); In re Brown, 356 N.C. 278, 570 S.E.2d 102, 2002 N.C. LEXIS 941 (2002); In re Inquiry Concerning a Judge (Hill), 357 N.C. 559, 591 S.E.2d 859, 2003 N.C. LEXIS 1264 (2003).

Cited in In re Wright, 313 N.C. 495, 329 S.E.2d 668 (1985); In re Greene, 340 N.C. 251, 456 S.E.2d 516 (1995); In re Spivey, 345 N.C.

404, 480 S.E.2d 693 (1997); In re Kiser, 126 N.C. App. 206, 484 S.E.2d 441 (1997); In re Inquiry Concerning Judge Tucker, 348 N.C. 677, 501 S.E.2d 67 (1998); In re Hayes, 353 N.C. 511, 546 S.E.2d 376, 2001 N.C. LEXIS 532 (2001).

II. WILLFUL MISCONDUCT.

Willful Misconduct Defined. — Willful misconduct in office is improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly, and generally in bad faith. It is more than a mere error of judgment or an act of negligence. While the term would encompass conduct involving moral turpitude, dishonesty or corruption, these elements need not necessarily be present. In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976); In re Stuhl, 292 N.C. 379, 233 S.E.2d 562 (1977).

Willful misconduct in office is the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross unconcern for his conduct, and generally in bad faith. It involves more than an error of judgment or a mere lack of diligence. Necessarily, the term would encompass conduct involving moral turpitude, dishonesty or corruption, and also any knowing misuse of the office, whatever the motive. However, these elements are not necessary to a finding of bad faith. A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Conduct need not be criminal in order to constitute willful misconduct in office. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Willful Misconduct Not Limited to Time in Court. — Willful misconduct in office is not limited to the hours of the day when a judge is actually presiding over court, and thus a judicial official's duty to conduct himself in a manner befitting his professional office does not end at the courthouse door. In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981).

Sexual Activities Between Judge and Defendant. — The use of a judge's office to grant leniency or favors to a defendant because of sexual activities between a judge and a defendant is willful misconduct in office. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Guilty Plea for Possession of Cocaine and Marijuana Held Willful Misconduct. — Judge's conduct resulting in his entering a plea of guilty to all charges concerning possession of cocaine, marijuana and drug paraphernalia constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute, for which he should be removed and be disqualified from holding further judicial office and ineligible for retirement benefits. In re Sherrill, 328 N.C. 719, 403 S.E.2d 255 (1991).

III. CONDUCT PREJUDICIAL TO ADMINISTRATION OF JUSTICE.

Conduct Prejudicial to Administration of Justice That Brings Judicial Office into Disrepute Defined. — Conduct prejudicial to the administration of justice that brings the judicial office into disrepute has been defined as conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office. In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976); In re Stuhl, 292 N.C. 379, 233 S.E.2d 562 (1977).

Willful misconduct in office of necessity is conduct prejudicial to the administration of justice that brings the judicial office into disrepute. However, a judge may also, through negligence or ignorance not amounting to bad faith, behave in a manner prejudicial to the administration of justice so as to bring the judicial office into disrepute. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Conduct Rather Than Motives Is Determinative. — Whether the conduct of a judge may be characterized as prejudicial to the administration of justice which brings the judicial office into disrepute depends not so much upon the judge's motives but more on the conduct itself, the results thereof and the impact such conduct might reasonably have upon knowledgeable observers. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975); In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976); In re Stuhl, 292 N.C. 379, 233 S.E.2d 562 (1977).

Whether a judge receives any personal benefit from his conduct is wholly irrelevant to an inquiry into his conduct. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975); In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

The fact that a judge received no personal benefit, financial or otherwise, from his conduct does not preclude his conduct from being conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975); In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

The fact that a judge receives no personal benefit, financial or otherwise, from his improper handling of a case does not preclude his conduct from being prejudicial to the administration of justice. The determinative factors, aside from the conduct itself, are the results of the conduct and the impact it might reasonably have upon knowledgeable observers. In re

Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Prior Recusal Not Prejudicial. — Where judge had previously recused himself from a case and on rehearing denied oral motion to recuse himself, the conduct associated with the rulings and the manner in which they were conducted were not such that they would be, to an objective observer, prejudicial to the public esteem of the judicial office. In re Bullock, 336 N.C. 586, 444 S.E.2d 174 (1994).

Inexperience or Lack of Training No Excuse. — A trial judge cannot rely on his inexperience or lack of training to excuse acts which tend to bring the judicial office into disrepute. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

Private Indiscretions. — A judge may commit indiscretions, or worse, in his private life which bring the judicial office into disrepute. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Disposition of cases for reasons other than an honest appraisal of facts and law, as disclosed by the evidence presented, will amount to conduct prejudicial to the proper administration of justice. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975); In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979); In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

The ex parte disposition of a case by a judge for reasons other than an honest appraisal of the law and facts as disclosed by the evidence and the advocacy of both parties to the proceeding amounts to conduct prejudicial to the administration of justice which in due course will bring the judicial office into disrepute. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

Ex parte disposition of a criminal case out of court will amount to conduct prejudicial to the administration of justice. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Judge was censured for conduct prejudicial to the administration of justice where he failed to continue a bad check action and improperly issued an arrest order. In re Ammons, 344 N.C. 195, 473 S.E.2d 326 (1996).

Judge was censured for misconduct under circumstances in which the judge entered an ex parte order striking an earlier order that had been entered by a different district court judge that had found a party in contempt for failure to pay child support, and the judge did not deny that he entered the ex parte order without notice to the plaintiff and without taking evidence; the defendant in that case subsequently vanished, causing problems to the other party, who had obtained an order in her favor, and thus the judge engaged in conduct prejudicial to the administration of justice so as to bring his judicial office into disrepute regardless of his good intentions. In re Royster, 361 N.C. 560, 648 S.E.2d 837, 2007 N.C. LEXIS 809 (2007).

Conviction of Failure to File Federal Income Tax Returns. — Judge was removed from office based on his guilty plea to failure to file federal income tax returns because this conviction involved moral turpitude and conduct prejudicial to administration of justice that brought the judicial office into disrepute. In re Inquiry Concerning a Judge (Ballance), 361 N.C. 338, 643 S.E.2d 584, 2007 N.C. LEXIS 406 (2007).

IV. ILLUSTRATIVE CASES.

Gross Abuse of Motor Vehicle Statutes. — Judge's execution judgments allowing limited driving privileges under G.S. 20-179 upon a mere ex parte request without making any effort or conducting any inquiry to ascertain whether the facts recited in the judgments were true and whether he was lawfully entitled to enter the judgments and without giving the State an opportunity to be heard, when in truth the judgments were supported neither in fact nor in law and were beyond the judge's jurisdiction to enter, constituted a gross abuse of important provisions of the motor vehicle statutes and amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Judge's disposition of traffic cases out of court and without notice to the prosecuting attorney and in his absence constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in that he: (1) improperly deprived the district attorney of the opportunity to participate in their disposition; (2) improperly removed the proceedings from the public domain; and (3) violated the North Carolina Code of Judicial Conduct. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

The arbitrary dismissal of a case, after the district attorney had refused to take a nolle prosequi and without permitting the State to offer its evidence, was willful misconduct in office clearly calculated to bring the court into disrepute. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

Failure to Give Notice to Defense Counsel. — Where the only actual notice to defendant's counsel as to the time of a hearing at which judgment was entered against defendant was one hour before the trial judge began to receive evidence, this conduct did not afford the defendant or his counsel the full right to be heard according to law and was, in effect, a willful ex parte consideration of the proceeding without proper legal notice to defendant or his counsel. Such conduct constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

Disposition of Criminal Prosecution Without Notice to District Attorney. — A criminal prosecution is an adversary proceeding in which the district attorney, as an advocate of the State's interest, is entitled to be present and be heard. Any disposition of a criminal case without notice to the district attorney who was prosecuting the docket, when the matter was not on the printed calendar for disposition, improperly excludes the district attorney from participating in the disposition. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Signing Order for Delivery of Property Without Notice or Opportunity to Be Heard. — The conduct of a judge in signing an order for delivery of personal property without notice to defendant or his counsel and without giving opposing party or counsel an opportunity to be heard constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

Use or Retention of Money Received for Purpose of Paying Defendant's Fine. — If a judge is indiscreet enough to take money for the purpose of paying a defendant's fine and costs, he should forthwith pay it to the clerk of the court. Any use or retention of such funds, whether it be inadvertent, forgetful, or because the judge is short of cash and intends to apply the money eventually to the purpose for which it was received, if not criminal, is willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Sexual Advances to Female Defendants. — Evidence concerning respondent's behavior toward and with two female criminal defendants who had appeared before him was sufficient to support findings by the Judicial Standards Commission that the respondent's conduct constituted conduct prejudicial to the administration of justice that tended to bring the judicial office into disrepute where such evidence tended to show that respondent followed one defendant in his automobile, indicated that he wanted defendant to get into his car, discussed the pending criminal cases against her, and indicated his willingness to appoint an attorney for her in exchange for sexual favors; that respondent subsequently met this same defendant in a parking lot to discuss her situation, and during the course of the conversation made improper advances; and that respondent went uninvited to the home of the second defendant and there attempted to force himself upon the defendant. In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981).

Sexual Harassment of Court Personnel. — Where evidence supporting a deputy court clerk's charge against a judge for sexual harassment was equivocal and contradictory, the supreme court after de novo review held that the evidence was in equipoise; as clear and convincing proof that the judge assaulted the clerk was lacking, the matter was dismissed. In re Hayes, 356 N.C. 389, 584 S.E.2d 260, 2002 N.C. LEXIS 1104 (2002).

Because a judge sexually harassed a judicial assistant and a paralegal, pursuant to G.S. 7A-376, G.S. 7A-377, and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, the judge was censured for conduct prejudicial to the administration of justice and violation of the judge's oath of office under G.S. 7A-376, N.C. Code Jud. Conduct 1, N.C. Code Jud. Conduct 2(A), and N.C. Code Jud. Conduct 3(A)(3). In re Inquiry Concerning Daisy, 359 N.C. 622, 614 S.E.2d 529, 2005 N.C. LEXIS 636 (2005).

Judge was censured for refusing to recuse himself from a case in which the plaintiff was also the plaintiff in a pending suit against the judge since this created grounds for disqualification as the judge's impartiality could reasonably have been questioned; the findings of the Judicial Standards Commission that the judge's conduct violated N.C. Code Jud. Conduct 2A, 3C(1) were supported by the evidence and were adopted by the court. In re Inquiry Concerning a Judge (Braswell), 358 N.C. 721, 600 S.E.2d 849, 2004 N.C. LEXIS 914 (2004).

Presiding over Session Where Judge Himself Was to Appear as Defendant. — Evidence was sufficient to support the conclusion of the Judicial Standards Commission that respondent's conduct constituted conduct prejudicial to the administration of justice that tended to bring the judicial office into disrepute and to support its recommendation of censure where it tended to show that respondent was charged with failure to stop at a stop sign; that he was to appear in district court at a session over which he was scheduled to preside; that he knew that it would be improper to preside over that session; that he said nothing when his case was called; that he did not offer to recuse himself; and that the assistant district attorney, upon learning that respondent was the defendant, took a voluntary dismissal in the case. In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981).

Communication with Defendant and Landlord. — Where judge communicated with the defendant and his landlord to assist him in his determinations on the question of visitation arrangements concerning a minor child who was not represented by counsel, these actions did not rise to the level of those instances of conduct that have previously been determined to be prejudicial to the administration of justice. In re Bullock, 336 N.C. 586, 444 S.E.2d 174 (1994).

Convicting Defendants of Traffic Violations with Which They Were Not Charged. — The actions of respondent/judge constituted willful misconduct, were prejudicial to the administration of justice such that they brought the judicial office into disrepute, violated Canons 2A, 3A(1), and 3A(4) of the North Carolina Code of Judicial Conduct, and warranted censure where the respondent knowingly convicted one defendant of careless and reckless driving when he had not been charged with that offense and where respondent took the disposition of a second case outside of the courtroom and convicted that defendant, charged with DWI, of careless and reckless driving. In re a Judge, No. 238 Brown, 351 N.C. 601, 527 S.E.2d 651, 2000 N.C. LEXIS 353 (2000).

Conduct Held Willful Misconduct and Conduct Prejudicial to Administration of Justice. — A district court judge was guilty of willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute where: (1) He consistently and improperly precluded the district attorney from participating in the disposition of cases on which he was entitled to be heard in behalf of the State, and removed the disposition of cases from public view in open court by transacting the court's business in secrecy; (2) he dismissed cases without a trial, in the absence of the defendant, without the knowledge of the district attorney, and on a day when the cases were not calendared for trial; (3) he maintained a special file in three counties, caused the clerk to remove certain cases from the active criminal docket and to be held in the files until he directed otherwise, and in consequence these cases were not tried speedily or calendared and disposed of in open court in the normal course of business in the district courts of the respective counties; (4) from time to time he paid to the clerk money which he had collected from the defendants in cases which he disposed of in their absence; in two cases he received $27.00 from each of two defendants for the purpose of paying their fines and costs when he disposed of the case; he never "took care of the cases," never paid the fines and costs and never returned the money; in a third such case, he returned the $27.00 after keeping it for 11 months. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Conduct Held Prejudicial to Administration of Justice. — Former judge's conduct amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of this section where he (1) attempted an assignation with a woman convicted of prostitution and on probation, and gave the impression that he could assist her with her legal problems; (2) changed verdicts in motor vehicle violation cases upon ex parte communications from defendants without providing the State an opportunity to be heard; (3) made an inappropriate advance toward a woman detective; (4) made improper and potentially embarrassing and humiliating remarks to the victim in a criminal proceeding before the court and the victim's girl-friend; and (5) made what could be construed as implied threats to attorneys who were representing clients in cases heard by him or pending before his court. In re Hair, 324 N.C. 328, 377 S.E.2d 749 (1989).

Initiation by district court judge of a series of extensive ex parte communications with a law enforcement officer concerning the son of a friend who had been taken into custody for felonious breaking and entering, and concerning an automobile accident which resulted in charges being filed against the driver of a car in which the daughter of a friend was a passenger constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of this section. In re Martin, 340 N.C. 248, 456 S.E.2d 517 (1995).

Respondent judge was censured under this section and G.S. 7A-377 when he found defendant, who was pleading guilty, not guilty of a DWI charge, without hearing sworn testimony or according the State its full right to participate and be heard in the proceedings. In re Tucker, 350 N.C. 649, 516 S.E.2d 593 (1999).

Judge was removed from office for conduct which included, inter alia, falsely reporting to newspapers, the North Carolina State Bar, and the United States Department of Justice that certain lawyers and judges had conspired and tried to have her assassinated, had conspired to file false professional complaints against her, and had conspired to violate her civil rights; the judge also publicly discussed with a newspaper a pending custody case over which she had presided, and had allowed her election campaign to conduct an improper raffle. In re Inquiry Concerning a Judge (Harrison), 359 N.C. 415, 611 S.E.2d 834, 2005 N.C. LEXIS 459 (2005).

V. CENSURE AND REMOVAL.

Strict Guidelines as to Censure or Removal Not Desirable. — Strict guidelines for determining whether a judge or justice should be censured or removed should not be adopted, since each case should be decided upon its own facts. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978); In re Peoples, 296 N.C. 109, 250

S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Censure and removal are not to be regarded as punishment, but as the legal consequences attached to adjudged judicial misconduct or unfitness. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Any Conduct Prejudicial to Administration of Justice Warrants Censure. — Any act by a judge or justice which is prejudicial to the administration of justice and brings the judicial office into disrepute warrants censure. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978); In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

But Such Conduct Is Not as Serious as Willful Misconduct. — Conduct prejudicial to the administration of justice, unless knowingly and persistently repeated, is not per se as serious and reprehensible as willful misconduct in office, which is a constitutional ground for impeachment and disqualification for public office. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Removal Is Warranted Only for Willful Misconduct. — A careful distinction should henceforth be made between "willful misconduct in office" and "conduct prejudicial to the administration of justice." A judge should be removed from office and disqualified from holding further judicial office only for the more serious offense of willful misconduct in office. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

If a judge knowingly and willfully persists in indiscretions and misconduct which the Supreme Court has declared to be, or which under the circumstances he should know to be, acts which constitute willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute, he should be removed from office. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978); In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Where a judge's misconduct involves personal financial gain, moral turpitude or corruption, he should be removed from office. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978); In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Censure Proper. — Evidence supported the Judicial Standards Commission's decision to censure judge who declared counsel, who initiated preliminary investigation of her before the Judicial Standards Commission, persona non grata, thereby constituting conduct in violation of Canons 2A and 3A(3) of the Code of Judicial Conduct and this section. In re Bissell, 333 N.C. 766, 429 S.E.2d 731 (1993).

Where judge was publicly intoxicated, which resulted in his arrest and in a negotiated plea of nolo contendere to the criminal offense of trespass after warning, was again publicly intoxicated which resulted in his conviction of the criminal offense of indecent exposure, and the respondent refused, even after admitting psychological dependency, to abstain from the consumption of alcohol, he was censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Leonard, 339 N.C. 596, 453 S.E.2d 521 (1995).

Where judge requested that parties, including district attorney and defendant, meet and indicated his desire to have defendant served with arrest warrant immediately and proposed to conduct bond proceedings himself, he was properly censured for ex parte communications and voluntary injection of himself into a case not properly before him. In re Martin, 345 N.C. 167, 478 S.E.2d 186 (1996).

Although judge's willful misconduct warranted removal, the Judicial Standards Commission recommendation of censure was accepted by the court where judge acknowledged the wrongdoing, resigned from office, and agreed not to hold future judicial office in North Carolina. In re Renfer, 347 N.C. 382, 493 S.E.2d 434 (1997).

Where the judge stipulated to making inappropriate comments during a probation revocation and to making sarcastic comments to defense counsel and a witness in a criminal case, and where the judge stipulated that the conduct violated N.C. Code Jud. Conduct 1, 2A, 3A(2), 3A(3), the reviewing court, pursuant to G.S. 7A-376 and G.S. 7A-377 and N.C. Sup. Ct. Rev. Recomm. of Jud. Standards Comm'n R. 3, adopted findings that reflected the stipulations and censured the judge. In re Inquiry Concerning a Judge (Hill), 359 N.C. 308, 609 S.E.2d 221, 2005 N.C. LEXIS 199 (2005).

Censure Not Proper. — Judge who solicited and accepted a plea of guilty to a charge which was not a lesser included offense of the charged offense, but who then corrected his mistake when the error was called to his attention, was not censured. In re Fuller, 345 N.C. 157, 478 S.E.2d 641 (1996).

Recommendation of a censure of a judge was not appropriate for conduct that included the judge presiding at a hearing wherein the judge testified under oath and conducted and ruled on objections to counsel's and her own voir dire of witnesses. In re Inquiry Concerning a Judge (Brown), 358 N.C. 711, 599 S.E.2d 502, 2004 N.C. LEXIS 910 (2004).

VI. DISQUALIFICATION FROM OFFICE.

Provision for Disqualification from Office Within Power of Legislature. — An adjudication of "willful misconduct in office" by the Supreme Court in a proceeding instituted by the Judicial Standards Commission, in which the judge or justice involved has been accorded due process of law and his guilt established by "clear and convincing evidence," is equivalent to an adjudication of guilt of "malpractice in any office" as used in N.C. Const., Art. VI, § 8. Therefore, the legislature acted within its power when it made disqualification from judicial office a consequence of removal for willful misconduct under this section. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

When Judge May Be Disqualified from Future Office. — When a judge is removed for "mental or physical incapacity" upon the recommendation of the Judicial Standards Commission, the remedy allowed by statute is limited to removal from office. On the other hand, when a judge is removed for reasons other than incapacity, this section (like N.C. Const., Art. IV, § 17, which it was intended to supplement), provides for both removal and disqualification from future judicial office. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

VII. LOSS OF RETIREMENT BENEFITS.

Loss of Retirement Benefits Is Additional Sanction. — In addition to the sanctions which follow removal by impeachment (loss of office and disqualification to hold further judicial office), this section imposes an additional sanction, the loss of retirement benefits. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

The constitutional source for the remedy of loss of retirement benefits does not lie in the impeachment provisions of N.C. Const., Art. IV, § 4, but in N.C. Const., Art. IV, § 8, which gives the General Assembly the power to "provide by general law for the retirement of Justices and Judges." Under this power the General Assembly may condition retirement benefits upon good conduct in office. Thus, the General Assembly acted well within its constitutional authority when it provided in this section that a judge who is removed from office for cause other than mental or physical incapacity shall receive no retirement compensation. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Right to Recover Contributions to Retirement Fund. — Loss of retirement benefits as the result of the removal of a judge from office for cause other than mental or physical incapacity does not mean that the judge forfeits his right to recover the contributions which he paid into the fund. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

VIII. FUNCTION OF COMMISSION.

The Commission can neither censure nor remove a judge. It functions as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

The Commission can neither censure nor remove a judge. It is an administrative agency created as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable. To that end, it is authorized to investigate complaints, hear evidence, find facts, and make a recommendation thereon. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Focus of Inquiry for Commission. — Whether the conduct of a judge can fairly be characterized as "private" or "public" is not the inquiry that the Judicial Standards Commission needs to make; rather, the proper focus is on, among other things, the nature and type of conduct, the frequency of occurrences, the impact which knowledge of the conduct would likely have on the prevailing attitudes of the community, and whether the judge acted knowingly or with a reckless disregard for the high standards of the judicial office. In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981).

The recommendations of the Commission are not binding upon the Supreme Court, which will consider the evidence on both sides and exercise its independent judgment as to whether it should censure, remove or decline to do either. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978); In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978); In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Each case arising from the Commission is to be decided upon its own facts. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

§ 7A-377. Procedures.

(a) Any citizen of the State may file a written complaint with the Commission concerning the qualifications or conduct of any justice or judge of the General Court of Justice, and thereupon the Commission shall make such investigation as it deems necessary. The Commission may also make an investigation on its own motion. The Commission may issue process to compel the attendance of witnesses and the production of evidence, to administer oaths, and to punish for contempt. No justice or judge shall be recommended for censure, suspension, or removal unless he has been given a hearing affording due process of law.

(a1) Unless otherwise waived by the justice or judge involved, all papers filed with and proceedings before the Commission, including any investigation that the Commission may make, are confidential, and no person shall disclose information obtained from Commission proceedings or papers filed with or by the Commission, except as provided herein. Those papers are not subject to disclosure under Chapter 132 of the General Statutes.

(a2) Information submitted to the Commission or its staff, and testimony given in any proceeding before the Commission, shall be absolutely privileged, and no civil action predicated upon that information or testimony may be instituted against any complainant, witness, or his or her counsel.

(a3) If, after an investigation is completed, the Commission concludes that a letter of caution is appropriate, it shall issue to the judge a letter of caution in lieu of any further proceeding in the matter. The issuance of a letter of caution is confidential in accordance with subsection (a1) of this section.

(a4) If, after an investigation is completed, the Commission concludes that a public reprimand is appropriate, the judge shall be served with a copy of the proposed reprimand and shall be allowed 20 days within which to accept the reprimand or to reject it and demand, in writing, that disciplinary proceedings be instituted in accordance with subsection (a5) of this section. A public reprimand, when issued by the Commission and accepted by the respondent judge, is not confidential.

(a5) If, after an investigation is completed, the Commission concludes that disciplinary proceedings should be instituted, the notice and statement of charges filed by the Commission, along with the answer and all other pleadings, are not confidential. Disciplinary hearings ordered by the Commission are not confidential, and recommendations of the Commission to the Supreme Court, along with the record filed in support of such recommendations are not confidential. Testimony and other evidence presented to the Commission is privileged in any action for defamation. At least five members of the Commission must concur in any recommendation to censure, suspend, or remove any judge. A respondent who is recommended for censure, suspension, or removal is entitled to a copy of the proposed record to be filed with the Supreme Court, and if the respondent has objections to it, to have the record settled by the Commission's chair. The respondent is also entitled to present a brief and to argue the respondent's case, in person and through counsel, to the Supreme Court. A majority of the members of the Supreme Court voting must concur in any order of censure, suspension, or removal. The Supreme Court may approve the recommendation, remand for further proceedings, or reject the recommendation. A justice of the Supreme Court or a member of the Commission who is a judge is disqualified from acting in any case in which he is a respondent.

(b) Repealed by Session Laws 2006-187, s. 11, effective January 1, 2007.

(c) The Commission may issue advisory opinions to judges, in accordance with rules and procedures adopted by the Commission.

(d) The Commission has the same power as a trial court of the General Court of Justice to punish for contempt, or for refusal to obey lawful orders or process issued by the Commission. (1971, c. 590, s. 1; 1973, c. 808; 1989 (Reg. Sess., 1990), c. 995, s. 2; 1997-72, s. 2; 2006-187, s. 11.)

Effect of Amendments. — Session Laws 2006-187, s. 11, effective January 1, 2007, substituted "Procedures" for "Procedures; employment of executive secretary, special counsel or investigator" in the section heading; and rewrote the section.

Legal Periodicals. — For note on the Judicial Standards Commission, see 54 N.C.L. Rev. 1074 (1976).

For survey of 1977 law on professional responsibility and the administration of justice, see 56 N.C.L. Rev. 871 (1978).

For note discussing the power of the North Carolina Supreme Court to remove state judges in the context of In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978), see 14 Wake Forest L. Rev. 1187 (1978).

For article, "The Discipline and Removal of Judges in North Carolina," see 4 Campbell L. Rev. 1 (1981).

CASE NOTES

Commission's procedures are required to meet constitutional due process standards, since a judge's interest in continuing in public office is an individual interest of sufficient importance to warrant constitutional protection against deprivation. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Because of the severe impact which adverse findings by the Judicial Standards Commission and censure or removal by the Supreme Court may reasonably be expected to have upon the individual, fundamental fairness entitles the judge to a hearing which meets the basic requirements of due process. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Due Process Not Violated by Commission's Functions. — The combination of investigative and judicial functions in the Judicial Standards Commission does not violate a respondent's due process rights under either the federal or North Carolina Constitutions, since it is an administrative agency created as an arm of the court, and any alleged partiality of the Commission is cured by the final scrutiny of the Supreme Court. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Section 7A-376 in Pari Materia. — The provisions of this section and G.S. 7A-376 are parts of the same enactment, relate to the same class of persons, and are aimed at suppression of the same evil. The statutes are therefore in pari materia and must be construed accordingly. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

A proceeding begun before the Judicial Standards Commission is neither a civil nor a criminal action. Such a proceeding is merely an inquiry into the conduct of one exercising judicial power to determine whether he is unfit to hold a judgeship. Its aim is not to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

The function of the Commission is to conduct hearings upon complaints filed against judges and justices, to find facts and make recommendations so as to bring before the Supreme Court the questions of whether a judge or justice should be censured or removed in order to maintain proper administration of justice, public confidence in the judicial system and the honor and integrity of judges. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

Powers of Commission. — The Judicial Standards Commission is empowered by this section to investigate complaints, compel the attendance of witnesses and the production of evidence, conduct hearings which afford due process of law, and make recommendations to the Supreme Court about what disciplinary action, if any, should be taken. In re Renfer, 345 N.C. 632, 482 S.E.2d 540 (1997).

Article Does Not Vest Absolute Discretion in Commission. — There is no merit in the contention that this Article illegally vests unguided and absolute discretion in the Judicial Standards Commission to choose which complaints to investigate and what evidence it will accept. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

The quantum of proof required in proceedings before the Commission of this State is proof by clear and convincing evidence — a burden greater than that of proof of a preponderance of the evidence and less than that of proof beyond a reasonable doubt. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977); In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

The quantum of proof required to sustain the findings of the Commission is by clear and convincing evidence. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Each case arising from the Commission is to be decided upon its own facts. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

A written minority recommendation filed with the Judicial Standards Commission by one or more of its members is not confidential and should be filed with the State Supreme Court together with the Commission's recommendation. In re Bissell, 333 N.C. 766, 429 S.E.2d 731 (1993).

Findings as to Character and Credibility Not Required. — The Commission is not required to make findings concerning a respondent's character or credibility. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Ex Post Facto Doctrine Inapplicable. — The ex post facto doctrine applies only to criminal prosecutions. Judicial disciplinary proceedings are not criminal actions. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Evidence of Conduct That Would Be Grounds for Impeachment Prior to January 1, 1973. — The ex post facto doctrine does not prohibit the Commission from considering evidence of conduct by a judge that would constitute grounds for impeachment prior to January 1, 1973. The remedies provided by the establishment of the Commission on January 1, 1973, did not abolish removal proceedings by impeachment but are cumulative thereto. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Appointment of Attorney Employee of State Bar as Special Counsel. — The Judicial Standards Commission was authorized to appoint an attorney who was a full-time employee of the North Carolina State Bar as special counsel in a proceeding to investigate alleged misconduct by a district court judge. In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981).

The Commission can neither censure nor remove. It functions as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

The recommendations of the Commission are not binding upon the Supreme Court, which will consider the evidence on both sides and exercise its independent judgment as to whether it should censure, remove, or decline to do either. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978); In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Nature of Proceeding upon Recommendation of Commission. — A proceeding before the Supreme Court on the recommendation of the Judicial Standards Commission is neither criminal nor civil in nature, but is an inquiry into the conduct of a judicial officer, the purpose of which is not primarily to punish any individual, but to maintain due and proper administration of justice in our State's courts, public confidence in its judicial system and the honor and integrity of its judges. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

The scope of Supreme Court review in a judicial qualifications proceeding should be that of an independent evaluation of the evidence. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Court's Options in Disposing of Commission Recommendation. — When this section and G.S. 7A-376 are read together properly, they provide that upon recommendation of the Judicial Standards Commission the Supreme Court may censure or remove any justice or judge, may approve or reject the recommendation of the Commission, or may remand the matter for further proceedings. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

This section and G.S. 7A-376 authorize and empower the Supreme Court, unfettered in its adjudication by the recommendation of the Commission, to make the final judgement whether to censure, remove, remand for further proceedings or dismiss the proceeding. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

The Supreme Court is authorized and empowered to order the removal of a judge when the Judicial Standards Commission has only recommended that the judge be censured. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

Judge was censured for conduct prejudicial to the administration of justice, etc. where he failed to continue a bad check action and improperly issued an arrest order. In re Ammons, 344 N.C. 195, 473 S.E.2d 326 (1996).

Respondent judge was censured under this section and G.S. 7A-376 when he found defendant, who was pleading guilty, not guilty of a DWI charge, without hearing sworn testimony or according the State its full right to participate and be heard in the proceedings.

Because a judge sexually harassed a judicial assistant and a paralegal, pursuant to G.S. 7A-376, G.S. 7A-377, and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, the judge was censured for conduct prejudicial to the administration of justice and violation of the judge's oath of office under G.S. 7A-376, N.C. Code Jud. Conduct 1, N.C. Code Jud. Conduct 2(A), and N.C. Code Jud. Conduct 3(A)(3). In re Inquiry Concerning Daisy, 359 N.C. 622, 614 S.E.2d 529, 2005 N.C. LEXIS 636 (2005).

Censure Held Not Appropriate. — Recommendation of a censure of a judge was not appropriate for conduct that included the judge presiding at a hearing wherein the judge testified under oath and conducted and ruled on objections to counsel's and her own voir dire of witnesses. In re Inquiry Concerning a Judge (Brown), 358 N.C. 711, 599 S.E.2d 502, 2004 N.C. LEXIS 910 (2004).

Judge was censured for refusing to recuse himself from a case in which the plaintiff was also the plaintiff in a pending suit against the judge since this created grounds for disqualification as the judge's impartiality could reasonably have been questioned; the findings of the Judicial Standards Commission that the judge's conduct violated N.C. Code Jud. Conduct 2A, 3C(1) were supported by the evidence and were adopted by the court. In re Inquiry Concerning a Judge (Braswell), 358 N.C. 721, 600 S.E.2d 849, 2004 N.C. LEXIS 914 (2004).

Where the judge stipulated to making inappropriate comments during a probation revocation and to making sarcastic comments to defense counsel and a witness in a criminal case, and where the judge stipulated that the conduct violated N.C. Code Jud. Conduct 1, 2A, 3A(2), 3A(3), the reviewing court, pursuant to G.S. 7A-376 and G.S. 7A-377 and N.C. Sup. Ct. Rev. Recomm. of Jud. Standards Comm'n R. 3, adopted findings that reflected the stipulations and censured the judge. In re Inquiry Concerning a Judge (Hill), 359 N.C. 308, 609 S.E.2d 221, 2005 N.C. LEXIS 199 (2005).

Applied in In re a Judge, No. 238 Brown, 351 N.C. 601, 527 S.E.2d 651, 2000 N.C. LEXIS 353 (2000); In re Brown, 356 N.C. 278, 570 S.E.2d 102, 2002 N.C. LEXIS 941 (2002); In re Inquiry Concerning a Judge (Hill), 357 N.C. 559, 591 S.E.2d 859, 2003 N.C. LEXIS 1264 (2003).

Cited in In re Hair, 324 N.C. 328, 377 S.E.2d 749 (1989); In re Bullock, 336 N.C. 586, 444 S.E.2d 174 (1994); In re Greene, 340 N.C. 251, 456 S.E.2d 516 (1995); In re Martin, 340 N.C. 248, 456 S.E.2d 517 (1995); In re Fuller, 345 N.C. 157, 478 S.E.2d 641 (1996); In re Martin, 345 N.C. 167, 478 S.E.2d 186 (1996); In re Hayes, 353 N.C. 511, 546 S.E.2d 376, 2001 N.C. LEXIS 532 (2001); In re Stephenson, 354 N.C. 201, 552 S.E.2d 137, 2001 N.C. LEXIS 939 (2001); In re Hayes, 356 N.C. 389, 584 S.E.2d 260, 2002 N.C. LEXIS 1104 (2002); In re Royster, 361 N.C. 560, 648 S.E.2d 837, 2007 N.C. LEXIS 809 (2007).

OPINIONS OF ATTORNEY GENERAL

Confidentiality of Documents Concerning Individual Justices or Judges. — There is no statute exempting records pertaining to the development and adoption of rules of Judicial Standards Commission from the scope of the Public Records Act, G.S. 132-1 et seq., however, subsection (a) of this section specifically addresses the confidentiality of the Commission's documents concerning individual justices or judges; the event that triggers a change in the status of records from confidential to public is a decision by the Commission to institute formal proceedings against a justice or judge by the filing of a complaint, thus, a private admonition falls on the confidential side because it always precedes the filing of a complaint and in fact cannot be issued once the Commission files a complaint against a justice or judge.

§ 7A-378. Censure, suspension, or removal of justice of Supreme Court.

(a) The recommendation of the Judicial Standards Commission for censure, suspension, or removal of any justice of the Supreme Court for any grounds provided by G.S. 7A-376 shall be made to, and the record filed with, the Court of Appeals, which shall have and shall proceed under the same authority for censure, suspension, or removal of any justice as is granted to the Supreme Court under G.S. 7A-376 and G.S. 7A-377(a) for censure, suspension, or removal of any judge.

(b) The proceeding shall be heard by a panel of the Court of Appeals consisting of the Chief Judge, who shall be the presiding judge of the panel, and six other judges, the senior in service, excluding the judge who is chairman of the Commission. For good cause, a judge may be excused by a majority of the panel. If the Chief Judge is excused, the presiding judge shall be designated by a majority of the panel. The vacancy created by an excused judge shall be filled by the judge of the court who is next senior in service. (1979, c. 486, s. 1; 2006-187, s. 11.)

Effect of Amendments. — Session Laws 2006-187, s. 11, effective January 1, 2007, added "suspension," preceding "or removal" in the section heading and three times in subsection (a); in subsection (a), inserted "G.S." preceding "7A-377(a)"; and made a minor stylistic change in subsection (b).

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For article, "The Discipline and Removal of Judges in North Carolina," see 4 Campbell L. Rev. 1 (1981).

CASE NOTES

When Removal and Disqualification Is Proper. — A judge should be removed from office and disqualified from holding further judicial office only for the more serious offense of willful misconduct in office. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

§§ 7A-379 through 7A-399: Reserved for future codification purposes.

ARTICLE 31.

Judicial Council.

§§ 7A-400 through 7A-408: Repealed by Session Laws 1983, c. 774, s. 1.

Editor's Note. — Sections 7A-400 to 7A-408 were formerly G.S. 7-448 through 7-456. They were transferred to Article 31 by Session Laws 1971, c. 377, s. 1.1. Former G.S. 7A-400 and 7A-401, which were added by Session Laws 1965, c. 310, s. 1, and formerly constituted Article 30 of this Chapter, Transitional Matters, were repealed by Session Laws 1971, c. 377, s. 32.

ARTICLE 31A.

State Judicial Council.

§ 7A-409. Composition of State Judicial Council.

(a) The State Judicial Council shall consist of 18 members as follows:

(1) The Chief Justice, who chairs the Council;
(2) The Chief Judge of the Court of Appeals;
(3) A district attorney chosen by the Conference of District Attorneys;
(4) A public defender chosen by the public defenders;
(5) A superior court judge chosen by the Conference of Superior Court Judges;
(6) A district court judge chosen by the Conference of District Court Judges;
(7) A clerk of superior court chosen by the Association of Clerks of Superior Court of North Carolina;
(8) A magistrate appointed by the North Carolina Magistrates' Association;
(9) An attorney appointed by the Council of the State Bar;
(10) One attorney and one nonattorney appointed by the Chief Justice;
(11) One nonattorney and one attorney appointed by the Governor;
(12) One nonattorney and one attorney appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives;
(13) One nonattorney and one attorney appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate; and
(14) One member appointed by the Commission on Indigent Defense Services.

(b) The Chief Justice and the Chief Judge shall be members of the State Judicial Council during their terms in those judicial offices. The terms of the other members selected initially for the State Judicial Council shall be as follows:

(1) One year. — The district court judge, the attorney appointed upon the recommendation of the President Pro Tempore of the Senate, and the attorney appointed upon the recommendation of the Speaker of the House of Representatives.
(2) Two years. — The district attorney, the magistrate, the nonattorney appointed by the Governor, and the nonattorney appointed by the Chief Justice.
(3) Three years. — The public defender, the attorney appointed by the Council of the State Bar, the nonattorney appointed upon the recommendation of the President Pro Tempore of the Senate, and the nonattorney appointed upon the recommendation of the Speaker of the House of Representatives.
(4) Four years. — The superior court judge, the clerk of superior court, the attorney appointed by the Governor, the attorney appointed by the Chief Justice, and the member appointed by the Commission on Indigent Defense Services.

After these initial terms, the members of the State Judicial Council shall serve terms of four years. All terms of members shall begin on January 1 and end on December 31. No member may serve more than two consecutive full terms. Any vacancy on the Council shall be filled by a person appointed by the official or entity who appointed the person vacating the position.

(c) If an official or entity is authorized to appoint more than one member of the State Judicial Council, the members appointed by that official or entity must reside in different judicial districts.

(d) No incumbent member of the General Assembly or incumbent judicial official, other than the ones specifically identified by office in subsection (a) of this section, may serve on the State Judicial Council.

(e) The appointing authorities shall confer with each other and attempt to arrange their appointments so that the members of the State Judicial Council fairly represent each area of the State, both genders, and each major racial group. (1999-390, s. 1; 2001-96, s. 1.)

Editor's Note. — The numbers of this Article and this section were assigned by the Revisor of Statutes, the numbers in Session Laws 1999-390, s. 1, having been Article 7A and G.S. 7A-49.4, respectively.

Sections 7A-409 and 7A-410, of Article 31, had been reserved for future codification purposes by Session Laws 1983, c. 761, s. 152.

Session Laws 2001-96, s. 2, provided: "This act becomes effective July 1, 2001, and the term of the member added to the Judicial Council by this act begins on that date."

§ 7A-409.1. Duties of the State Judicial Council.

(a) The State Judicial Council shall:
(1) Study the judicial system and report periodically to the Chief Justice on its findings;
(2) Advise the Chief Justice on priorities for funding;
(3) Review and advise the Chief Justice on the budget prepared by the Director of the Administrative Office of the Courts for submission to the General Assembly;
(4) Study and recommend to the General Assembly the salaries of justices and judges;
(5) Recommend to the General Assembly changes in the expense allowances, benefits, and other compensation for judicial officials;
(6) Recommend the creation of judgeships; and
(7) Advise or assist the Chief Justice, as requested, on any other matter concerning the operation of the courts.

(b) The State Judicial Council, with the assistance of the Director of the Administrative Office of the Courts, shall recommend to the Chief Justice performance standards for all courts and all judicial officials and shall recommend procedures for periodic evaluation of the court system and individual judicial officials and employees. If these standards are implemented by the Chief Justice, the Director of the Administrative Office of the Courts shall inform each judicial official of the standards being used to evaluate that official's performance. If implemented, the evaluation of each judge shall include assessments from other judges, litigants, jurors, and attorneys, as well as a self-evaluation by the judge. Summaries of the evaluations of justices and judges shall be made available to the public, in a manner to be determined by the Council, but the data collected in producing the evaluations shall not be a public record.

(c) The State Judicial Council shall study and recommend guidelines for the assignment and management of cases, including the identification of different kinds of cases for different kinds of resolution. If the Chief Justice decides to implement these guidelines, the guidelines may provide that, except for good cause, each civil case subject to assignment to a trial judge should be directed first to an appropriate form of alternative dispute resolution. The guidelines may also provide for posttrial alternative dispute resolution before or as part of an appeal. The guidelines should not require absolute uniformity from district to district and should allow case management personnel within each district the flexibility to direct cases to the most appropriate means of resolution in that district.

(d) The State Judicial Council shall monitor the use of alternative dispute resolution throughout the court system and, with the assistance of the Director of the Administrative Office of the Courts and the Dispute Resolution Commission, evaluate the effectiveness of those programs.

(e) The State Judicial Council may recommend changes in the boundaries of the judicial districts or divisions.

(f) The State Judicial Council shall monitor the administration of justice and assess the effectiveness of the Judicial Branch in serving the public and to advise the Chief Justice and the General Assembly on changes needed to assist the General Court of Justice in better fulfilling its mission.

(g) The State Judicial Council shall report to the General Assembly and the Chief Justice no later than December 31, 2009, and no later than December 31 of every third year, regarding the implementation of S.L. 2006-184 and shall include in its report the statistics regarding inquiries and any recommendations for changes. The House of Representatives and the Senate shall refer the report of the State Judicial Council to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee and such other committees as the Speaker of the House of Representatives or the President Pro Tempore of the Senate shall deem appropriate, for their review. (1999-390, s. 1; 2006-184, s. 10.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1999-390, s. 1, having been G.S. 7A-49.5.

Session Laws 2006-184 enacted the North Carolina Inquiry Commission, Article 92 of Chapter 15A of the General Statutes of North Carolina.

Session Laws 2006-184, s. 10, effective August 3, 2006, and applicable to claims of factual innocence filed on or before December 31, 2010, was codified as subsection (g) of this section at the direction of the Revisor of Statutes.

§ 7A-409.2. Compensation of the State Judicial Council.

Members of the State Judicial Council who are not officers or employees of the State shall receive compensation and reimbursement for travel and subsistence expenses at the rates specified in G.S. 138-5. Members of the State

Judicial Council who are officers or employees of the State shall receive reimbursement for travel and subsistence expenses at the rate set out in G.S. 138-6. (1999-390, s. 1.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1999-390, s. 1, having been G.S. 7A-49.6.

Article 31B.

Declaration of Vacancy, Suspension of Salary.

§ 7A-410. Vacancy exists on disbarment.

When a judge of the district court, judge of the superior court, judge of the Court of Appeals, justice of the Supreme Court, or a district attorney is no longer authorized to practice law in the courts of this State, the Governor shall declare the office vacant. Prior to making such declaration, the Governor shall notify the justice, judge, or district attorney at least 10 days in advance of taking such action and shall afford the justice, judge, or district attorney the opportunity to be heard on the matter. For purposes of this Article, the term "no longer authorized to practice law" means that the person has been disbarred or suspended and all appeals under G.S. 84-28 have been exhausted. (2007-104, s. 1.)

Editor's Note. — Session Laws 2007-104, s. 3, made this Article effective June 21, 2007, and not applicable to persons elected to or serving in the capacity of justice or judge on or before January 1, 1981, that were not authorized to practice law at the time of their election or at the time they began serving in the capacity of justice or judge.

§ 7A-410.1. Suspension of salary.

When a justice, judge, or district attorney has been disbarred or suspended from the practice of law under G.S. 84-28 but the office has not been declared vacant under G.S. 7A-410, the salary of the justice, judge, or district attorney is suspended immediately. If the order of disbarment or suspension is reversed on appeal, the salary shall be paid retroactively from the date the salary was suspended. (2007-104, s. 1.)

Editor's Note. — Session Laws 2007-104, s. 3, provides: "This act is effective when it becomes law and does not apply to persons elected to or serving in the capacity of justice or judge on or before January 1, 1981, that were not authorized to practice law at the time of their election or at the time they began serving in the capacity of justice or judge."

SUBCHAPTER VIII. CONFERENCE OF DISTRICT ATTORNEYS.

Article 32.

Conference of District Attorneys.

§ 7A-411. Establishment and purpose.

There is created the Conference of District Attorneys of North Carolina, of which every district attorney in North Carolina is a member. The purpose of the Conference is to assist in improving the administration of justice in North

Carolina by coordinating the prosecution efforts of the various district attorneys, by assisting them in the administration of their offices, and by exercising the powers and performing the duties provided for in this Article. (1983, c. 761, s. 152.)

§ 7A-412. Annual meetings; organization; election of officers.

(a) Annual Meetings. — The Conference shall meet annually at a time and place selected by the President of the Conference.

(b) Election of Officers. — Officers of the Conference are a President, a President-elect, a Vice-president, and other officers from among its membership that the Conference may designate in its bylaws. Officers are elected for one-year terms at the annual Conference, and take office on July 1 immediately following their election.

(c) Executive Committee. — The Executive Committee of the Conference consists of the President, the President-elect, the Vice-president, and four other members of the Conference. One of these four members shall be the immediate past president if there is one and if he continues to be a member.

(d) Organization and Functioning; Bylaws. — The bylaws may provide for the organization and functioning of the Conference, including the powers and duties of its officers and committees. The bylaws shall state the number of members required to constitute a quorum at any meeting of the Conference or the Executive Committee. The bylaws shall set out the procedure for amending the bylaws.

(e) Calling Meetings; Duty to Attend. — The President or the Executive Committee may call a meeting of the Conference upon 10 days' notice to the members, except upon written waiver of notice signed by at least three-fourths of the members. A member should attend each meeting of the Conference and the Executive Committee of which he is given notice. Members are entitled to reimbursement for travel and subsistence expenses at the rate applicable to State employees. (1983, c. 761, s. 152.)

§ 7A-413. Powers of Conference.

(a) The Conference may:
- (1) Cooperate with citizens and other public and private agencies to promote the effective administration of criminal justice.
- (2) Assist prosecutors in the effective prosecution and trial of criminal offenses, and develop an advisory trial manual.
- (3) Develop advisory manuals to assist prosecutors in the organization and administration of their offices, case management, calendaring, case tracking, filing, and office procedures.
- (4) Cooperate with the Administrative Office of the Courts and the School of Government at the University of North Carolina at Chapel Hill concerning education and training programs for prosecutors and staff.

(b) The Conference may not adopt rules pursuant to Chapter 150B of the General Statutes. (1983, c. 761, s. 152; 1987, c. 827, s. 1; 2006-264, s. 29(b).)

Effect of Amendments. — Session Laws 2006-264, s. 29(b), effective August 27, 2006, substituted "School of Government at the University of North Carolina at Chapel Hill" for "Institute of Government" in subdivision (a)(4).

§ 7A-414. Executive Secretary; clerical support.

The Conference may employ an executive secretary and any necessary supporting staff to assist it in carrying out its duties. (1983, c. 761, s. 152.)

Articles 33 to 35.

§§ 7A-415 through 7A-449: Reserved for future codification purposes.

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

Article 36.

Entitlement of Indigent Persons Generally.

§ 7A-450. Indigency; definition; entitlement; determination; change of status.

(a) An indigent person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding enumerated in this Subchapter. An interpreter is a necessary expense as defined in Chapter 8B of the General Statutes for a deaf person who is entitled to counsel under this subsection.

(b) Whenever a person, under the standards and procedures set out in this Subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation. The professional relationship of counsel so provided to the indigent person he represents is the same as if counsel had been privately retained by the indigent person.

(b1) An indigent person indicted for murder may not be tried where the State is seeking the death penalty without an assistant counsel being appointed in a timely manner. If the indigent person is represented by the public defender's office, the requirement of an assistant counsel may be satisfied by the assignment to the case of an additional attorney from the public defender's staff.

(c) The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation.

(d) If, at any stage in the action or proceeding, a person previously determined to be indigent becomes financially able to secure legal representation and provide other necessary expenses of representation, he must inform the counsel appointed by the court to represent him of that fact. In such a case, that information is not included in the attorney client privilege, and counsel must promptly inform the court of that information. (1969, c. 1013, s. 1; 1981, c. 409, s. 2; c. 937, s. 3; 1985, c. 698, s. 22(a); 2000-144, s. 5.)

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B. As to representation by counsel of person affected by limited freedom of movement or access imposed due to terrorist incident, see G.S. 130A-475(b).

Legal Periodicals. — For comment on assigned counsel and public defender systems, see 49 N.C.L. Rev. 705 (1971).

For note on providing indigent criminal defendants state-paid investigators, see 13 Wake Forest L. Rev. 655 (1977).

For note on an indigent's constitutional right to a state-paid expert, see 16 Wake Forest L. Rev. 1031 (1980).

For survey of 1980 law on criminal procedure, see 59 N.C.L. Rev. 1140 (1981).

For note discussing failure to communicate and effective assistance of counsel in light of State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981), see 13 N.C. Cent. L.J. 101 (1981).

For survey of 1981 law on criminal procedure, see 60 N.C.L. Rev. 1302 (1982).

For note discussing defendant's due process right to a psychiatric expert, see 8 Campbell L. Rev. 323 (1986).

For note, "North Carolina County Jail Inmates' Right of Access to Courts," see 66 N.C.L. Rev. 583 (1988).

For note, "The Right to Appointment of Counsel for the Indigent Civil Contemnor Facing Incarceration for Failure to Pay Child Support — McBride v. McBride," 16 Campbell L. Rev. 127 (1994).

CASE NOTES

I. General Consideration.
II. Appointment of Counsel.
III. Appointment of Experts.
IV. Furnishing Transcripts.

I. GENERAL CONSIDERATION.

Legislative Intent. — This Article clearly manifests the legislative intent that every defendant in a criminal case, to the limit of his ability to do so, shall pay the cost of his defense. It is not the public policy of this State to subsidize any portion of a defendant's defense which he himself can pay. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972); State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The purpose of the statutory provision for appointment of counsel, at public expense, for indigent defendants is to put indigent defendants on an equality with affluent defendants in trials upon criminal charges. To deny or restrict the right of the indigent to waive counsel, i.e., to represent himself, while permitting the affluent defendant to exercise such right, has no reasonable relation to the objective of equal opportunity to prevail at the trial of the case. Such classification is beyond the power of the legislature. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Responsibility of State. — It is manifest that the State has the responsibility to provide an indigent defendant with the effective assistance of counsel and the other necessary resources which are incident to presenting a defense in a criminal prosecution. State v. McDowell, 301 N.C. 279, 271 S.E.2d 286 (1980), cert. denied, 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 220, rehearing denied, 451 U.S. 1012, 101 S. Ct. 2350, 68 L. Ed. 2d 865 (1981).

Who Is Indigent. — An indigent is not one who lacks sufficient funds over and above his homestead and personal property exemptions and his preexisting debts and obligations to pay the total costs of his defense from beginning to end. An indigent is one who does not have available, at the time they are required, adequate funds to pay a necessary cost of his defense. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

The court makes the final determination of indigency, and this may be determined or redetermined by the court at any stage of the proceeding at which the indigent is entitled to representation. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972).

Appointment of Counsel for Indigent Civil Contemnors. — Principles of due process embodied in the Fourteenth Amendment require that, absent the appointment of counsel, indigent civil contemnors may not be incarcerated for failure to pay child support arrearages. McBride v. McBride, 334 N.C. 124, 431 S.E.2d 14 (1993).

Effect of Accepting Counsel Obtained by Family. — Where, during a pretrial proceeding, defendant explicitly accepted an attorney obtained by his family as counsel of his own choosing, from this point on in the pretrial proceeding defendant was not an indigent within the meaning of subsection (a) of this section, as he had, through his family, secured private representation, and therefore he was not entitled to the appointment of assistant counsel. State v. McDowell, 329 N.C. 363, 407 S.E.2d 200 (1991).

Hiring Counsel Does Not Preclude Access to Funds for Other Purposes. — That defendant had sufficient resources to hire counsel does not in itself foreclose defendant's access to state funds for other necessary expenses of representation — including expert witnesses — if, in fact, defendant does not have sufficient funds to defray these expenses when the need for them arises. State v. Boyd, 332 N.C. 101, 418 S.E.2d 471 (1992).

Right to Counsel May Be Forfeited. — The defendant forfeited his right to counsel and the trial court did not err by requiring him to proceed pro se, without conducting an inquiry pursuant to G.S. 15A-1242, where he was twice appointed counsel as an indigent, each time releasing his appointed counsel and retaining private counsel; where defendant was disruptive in the courtroom on two occasions, refused to cooperate with his counsel and assaulted him, resulting in an additional month's delay in the trial. State v. Montgomery, 138 N.C. App. 521, 530 S.E.2d 66, 2000 N.C. App. LEXIS 640 (2000).

Applied in State v. Cradle, 13 N.C. App. 120, 185 S.E.2d 35 (1971); State v. Hairston, 280 N.C. 220, 185 S.E.2d 633 (1972); State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983); State v. Poindexter, 69 N.C. App. 691, 318 S.E.2d 329 (1984); State v. Vereen, 312 N.C. 499, 324 S.E.2d 250 (1985); State v. Barranco, 73 N.C. App. 502, 326 S.E.2d 903 (1985); State v. Seaberry, 97 N.C. App. 203, 388 S.E.2d 184 (1990); State v. Taylor, 327 N.C. 147, 393 S.E.2d 801 (1990); State v. Tucker, 329 N.C. 709, 407 S.E.2d 805 (1991); State v. Burke, 342 N.C. 113, 463 S.E.2d 212 (1995); State v. Sines, 158 N.C. App. 79, 579 S.E.2d 895, 2003 N.C. App. LEXIS 943 (2003), cert. denied, 357 N.C. 468, 587 S.E.2d 69 (2003).

Cited in State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971); State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977); State v. Sanders, 294 N.C. 337, 240 S.E.2d 788 (1978); State v. Phipps, 331 N.C. 427, 418 S.E.2d 178 (1992); State v. Boyd, 332 N.C. 101, 418 S.E.2d 471 (1992); State v. Allen, 112 N.C. App. 419, 435 S.E.2d 802 (1993); State v. Conner, 335 N.C. 618, 440 S.E.2d 826 (1994), cert. denied, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997); State v. Eason, 336 N.C. 730, 445 S.E.2d 917 (1994); State v. Frye, 341 N.C. 470, 461 S.E.2d 664 (1995); State v. Fullwood, 343 N.C. 725, 472 S.E.2d 883 (1996), cert. denied, 520 U.S. 1122, 117 S. Ct. 1260, 137 L. Ed. 2d 339 (1997); State v. Green, 124 N.C. App. 269, 477 S.E.2d 182 (1996), cert. denied and appeal denied, 345 N.C. 644, 483 S.E.2d 714 (1997), aff'd, 348 N.C. 588, 502 S.E.2d 819 (1998), cert. denied, 525 U.S. 1111, 119 S. Ct. 883, 142 L. Ed. 2d 783 (1999); State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000), cert. denied, 532 U.S. 949, 121 S. Ct. 1419, 149 L. Ed. 2d 360 (2001); State v. Hunt, 357 N.C. 257, 582 S.E.2d 593, 2003 N.C. LEXIS 746 (2003), cert. denied, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003); State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

II. APPOINTMENT OF COUNSEL.

In Action to Terminate Parental Rights, This Section Controls Over G.S. 1-288. — In a termination of parental rights action, G.S. 1-288 did not control the father's right to appointed counsel because G.S. 7A-450 dealt specifically with the determination of indigency of a termination of parental rights respondent seeking appointed counsel, and the more specific statute controlled. In re D.Q.W., 167 N.C. App. 38, 604 S.E.2d 675, 2004 N.C. App. LEXIS 2077 (2004).

Right to Counsel Attaches upon Determination of Indigency. — If a defendant is determined to be indigent, he is entitled to have counsel provided by the State to represent him during any critical stage of the action or proceeding. State v. Moses, 16 N.C. App. 174, 191 S.E.2d 368 (1972).

The requirement that the State furnish counsel to each defendant charged with a criminal offense beyond the class of petty misdemeanor is conditioned upon a showing of indigency and inability to procure counsel for that reason. State v. Turner, 283 N.C. 53, 194 S.E.2d 831 (1973).

Where a defendant is charged with a felony or a serious misdemeanor, it is the duty of the trial judge to (1) settle the question of indigency, and (2) if defendant is indigent, appoint counsel to represent him unless counsel is knowingly and understandingly waived. State v. Moses, 16 N.C. App. 174, 191 S.E.2d 368 (1972).

Indigent defendant does not have the right to a lawyer of his choice. State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982).

Nor to Both Attorney's Making Objections During the Testimony of Each Witness. — The trial court did not impermissibly infringe on defendant's statutory right to the assistance of two attorneys in a capital trial, as required by this section, by permitting only one of his attorneys to object during the prosecutor's direct examination of a witness. State v. Call, 353 N.C. 400, 545 S.E.2d 190, 2001 N.C. LEXIS 429 (2001), cert. denied, 534 U.S. 1046, 122 S. Ct. 628, 151 L. Ed. 2d 548 (2001), cert. denied, 357 N.C. 579, 589 S.E.2d 130 (2003).

Nor to Choose Who Will Deliver Closing Argument. — An indigent defendant represented by two lawyers does not have the right to require that the lawyer of his choice deliver the closing argument at his trial. State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982).

Determination of Right to More Than One Lawyer. — An indigent defendant's right to court-appointed counsel does not include the right to require the court to appoint more than one lawyer unless there is a clear showing that the first appointed counsel is not adequately representing the interests of the accused. In making that determination the legitimate interest that the State has in securing the best utilization of its legal resources must be considered along with the interests of the defendant. State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907, 100 S. Ct. 3050, 65 L. Ed. 2d 1137, rehearing denied, 448 U.S. 918, 101 S. Ct. 41, 65 L. Ed. 2d 1181 (1980); State v. McDowell, 301 N.C. 279, 271 S.E.2d 286 (1980), cert. denied, 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 220, rehearing denied, 451 U.S. 1012, 101 S. Ct. 2350, 68 L. Ed. 2d 865 (1981). But see now subsection (b1) of this section.

The appointment of additional counsel is a matter within the discretion of the trial judge and required only upon a showing by a defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981). But see now subsection (b1) of this section.

An indigent defendant's right to the appointment of additional counsel in capital cases is statutory, not constitutional. State v. Locklear, 322 N.C. 349, 368 S.E.2d 377 (1988).

Trial court erred in failing to appoint assistant counsel to defendant's retained counsel because assistant counsel, which could not be retained, fell within a "necessary expense" of capital defense, which the State needed to provide or defendant needed to waive. State v. Davis, 168 N.C. App. 321, 608 S.E.2d 74, 2005 N.C. App. LEXIS 256 (2005), cert. denied, 359 N.C. 412, 612 S.E.2d 324 (2005).

Trial court's denial of defendant's motion for the appointment of assistant counsel to assist sole practitioner did not constitute an abuse of discretion, where defendant presented no evidence to the trial court that would tend to establish, nor did the record disclose, that defendant's case was so factually or legally complex, or so plagued with other difficulties, as to require the appointment of assistant counsel to ensure defendant's right to a fair trial and an adequate defense. State v. Massey, 316 N.C. 558, 342 S.E.2d 811 (1986), decided under this section as it read prior to 1985 amendment adding subsection (b1).

Absences of Appointed Counsel During Trial. — A capital murder defendant's right to the assistance of two attorneys was not infringed by the absence of one of them at various times during trial, where no absence was longer than four minutes, one of the two attorneys was always present, and this section does not require that both attorneys be present at all times. State v. Thomas, 350 N.C. 315, 514 S.E.2d 486, 1999 N.C. App. LEXIS 246 (1999), cert. denied, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999).

Capital murder defendant's statutory right to the assistance of two counsel was not violated when on the final day of defendant's sentencing hearing, while evidence was being presented, one of defendant's two counsel, with defendant's consent, departed on a previously scheduled vacation. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, — U.S. —, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Appointment of Counsel Where Defendant Conducts Own Defense. — Defendant was not prejudiced in any respect by the appointment of counsel for the limited purpose of furnishing advice to him if so requested, even though defendant waived counsel and conducted his own defense. State v. Harper, 21 N.C. App. 30, 202 S.E.2d 795, cert. denied, 285 N.C. 375, 205 S.E.2d 100 (1974).

Absences of appointed counsel during trial on account of illness did not violate defendant's rights under this section, because he had two other attorneys present; the statute does not require that both appointed attorneys be involved in every aspect of a defendant's case. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Although a criminal defendant cannot be required to accept the services of court-appointed counsel, a criminal defendant cannot represent himself and, at the same time, accept the services of court-appointed counsel. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981).

Right Is Limited to Direct Appeals Taken as of Right. — This Article has generally been construed to limit the right to appointed counsel in criminal cases to direct appeals taken as of right, not discretionary appeals. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

Defendant Not Indigent at Time of Arrest and Interrogation. — The record affirmatively disclosed that at the time of his interrogation on the morning of his arrest defendant had funds, immediately available and adequate, with which to employ counsel to provide the legal advice he then needed. His ability to pay the costs of subsequent proceedings was not then a question. That was a matter to be determined when that question arose. The admissibility of defendant's statements to the officers was not, therefore, affected by this Article. The statements were competent evidence and defendant's assignments of error relating to their admission would be overruled. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

At the time of defendant's arrest, according to his sworn statement, he had $160 in the bank. The Supreme Court took judicial notice of the fact that for a fee of less than $160 defendant could have obtained counsel for the purpose of advising him with reference to the course of conduct which would serve his best interest at that time. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

The trial court erred in failing to determine defendant's indigency and to appoint counsel for him until after he had entered his plea and the jury had been selected, sworn and empaneled. State v. Moses, 16 N.C. App. 174, 191 S.E.2d 368 (1972).

The trial court erred in finding that defendant was not an indigent and in refusing to appoint counsel to represent her at her preliminary hearing on a felony charge where defendant's affidavit of indigency stated that she had no income, no money and no property except a 1958 automobile which was paid for, and that she had three children, an unemployed husband and owed $3,000, and where nothing in the record refuted or contradicted the import of defendant's affidavit of indigency. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 499 (1972).

In a prosecution for the capital crime of rape, the trial court erred in finding that defendant was not indigent and could employ counsel at the time he confessed and that he, therefore, could not invoke the former provision of G.S. 7A-457 that counsel could not be waived in a capital case, where the evidence before the court disclosed that when arrested defendant was earning $149.00 per month, that he had $5.00 in cash, an automobile on which $56.00 per month was due, and two bonds costing $18.75 each which were in his mother's possession, that his stepfather earned $9,000 per year and had a wife and eleven children other than defendant, and that any contribution the stepfather might make would have to be borrowed. State v. Wright, 281 N.C. 38, 187 S.E.2d 761 (1972).

The fact that the defendant was a painter capable of earning $60.00 per week when he was able to obtain work and that he had made little, if any, effort to secure counsel, either privately or by court appointment, was not sufficient to sustain a finding that he was not indigent at the time of trial, and, therefore, not entitled to a court-appointed attorney when it was requested at the trial. State v. Haire, 19 N.C. App. 89, 198 S.E.2d 31 (1973).

Once defendant accepted the services of properly retained counsel and consented to the withdrawal of appointed counsel, he was no longer indigent within the meaning of subsection (a). Retained counsel's general notice of appearance pursuant to G.S. 15A-143 meant counsel was required to represent him in the case through the entry of final judgment. State v. Richardson, 342 N.C. 772, 467 S.E.2d 685 (1996), cert. denied, 519 U.S. 890, 117 S. Ct. 229, 136 L. Ed. 2d 160 (1996).

Denial of counsel without evidence to support a finding of nonindigency entitles defendant to a new trial. State v. Haire, 19 N.C. App. 89, 198 S.E.2d 31 (1973).

Waiver of counsel may not be presumed from a silent record. State v. Moses, 16 N.C. App. 174, 191 S.E.2d 368 (1972).

Where the court is required in a pretrial proceeding in superior court to inform a defendant of his right to counsel, it must be done in substantially the same manner as at the first appearance in district court. State v. Williams, 65 N.C. App. 498, 309 S.E.2d 721 (1983).

Adequate Time for Appointed and Retained Counsel to Prepare. — Argument that the trial court erred by not acting ex mero motu to continue a hearing on certain pretrial motions in order to provide his court-appointed counsel adequate time to confer with retained counsel in preparation for the hearing was without merit, where retained counsel had been in the case for at least three and one-half months when the motions were heard, and there was no showing that either appointed or retained counsel was not fully prepared to argue defendant's motions. State v. Locklear, 322 N.C. 349, 368 S.E.2d 377 (1988).

Failure to Assert Rights Under Subsection (b1) Does Not Constitute Waiver. — Subsection (b1) of this section requires the trial court to appoint assistant counsel as a matter of course when an indigent is to be prosecuted in a capital case; it neither expressly nor impliedly places any responsibility on the defendant to ask for assistant counsel. State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988).

Subsection (b1) mandates appointment of assistant counsel "in a timely manner", which ensures under the particular circumstances of a case that both attorneys representing the indigent defendant have time to effectively prepare for trial; in most cases, that mandate would require appointment of assistant counsel as soon as practicable after indictment of the indigent defendant on a capital charge. State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988).

Although the appointment of assistant counsel required by G.S. 7A-450(b1) for an indigent person indicted for murder is not constitutionally required, counsel must be appointed in a timely manner. State v. Wilson, 354 N.C. 493, 556 S.E.2d 272, 2001 N.C. LEXIS 1236 (2001).

Failure to Make Timely Appointment as Prejudicial Error. — Failure to appoint additional counsel for the defendant in a timely manner violated the mandate of this section and was prejudicial error per se. State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988); State v. Brown, 325 N.C. 427, 383 S.E.2d 910 (1989).

III. APPOINTMENT OF EXPERTS.

Appointment of Experts Is Within Discretion of Trial Judge. — This section and the better reasoned decisions place the question of whether an expert should be appointed at State expense to assist an indigent defendant within the sound discretion of the trial judge. State v. Tatum, 291 N.C. 73, 229 S.E.2d

562 (1976); State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981); State v. Brown, 59 N.C. App. 411, 296 S.E.2d 839 (1982), cert. denied, 310 N.C. 155, 311 S.E.2d 294 (1984).

The appointment of experts to assist an indigent in his defense depends really upon the facts and circumstances of each case and lies, finally, within the discretion of the trial judge. State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977); State v. Alford, 298 N.C. 465, 259 S.E.2d 242 (1979); State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and cert. denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

The appointment of an expert for an indigent defendant is a matter addressed to the trial judge's discretion and such appointment should be made with caution. State v. Stokes, 308 N.C. 634, 304 S.E.2d 184 (1983).

The State has no constitutional duty to provide an expert witness to assist in the defense of an indigent. This is a question properly left within the sound discretion of the trial judge. State v. Watson, 310 N.C. 384, 312 S.E.2d 448 (1984).

The trial court has discretion to determine whether a defendant has made an adequate showing of particularized need, and in making its determination the trial court should consider all the facts and circumstances known to it at the time the motion for assistance is made. State v. Anderson, 350 N.C. 152, 513 S.E.2d 296, 1999 N.C. App. LEXIS 239 (1999), cert. denied, 528 U.S. 973, 120 S. Ct. 417, 145 L. Ed. 2d 326 (1999).

The trial court has authority to approve a fee for the service of an expert witness who testifies for an indigent person. State v. Anderson, 350 N.C. 152, 513 S.E.2d 296, 1999 N.C. App. LEXIS 239 (1999), cert. denied, 528 U.S. 973, 120 S. Ct. 417, 145 L. Ed. 2d 326 (1999).

As Is Appointment of Investigators. — The decision whether to provide a defendant with an investigator under the provisions of this section and G.S. 7A-454 is a matter within the discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion. State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981), overruled on other grounds, State v. Freeman, 314 N.C. 432, 333 S.E.2d 743 (1985).

The issue of whether a private investigator should be appointed at State expense to assist an indigent defendant rests within the sound discretion of the trial judge. State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985).

Whether investigative assistance is constitutionally mandated must be determined after consideration of the facts of the case; defendant must demonstrate that the State's failure to provide funds with which to hire an investigator substantially prejudiced his ability to obtain a fair trial. State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981), overruled on other grounds, State v. Freeman, 314 N.C. 432, 333 S.E.2d 743 (1985).

The appointment of an investigator as an expert witness should be made with caution and only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981); State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985); State v. Allen, 77 N.C. App. 142, 334 S.E.2d 410 (1985).

When Right to Investigator Arises. — This section has never been construed to extend to the employment of an investigator in the absence of a showing of a reasonable likelihood that such an investigator could discover evidence favorable to the defendant. State v. Montgomery, 291 N.C. 91, 229 S.E.2d 572 (1976); State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977).

Denial of a state-paid private investigator to an indigent defendant under subsection (b) of this section did not, ipso facto, constitute a denial of equal protection of the laws, notwithstanding that such investigators might be available to indigent defendants represented by public defenders under former G.S. 7A-468 and to pecunious defendants. State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977).

Subsection (b) of this section and G.S. 7A-454 require that private investigators or expert assistance be provided only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial. Neither the State nor the federal Constitution requires more. State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977); State v. Shook, 38 N.C. App. 465, 248 S.E.2d 425 (1978); State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981); State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981); State v. Allen, 77 N.C. App. 142, 334 S.E.2d 410 (1985), cert. denied, 316 N.C. 196, 341 S.E.2d 579 (1986).

An indigent defendant's constitutional and statutory right to a state appointed investigator arises only upon a showing by defendant that there is a reasonable likelihood that such an investigator would discover evidence which would materially assist defendant in the preparation of his defense. State v. Alford, 298 N.C. 465, 259 S.E.2d 242 (1979); State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980); State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and cert. denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

Where, in his motion for the hiring of a private investigator, the defendant alleged that the district attorney furnished him with information that there appeared to be a number of suspects in the initial investigation of the case, and at the hearing the defendant introduced a police report that an automobile which was not the vehicle he was driving was seen "speeding away" from the crime scene, this evidence arose only to the level of mere hope or suspicion that favorable evidence was available; thus, trial court did not err in denying defendant funds for a private investigator. State v. Barnes, 333 N.C. 666, 430 S.E.2d 223, cert. denied, 510 U.S. 946, 114 S. Ct. 387, 126 L. Ed. 2d 336 (1993).

Section 7A-454 and this section require that a private investigator be provided upon a showing by the defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help more likely than not the defendant will not receive a fair trial. State v. Fletcher, 125 N.C. App. 505, 481 S.E.2d 418 (1997), cert. denied, 346 N.C. 285, 487 S.E.2d 560 (1997), cert. denied, 522 U.S. 957, 118 S. Ct. 383, 139 L. Ed. 2d 299 (1997).

When Right to Expert Arises. — Defendant's constitutional and statutory right to a state-appointed expert arises only upon a showing that there is a reasonable likelihood that such an expert would discover evidence which would materially assist defendant in the preparation of his defense. There is no requirement that an indigent defendant be provided with investigative assistance merely upon the defendant's request. State v. Brown, 59 N.C. App. 411, 296 S.E.2d 839 (1982), cert. denied, 310 N.C. 155, 311 S.E.2d 294 (1984).

Expert assistance must be provided only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial. State v. Hefler, 60 N.C. App. 466, 299 S.E.2d 456 (1983), aff'd, 310 N.C. 135, 310 S.E.2d 310 (1984); State v. Stokes, 308 N.C. 634, 304 S.E.2d 184 (1983); State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985); State v. Bush, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

Expert assistance need only be provided by the State when the defendant can show that it is probable that he will not receive a fair trial without the requested assistance. State v. Craig, 308 N.C. 446, 302 S.E.2d 740, cert. denied, 464 U.S. 908, 104 S. Ct. 263, 78 L. Ed. 2d 247 (1983); 484 U.S. 887, 108 S. Ct. 42, 98 L. Ed. 2d 174 (1984).

Expert assistance need only be provided by the State when the defendant can show that it is probable that he will not receive a fair trial without the requested assistance, or upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense. Mere hope or suspicion that favorable evidence is available is not sufficient. State v. Watson, 310 N.C. 384, 312 S.E.2d 448 (1984).

A defendant's constitutional right to effective assistance of counsel does not require that the State furnish a defendant with a particular service simply because the service might be of some benefit to his defense. State v. Cauthen, 66 N.C. App. 630, 311 S.E.2d 649 (1984).

Subsection (b) of this section requires the appointment of expert assistance only upon a showing by the defendant that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it will materially assist him in the preparation of his defense. State v. Johnson, 317 N.C. 193, 344 S.E.2d 775 (1986).

There is no constitutional requirement that private investigators or experts always be made available, and subsection (b) of this section and G.S. 7A-454 require such assistance only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that the defendant will not receive a fair trial. State v. Newton, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

This section requires the appointment of expert assistance only upon a showing by the defendant that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it will materially assist him in the preparation of his defense. State v. Crandell, 322 N.C. 487, 369 S.E.2d 579 (1988).

Mere hope or suspicion that favorable evidence is available is not enough under the State or federal Constitutions to require that expert assistance or private investigators be provided to an indigent defendant. State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987), cert. denied, 522 U.S. 1126, 118 S. Ct. 1074, 140 L. Ed. 2d 132 (1998), cert. denied, 486 U.S. 1061, 108 S. Ct. 2835, 100 L. Ed. 2d 935 (1988); State v. McNeill, 349 N.C. 634, 509 S.E.2d 415, 1998 N.C. App. LEXIS 853 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 102, 145 L. Ed. 2d 87 (1999), cert. denied, 358 N.C. 548, 599 S.E.2d 911 (2004).

Burden is on defendant to show a reasonable likelihood that he will be deprived of a fundamentally fair trial without expert assistance at state expense. State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898, cert. denied, 484 U.S. 959, 108 S. Ct. 359, 98 L. Ed. 2d 384 (1987).

Defendant Must Make a Particularized Showing. — In order to be entitled to the appointment of experts at State expense or to the payment of such experts, defendant is required to make a particularized showing that

(1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that expert assistance would materially assist him in the preparation of his case. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988); State v. Anderson, 350 N.C. 152, 513 S.E.2d 296, 1999 N.C. App. LEXIS 239 (1999), cert. denied, 528 U.S. 973, 120 S. Ct. 417, 145 L. Ed. 2d 326 (1999).

To establish a particularized need for expert assistance, a defendant must show: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that the expert will materially assist him in the preparation of his case. State v. Page, 346 N.C. 689, 488 S.E.2d 225 (1997), cert. denied, 522 U.S. 1056, 118 S. Ct. 710, 139 L. Ed. 2d 651 (1998).

To make a threshold showing of specific need for the assistance of an expert, a defendant must demonstrate either that he will be deprived of a fair trial without expert assistance or that there is a reasonable likelihood that it will materially assist him in the preparation of his case. State v. Jones, 344 N.C. 722, 477 S.E.2d 147 (1996).

But Defendant Is Not Required to Affirmatively Discredit State's Witness as Threshold Requirement. — While the threshold showing of specific necessity for the appointment of a technical expert is not a light burden, it is not so severe as to require that a defendant affirmatively discredit the State's expert witness before gaining access to his own. State v. Moore, 321 N.C. 327, 364 S.E.2d 648 (1988).

Focus Is Upon What Was Before Trial Court. — The focus in determining whether the trial court erred in denying a defendant's request for expert assistance must be upon what was before the trial court at the time of the motions. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

In order to show a "particularized need" for the assistance of a fingerprint expert, defendant was not required to present a specific basis for questioning the accuracy of the State's determination that the print found at the scene of the offense matched a print taken from defendant. State v. Moore, 321 N.C. 327, 364 S.E.2d 648 (1988).

Psychiatrist Appointed to Assess Competency Held Insufficient. — Psychiatrist who was not appointed for the purpose of assisting defendant in preparation of his defense, but was appointed solely for the purpose of assessing defendant's competency to stand trial, did not satisfy the State's constitutional obligation to furnish defendant with a court-appointed psychiatrist. State v. Moore, 321 N.C. 327, 364 S.E.2d 648 (1988).

Refusal to Appoint Expert Upheld — Ballistics Expert. — In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, where the victim testified that she was shot at point-blank range, but defendant testified that he accidentally shot her when he picked up his shotgun in the den where he had placed it after a hunting trip and pulled the lever to see if it was loaded, and that he was some distance away from the victim when it discharged, the trial judge did not abuse his discretion in denying defendant's request for a medical expert and a ballistics expert. Defense counsel could educate himself on the likely effects of a point-blank gunshot to adequately cross-examine the State's witness. State v. Newton, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

Same — Investigator. — Defendant's mere general desire to search for possible evidence which might be of use in impeaching a key witness who provided evidence to support the elements of premeditation and deliberation in murder prosecution was not such a significant factor in the defendant's defense as to justify the appointment of an investigator. State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986).

Denial of funds for an investigator to interview witnesses was not error where, although defendant's primary language was Spanish, his counsel had no language handicap. State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898, cert. denied, 484 U.S. 959, 108 S. Ct. 359, 98 L. Ed. 2d 384 (1987).

General allegations that defendant's attorney did not have the time or expertise to conduct the investigation, that because witnesses might be reluctant to speak it would take a trained criminal investigator to conduct the investigation, and that without an expert criminal investigator defendant could not obtain an adequate defense and a fair trial, amounted to little more than undeveloped assertions that the requested assistance would be beneficial; thus defendant failed to make the requisite threshold showing of specific necessity, and the trial court did not abuse its discretion in denying the appointment of an investigator. State v. Locklear, 322 N.C. 349, 368 S.E.2d 377 (1988).

Where defendant broadly stated that the case was complicated and involved a large number of witnesses, he failed to point to any evidence that might have been obtained by a private investigator and been beneficial to his defense. Mere hope or suspicion that such evidence is available will not suffice. That alone was not enough to require the appointment of additional assistance. State v. Crandell, 322 N.C. 487, 369 S.E.2d 579 (1988).

The prohibition of the surveillance of rape victim by a private investigator did not impose an arbitrary barrier, nor a violation of defendant's right to equal protection of the law. State

v. Fletcher, 125 N.C. App. 505, 481 S.E.2d 418 (1997), cert. denied, 346 N.C. 285, 487 S.E.2d 560 (1997), cert. denied, 522 U.S. 957, 118 S. Ct. 383, 139 L. Ed. 2d 299 (1997).

Same — Medical Expert. — The trial court did not err in denying defendant's motion to appoint a medical expert to assist in the preparation of his defense in a first-degree murder by poisoning case, where defendant failed to set out any facts evidencing a specific or particularized need for a medical expert. State v. Johnson, 317 N.C. 193, 344 S.E.2d 775 (1986).

Same — Optometrist. — The trial court's denial of the defendant's motion for the state-funded services of an optometrist to demonstrate that he could not read his rights waiver form at the time he signed it because he was not wearing glasses was supported by the evidence. State v. Cummings, 353 N.C. 281, 543 S.E.2d 844, 2001 N.C. LEXIS 279 (2001).

Trial court's denial of defendant's motions, alleging a question as to the cause of death, for the appointment of a pathologist or other medical expert was not error where, although the defendant arguably made a threshold showing of a specific necessity for the assistance of such experts, he was provided with a copy of the autopsy report, and also had available and used ample medical expertise (including the favorable testimony of the two specialists) in preparing and presenting his defense. State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986).

Same — Psychiatrist. — Where defendant was convicted of statutory rape and first-degree sexual offense, and where defendant had argued in his affidavit that the appointment of a psychiatrist would assist the defendant in evaluating, preparing, and presenting his defense, trial court did not err in denying the defendant's motion for appointment of a psychiatrist since defendant offered little more than undeveloped assertions that the requested assistance would be beneficial. State v. Freeman, 93 N.C. App. 380, 378 S.E.2d 545, cert. denied, 325 N.C. 229, 381 S.E.2d 787 (1989).

Trial court did not abuse its discretion in denying the defendant's ex parte motion that a doctor be appointed as an expert on substance induced mood disorder because in that the defendant did not meet his burden of showing particularized need or a reasonable likelihood that the doctor could have materially assisted him in the preparation of his case. Further, the trial court had already appointed a psychologist for defendant. State v. Brown, 357 N.C. 382, 584 S.E.2d 278, 2003 N.C. LEXIS 834 (2003), cert. denied, 540 U.S. 1194, 124 S. Ct. 1447, 158 L. Ed. 2d 106 (2004).

Same — Mental Health Care Provider. — Where a mother in a proceeding to terminate her parental rights failed to demonstrate how the diagnosis and records of a new mental health care provider would materially assist her in her trial preparation and she was unable to demonstrate how she was deprived of a fair trial without the requested expert assistance, the trial court did not abuse its discretion in denying the mother's request for expenses related to expert witness fees. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

Same — Crime Scene Expert. — Defendant failed to show a need for a crime scene expert, where the defendant contended that all the evidence was contained in a grocery store (where murders took place) and that the evidence was circumstantial. State v. McNeill, 349 N.C. 634, 509 S.E.2d 415, 1998 N.C. App. LEXIS 853 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 102, 145 L. Ed. 2d 87 (1999), cert. denied, 358 N.C. 548, 599 S.E.2d 911 (2004).

Indigent defendant was not prejudiced by the denial of his request for funds to hire a psychiatrist or a psychologist, a forensic pathologist, a firearms and ballistics expert, and a behavioral pharmacologist. State v. Sokolowski, 344 N.C. 428, 474 S.E.2d 333 (1996).

Trial court's authorization of $250 for employment of an expert witness in the field of textile science, rather than the $500 which defendant in capital murder case had sought, did not constitute error where, in any event, defendant failed to make the requisite showing of specific need for any more funds. State v. Coffey, 326 N.C. 268, 389 S.E.2d 48, 1990 N.C. LEXIS 119 (1990), cert. denied, 421 S.E.2d 360 (1992).

As the statutory plan established in this section and § 7A-454 and the plan of former § 7A-468 for State provision of investigative or expert assistance were substantially equivalent, and there was no real distinction between indigent defendants represented by a public defender and those with court-appointed counsel with respect to the availability of state-provided investigative assistance, denial of defendant's motion for the appointment of an investigator did not violate his constitutionally guaranteed rights to equal protection of the laws. State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976).

Psychiatric Examination Two and One-Half Years After Incident. — It was within the exercise of his discretion for the court to find that a psychiatric examination two and one-half years after shooting incident would not materially assist the indigent defendant in showing his mental condition at the time of the incident. State v. Shook, 38 N.C. App. 465, 248 S.E.2d 425 (1978).

An indigent defendant does not have the same right to a second medical expert as a defendant who can afford to hire one. State v. Cauthen, 66 N.C. App. 630, 311 S.E.2d 649 (1984).

A second expert opinion is necessary only when substantial prejudice will result from the denial of fees. State v. Cauthen, 66 N.C. App. 630, 311 S.E.2d 649 (1984).

Additional Psychiatric Evaluation. — Where there was no evidence presented in the motion to have a court appointed psychiatrist under this section, or at the hearing on the motion to support even a suspicion, much less a reasonable likelihood, that defendant could establish a meritorious defense of insanity, the court's refusal to require the state to pay for an additional psychiatric evaluation was not error. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

There is no violation of an indigent defendant's constitutional rights to due process and equal protection by the trial court's refusal to appoint an additional psychiatric expert where the State has provided competent psychiatric assistance. State v. Bush, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

Where defendant failed to show a particularized need for jury selection expert, the trial judge did not abuse his discretion in denying the appointment of a juristic psychologist. State v. Artis, 316 N.C. 507, 342 S.E.2d 847 (1986).

Refusal to Appoint Expert Held Error — Psychiatrist. — The trial court's denial of defendant's pretrial motion for the appointment of a psychiatrist to assist in his defense was error where, under all the facts and circumstances known to the court at the time the motion for psychiatric assistance was made, defendant had demonstrated that his sanity when the offense was committed would likely be a significant factor at trial. State v. Gambrell, 318 N.C. 249, 347 S.E.2d 390 (1986).

Defendant, convicted of first degree sexual offense, had a particularized need for the assistance of a psychiatrist in the preparation of his defense, where the credibility of his confession was pivotal in the State's case against him, since the victim could not identify her assailant and there was little other evidence linking defendant to the crime, and where defendant had an I.Q. of 51 and demonstrated that he was easily led and influenced by those in authority. State v. Moore, 321 N.C. 327, 364 S.E.2d 648 (1988).

Same — Fingerprint Expert. — Defendant made the requisite threshold showing of specific necessity for a fingerprint expert where he showed that absent a fingerprint expert he would be unable to adequately assess the State's expert's conclusion that defendant's palm print, the one item of hard evidence implicating him in the crimes charged, was found at the scene of the attack, that because the victim could not identify her assailant, this testimony by the State's expert was crucial to the state's ability to identify defendant as the perpetrator of the crimes charged against him, and moreover, that due to his mental retardation, he had extremely limited communication and reasoning abilities, and thus could provide defense counsel with little assistance in making a defense. State v. Moore, 321 N.C. 327, 364 S.E.2d 648 (1988).

IV. FURNISHING TRANSCRIPTS.

An indigent appellant is entitled to receive a copy of the trial transcript at State expense in order to perfect an appeal. State v. Rich, 13 N.C. App. 60, 185 S.E.2d 288 (1971), appeal dismissed, 280 N.C. 304, 186 S.E.2d 179 (1972).

Test for Determining Right to Free Transcript. — A free transcript need not always be provided. Instead, availability is determined by the trial court through the implementation of a two-step process which examines (1) whether a transcript is necessary for preparing an effective defense, and (2) whether there are alternative devices available to the defendant which are substantially equivalent to a transcript. If the trial court finds there is either no need of a transcript for an effective defense or there is an available alternative which is substantially equivalent to a transcript, one need not be provided and denial of such a request would not be prejudicial. State v. Rankin, 306 N.C. 712, 295 S.E.2d 416 (1982).

Indigents are to be provided free transcripts of prior proceedings if the trial court determines it necessary for an effective defense or appeal. This determination by the trial court requires a consideration of two factors: (1) the value of the transcript to the defendant in connection with the matters for which it is sought, and (2) whether alternative devices are available which are substantially equivalent to a transcript. State v. Jackson, 59 N.C. App. 615, 297 S.E.2d 610 (1982).

Denial of Free Transcript Where Second Trial Not Yet Scheduled. — In a case where the second trial has not even been rescheduled, denial of an indigent defendant's motion for a free transcript of the record as being untimely is improper because such a holding could only have been based on speculation. State v. Rankin, 306 N.C. 712, 295 S.E.2d 416 (1982).

Burden of Proving Inadequacy of Alternatives to Transcript. — A defendant who claims the right to a free transcript does not bear the burden of proving inadequate such alternatives as may be suggested by the State or conjured up by a court in hindsight. Britt v. North Carolina, 404 U.S. 226, 92 S. Ct. 431, 30 L. Ed. 2d 400 (1971).

An indigent defendant was not entitled, as a matter of right, to a daily transcript of his trial. State v. Rich, 13 N.C. App. 60, 185 S.E.2d 288 (1971), appeal dismissed, 280 N.C.

304, 186 S.E.2d 179 (1972).

There was no deprivation of a substantial constitutional right by denial of an indigent defendant's motion that he be provided a daily transcript of the testimony during the trial where defendant could not show that he would be deprived of an opportunity to receive adequate review. State v. Rich, 13 N.C. App. 60, 185 S.E.2d 288 (1971), appeal dismissed, 280 N.C. 304, 186 S.E.2d 179 (1972).

A daily transcript is not a necessary expense of representation which the State is required to provide an indigent defendant under this section. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

Substantially Equivalent Alternative to Transcript. — Where the trials of a case took place in a small town, and according to defendant's counsel the court reporter was a good friend of all the local lawyers and was reporting the second trial, and it appeared that the reporter would at any time have read back to counsel his notes of the mistrial well in advance of the second trial if counsel had simply made an informal request, the defendant could have obtained from the court reporter far more assistance than that available to the ordinary defendant, and consequently he had available an informal alternative which appeared to be substantially equivalent to a transcript. Thus, the State court properly determined that the mistrial transcript requested was not needed for a proper defense. Britt v. North Carolina, 404 U.S. 226, 92 S. Ct. 431, 30 L. Ed. 2d 400 (1971).

Failure to comply with the requirement of this section to provide defendant with a complete transcript of his proceedings, as a result of a mechanical malfunction, did not entitle the defendant to any relief because the state's narrative constituted an available alternative that was "substantially equivalent" to the complete transcript, as demonstrated by the testimony of two witnesses that the narrative accurately summarized their testimony at trial. State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807, 2000 N.C. LEXIS 441 (2000).

Reimbursement of Juvenile's Attorney for Preparation of Transcript. — As juvenile appellant was entitled to transcript at State expense, her attorney was entitled to be reimbursed for his reasonable expenses in having the transcript prepared. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

§ 7A-450.1. Responsibility for payment by certain fiduciaries.

It is the intent of the General Assembly that, whenever possible, if an attorney or guardian ad litem is appointed pursuant to G.S. 7A-451 for a person who is less than 18 years old or who is at least 18 years old but remains dependent on and domiciled with a parent or guardian, the parent, guardian, or any trustee in possession of funds or property for the benefit of the person, shall reimburse the State for the attorney or guardian ad litem fees, pursuant to the procedures established in G.S. 7A-450.2 and G.S. 7A-450.3. This section shall not apply in any case in which the person for whom an attorney or guardian ad litem is appointed prevails. (1983, c. 726, s. 1; 1991 (Reg. Sess., 1992), c. 1030, s. 2.)

§ 7A-450.2. Determination of fiduciaries at indigency determination; summons; service of process.

At the same time as a person who is less than 18 years old or who is at least 18 years old but remains dependent on and domiciled with a parent or guardian is determined to be indigent, and has an attorney or guardian ad litem appointed pursuant to G.S. 7A-451, the court shall determine the identity and address of the parent, guardian or any trustee in possession of funds or property for the benefit of the person. The court shall issue a summons to the parent, guardian or trustee to be present at the dispositional hearing or the sentencing hearing or other appropriate hearing and to be a party to these hearings for the purpose of being determined responsible for reimbursing the State for the person's attorney or guardian ad litem fees, or to show cause why he should not be held responsible.

Both the issuance of the summons and the service of process shall be pursuant to G.S. 1A-1, Rule 4. (1983, c. 726, s. 1.)

§ 7A-450.3. Determination of responsibility at hearing.

At the dispositional, sentencing or other hearing of the person who is less than 18 years old or who is at least 18 years old but remains dependent on and domiciled with a parent or guardian, the court shall make a determination whether the parent, guardian or trustee should be held responsible for reimbursing the State for the person's attorney or guardian ad litem fees. This determination shall include the financial situation of the parent, guardian or trustee, the relationship of responsibility the parent, guardian or trustee bears to the person and any showings by the parent, guardian or trustee that the person is emancipated or not dependent. The test of the party's financial ability to pay is the test applied to appointment of an attorney in cases of indigency. Any provision of any deed, trust or other writing, which, if enforced, would defeat the intent or purpose of this section is contrary to the public policy of this State and is void insofar as it may apply to prohibit reimbursement to the State.

If the court determines that the parent, guardian or trustee is responsible for reimbursing the State for the attorney or guardian ad litem fees, the court shall so order. If the party does not comply with the order at the time of disposition, the court shall file a judgment against him for the amount due the State. (1983, c. 726, s. 1; 2005-254, s. 3.)

Editor's Note. — The last paragraph, as amended by Session Laws 2005-254, s. 3, effective October 1, 2005, is applicable to the appointment of counsel on or after that date.

§ 7A-450.4. Exemptions.

General Statutes 7A-450.1, 7A-450.2 and 7A-450.3 do not authorize the court to require the Department of Health and Human Services or any county Department of Social Services to reimburse the State for fees. (1983, c. 726, s. 1; 1997-443, s. 11A.118(a).)

§ 7A-451. Scope of entitlement.

(a) An indigent person is entitled to services of counsel in the following actions and proceedings:

(1) Any case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged;

(2) A hearing on a petition for a writ of habeas corpus under Chapter 17 of the General Statutes;

(3) A motion for appropriate relief under Chapter 15A of the General Statutes if the defendant has been convicted of a felony, has been fined five hundred dollars ($500.00) or more, or has been sentenced to a term of imprisonment;

(4) A hearing for revocation of probation;

(5) A hearing in which extradition to another state is sought;

(6) A proceeding for an inpatient involuntary commitment to a facility under Part 7 of Article 5 of Chapter 122C of the General Statutes, or a proceeding for commitment under Part 8 of Article 5 of Chapter 122C of the General Statutes.

(7) In any case of execution against the person under Chapter 1, Article 28 of the General Statutes, and in any civil arrest and bail proceeding under Chapter 1, Article 34, of the General Statutes;

(8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible;

(9) A hearing for revocation of parole at which the right to counsel is provided in accordance with the provisions of Chapter 148, Article 4, of the General Statutes;

(10) Repealed by Session Laws 2003, c. 13, s. 2(a), effective April 17, 2003, and applicable to all petitions for sterilization pending and orders authorizing sterilization that have not been executed as of April 17, 2003.

(11) A proceeding for the provision of protective services according to Chapter 108A, Article 6 of the General Statutes;

(12) In the case of a juvenile alleged to be abused, neglected, or dependent under Subchapter I of Chapter 7B of the General Statutes;

(13) A proceeding to find a person incompetent under Subchapter I of Chapter 35A, of the General Statutes;

(14) A proceeding to terminate parental rights where a guardian ad litem is appointed pursuant to G.S. 7B-1101;

(15) An action brought pursuant to Article 11 of Chapter 7B of the General Statutes to terminate an indigent person's parental rights.

(16) A proceeding involving consent for an abortion on an unemancipated minor pursuant to Article 1A, Part 2 of Chapter 90 of the General Statutes. G.S. 7A-450.1, 7A-450.2, and 7A-450.3 shall not apply to this proceeding.

(17) A proceeding involving limitation on freedom of movement or access pursuant to G.S. 130A-475 or G.S. 130A-145.

(b) In each of the actions and proceedings enumerated in subsection (a) of this section, entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process. Entitlement continues through any critical stage of the action or proceeding, including, if applicable:

(1) An in-custody interrogation;

(2) A pretrial identification procedure which occurs after formal charges have been preferred and at which the presence of the indigent is required;

(3) A hearing for the reduction of bail, or to fix bail if bail has been earlier denied;

(4) A probable cause hearing;

(5) Trial and sentencing;

(6) Review of any judgment or decree pursuant to G.S. 7A-27, 7A-30(1), 7A-30(2), and Subchapter XIV of Chapter 15A of the General Statutes;

(7) In a capital case in which a defendant is under a sentence of death, subject to rules adopted by the Office of Indigent Defense Services, review of any judgment or decree rendered on direct appeal by the Supreme Court of North Carolina pursuant to the certiorari jurisdiction of the United States Supreme Court; and

(8) In a noncapital case, subject to rules adopted by the Office of Indigent Defense Services, review of any judgment or decree rendered on direct appeal by a court of the North Carolina Appellate Division pursuant to the certiorari jurisdiction of the United States Supreme Court, when the judgment or decree:

  a. Decides an important question of federal law in a way that conflicts with relevant decisions of the United States Supreme Court, a federal Court of Appeals, or the court of last resort of another state;

  b. Decides an important question of federal law that has not been, but should be, settled by the United States Supreme Court; or

  c. Decides a question of federal law in the indigent's favor and the judgment or decree is challenged by opposing counsel through an attempt to invoke the certiorari jurisdiction of the United States Supreme Court.

(c) In any capital case, an indigent defendant who is under a sentence of death may apply to the superior court of the district where the defendant was indicted for the appointment of counsel to represent the defendant in preparing, filing, and litigating a motion for appropriate relief. The application for the appointment of such postconviction counsel may be made prior to completion of review on direct appeal and shall be made no later than 10 days from the latest of the following:

(1) The mandate has been issued by the Supreme Court of North Carolina on direct appeal pursuant to N.C.R. App. P. 32(b) and the time for filing a petition for writ of certiorari to the United States Supreme Court has expired without a petition being filed;

(2) The United States Supreme Court denied a timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina; or

(3) The United States Supreme Court granted the defendant's or the State's timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina, but subsequently left the defendant's death sentence undisturbed.

If there is not a criminal or mixed session of superior court scheduled for that district, the application must be made no later than 10 days from the beginning of the next criminal or mixed session of superior court in the district. Upon application, supported by the defendant's affidavit, the superior court shall enter an order appointing the Office of Indigent Defense Services if the court finds that the defendant is indigent and desires counsel, and the Office of Defense Services shall appoint two counsel to represent the defendant. The defendant does not have a right to be present at the time of appointment of counsel, and the appointment need not be made in open court. If the defendant was previously adjudicated an indigent for purposes of trial or direct appeal, the defendant shall be presumed indigent for purposes of this subsection.

(d) The appointment of counsel as provided in subsection (c) of this section and the procedure for compensation shall comply with rules adopted by the Office of Indigent Defense Services.

(e) No counsel appointed pursuant to subsection (c) of this section shall have previously represented the defendant at trial or on direct appeal in the case for which the appointment is made unless the defendant expressly requests continued representation and understandingly waives future allegations of ineffective assistance of counsel.

(f) A guardian ad litem shall be appointed to represent the best interest of an underage party seeking judicial authorization to marry pursuant to G.S. 51-2A. The appointment and duties of the guardian ad litem shall be governed by G.S. 51-2A. The procedure for compensation of the guardian ad litem shall comply with rules adopted by the Office of Indigent Defense Services. (1969, c. 1013, s. 1; 1973, c. 151, ss. 1, 3; c. 616; c. 726, s. 4; c. 1116, s. 1; c. 1125; c. 1320; c. 1378, s. 2; 1977, c. 711, ss. 7, 8; c. 725, s. 2; 1979, 2nd Sess., c. 1206, s. 3; 1981, c. 966, s. 4; 1983, c. 638, s. 23; c. 864, s. 4; 1985, c. 509, s. 1; c. 589, s. 3; 1987, c. 550, s. 16; 1995, c. 462, s. 3; 1995 (Reg. Sess., 1996), c. 719, s. 7; 1998-202, s. 13(a); 2000-144, s. 6; 2001-62, s. 14; 2002-179, s. 16; 2003-13, s. 2(a); 2005-250, s. 2; 2007-323, s. 14.19(a).)

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 14.19(a), effective July 1, 2007, in subsection (b), deleted "and" at the end of subdivision (b)(5), substituted a semicolon for a period at the end of subdivision (b)(6), and added subdivisions (b)(7) and (b)(8).

Legal Periodicals. — For comment on assigned counsel and public defender systems, see 49 N.C.L. Rev. 705 (1971).

For survey of 1972 case law on the right to counsel for the "undisciplined child," see 51 N.C.L. Rev. 1023 (1973).

For note discussing the right to counsel on discretionary appeal, see 53 N.C.L. Rev. 560 (1974).

For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

For note on the indigent parent's right to have counsel furnished by state in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

For survey of 1983 constitutional law, see 62 N.C.L. Rev. 1149 (1984).

For note, "North Carolina County Jail Inmates' Right of Access to Courts," see 66 N.C.L. Rev. 583 (1988).

For note, "The Right to Appointment of Counsel for the Indigent Civil Contemnor Facing Incarceration for Failure to Pay Child Support — McBride v. McBride," 16 Campbell L. Rev. 127 (1994).

CASE NOTES

I. General Consideration.
II. Right to Counsel in Particular Actions.
III. Right to Counsel at Critical Stages of Proceedings.
  A. In-Custody Interrogation.
  B. Pretrial Identification.
  C. Preliminary Hearing.
  D. On Appeal.

I. GENERAL CONSIDERATION.

History of Section. — See Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980).

Right to Counsel in Adversarial Proceedings That Jeopardize Liberty Interests. — Indigents are entitled to court-appointed counsel under North Carolina law whenever they are involved in adversarial proceedings that jeopardize their liberty interests. An individual facing involuntary commitment for psychiatric treatment or parole revocation proceedings, for example, may petition the State for court-appointed counsel. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

An indigent defendant must accept counsel appointed by the court, unless he desires to present his own defense. State v. Gibson, 14 N.C. App. 409, 188 S.E.2d 683 (1972).

And Is Not Entitled to Have Court Appoint Counsel of His Own Choosing. — An indigent is entitled to have the court appoint competent counsel to represent him at his trial, but he is not entitled to have the court appoint counsel of his own choosing or to have the court change his counsel in the middle of the trial. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652, death sentence vacated, 409 U.S. 1004, 93 S. Ct. 453, 34 L. Ed. 2d 295 (1972).

Clearly, and for cogent reasons, an indigent defendant is not entitled to have the court appoint counsel of his own choosing. State v. Smith, 24 N.C. App. 498, 211 S.E.2d 539 (1975), overruled on other grounds, State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989).

Dissatisfaction with Court-Appointed Counsel. — An expression of an unfounded dissatisfaction with his court-appointed counsel does not entitle defendant to the services of another court-appointed attorney. State v. Gibson, 14 N.C. App. 409, 188 S.E.2d 683 (1972).

Right of State to Recoup Costs. — North Carolina is not barred from structuring a program to collect the amount it is owed from a financially-able defendant through reasonable and fairly administered procedures. The State's initiatives in this area naturally must be narrowly drawn to avoid either chilling the indigent's exercise of the right to counsel or creating discriminating terms of repayment based solely on the defendant's poverty. Beyond these threshold requirements, however, the State has wide latitude to shape its attorneys' fees recoupment or restitution program along the lines it deems most appropriate for achieving lawful State objectives. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

Lien Against Future Earnings. — Legal assistance is extended unconditionally once indigency is established, although North Carolina, like many other jurisdictions, reserves to itself a general lien against the petitioner's future earnings should he later become able to pay. The lien is perfected through independent civil proceedings and cannot be enforced unless the indigent had notice of, and the opportunity to participate in, the proceedings. Alexander v.

Johnson, 742 F.2d 117 (4th Cir. 1984).

Applied in State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975); State v. Sadler, 40 N.C. App. 22, 251 S.E.2d 902 (1979).

Cited in State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970); State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970); State v. Jenkins, 12 N.C. App. 387, 183 S.E.2d 268 (1971); State v. Speights, 280 N.C. 137, 185 S.E.2d 152 (1971); State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972); State v. Ratliff, 281 N.C. 397, 189 S.E.2d 179 (1972); Farrington v. North Carolina, 391 F. Supp. 714 (M.D.N.C. 1975); State v. Sanders, 294 N.C. 337, 240 S.E.2d 788 (1978); State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978); State v. Matthews, 295 N.C. 265, 245 S.E.2d 727 (1978); State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979); State v. McKenzie, 46 N.C. App. 34, 264 S.E.2d 391 (1980); State v. Wall, 49 N.C. App. 678, 272 S.E.2d 152 (1980); In re Smith, 56 N.C. App. 142, 287 S.E.2d 440 (1982); Wake County ex rel. Carrington v. Townes, 306 N.C. 333, 293 S.E.2d 95 (1982); State v. McLain, 64 N.C. App. 571, 307 S.E.2d 769 (1983); In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984); Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988); State v. Taylor, 327 N.C. 147, 393 S.E.2d 801 (1990); Ashe v. Styles, 67 F.3d 46 (4th Cir. 1995), cert. denied, 516 U.S. 1162, 116 S. Ct. 1051, 134 L. Ed. 2d 196 (1996); State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997), cert. denied, 522 U.S. 1092, 118 S. Ct. 886, 139 L. Ed. 2d 873 (1998); State v. Taylor, 354 N.C. 28, 550 S.E.2d 141, 2001 N.C. LEXIS 832 (2001), cert. denied, 535 U.S. 934, 122 S. Ct. 1312, 152 L. Ed. 2d 221 (2002).

II. RIGHT TO COUNSEL IN PARTICULAR ACTIONS.

Purpose of Subdivision (a)(1). — A joint review of legislative history and case law developments in the area of the right to appointed counsel under U.S. Const., Amend. VI leaves no doubt that the purpose of subdivision (a)(1) of this section is to state the scope of an indigent's entitlement to court appointed counsel in criminal cases subject to the limitations of U.S. Const., Amend. VI. Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980).

The provisions of subdivision (a)(1) have application only to criminal cases. Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980).

Representation as Matter of Right on Felony Charge. — An indigent charged with a felony is entitled to representation by counsel as a matter of right, and the right to counsel includes the right of counsel to consult with witnesses and to prepare a defense. State v. Mays, 14 N.C. App. 90, 187 S.E.2d 479, cert. denied, 281 N.C. 157, 188 S.E.2d 366 (1972), decided prior to the 1973 amendments to this section.

Active Sentence May Not Be Imposed Absent Opportunity for Counsel. — If the crime for which the defendant is charged carries a possible prison sentence of any length, the judge may not impose an active prison sentence on the defendant unless defendant has been afforded the opportunity to have counsel represent him. State v. Neeley, 307 N.C. 247, 297 S.E.2d 389 (1982).

Possibility of Incarceration Shown. — Where eleven charges were made against indigent defendant, six for issuing worthless checks in amounts below $50.00 and five for checks in amounts above $50.00, defendant was entitled to court-appointed counsel under subsection (a)(1) of this section, since upon his fourth conviction for any of the charges against him, defendant could have been incarcerated for as long as two years as a general misdemeanant. Lawrence v. State, 18 N.C. App. 260, 196 S.E.2d 623 (1973), decided prior to the 1973 amendments to this section.

Revocation of Suspended Sentence. — Subsection (a) of this section would apply to revocation of a suspended sentence. State v. Hodges, 34 N.C. App. 183, 237 S.E.2d 576 (1977).

When a court activates a suspended prison sentence, defendant may, upon appeal of such activation, raise the claim that he was unconstitutionally denied counsel at his original trial. State v. Neeley, 307 N.C. 247, 297 S.E.2d 389 (1982).

There was no prejudice to the defendant when he was not appointed counsel prior to a revocation of sentence hearing in district court where upon his appeal of the district court order he was awarded a trial de novo in superior court, and where counsel was appointed for him in the superior court in ample time to prepare for his defense. State v. Hodges, 34 N.C. App. 183, 237 S.E.2d 576 (1977).

There is no constitutional right to appointed counsel to seek discretionary review in either a State forum or in the United States Supreme Court. Morgan v. Yancy County Dep't of Cors., 527 F.2d 1004 (4th Cir. 1975).

And Failure to Appoint Counsel for Defendant Seeking Discretionary Review Does Not Violate Constitution. — A defendant is not denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking discretionary review in that court. At that stage he will have a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and often an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make pro se, would appear to provide the Supreme Court with an adequate basis on which to base its decision to grant or deny review. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

Abuse of Discretion in Denying Appointment Not Shown. — In a murder prosecution, denial of defendant's motion for appointment of counsel to prosecute a motion for appropriate relief regarding a prior murder conviction in another county was not an abuse of discretion, since the defendant did not show how he was prejudiced thereby or how the use of the guilty plea and prior conviction violated his constitutional rights. State v. Warren, 348 N.C. 80, 499 S.E.2d 431 (1998).

Hearing on Initial Petition Alleging Child to Be Undisciplined. — Subdivision (a)(8) of this section would not afford a child the right to counsel at the hearing on the initial petition alleging him to be an undisciplined child, where a hearing could not result in his commitment to an institution in which his freedom would be curtailed. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

This section does not cover appointment of counsel in federal habeas corpus or State or federal civil rights actions, all of which are encompassed by the constitutional right of access to the courts. Bounds v. Smith, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977), overruled in part by Lewis v. Casey, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996).

An action under 42 U.S.C. § 1983 to obtain redress for the deprivation, under color of State law, of rights secured by the United States Constitution, is not covered by subsection (a) of this section. Loren v. Jackson, 57 N.C. App. 216, 291 S.E.2d 310 (1982).

Contempt for Noncompliance with Support Order. — Subdivision (a)(1) of this section requires appointment of counsel in "any case in which imprisonment … is likely to be adjudged," and that includes citations for criminal contempt for failure to comply with civil child support orders. Hammock v. Bencini, 98 N.C. App. 510, 391 S.E.2d 210 (1990).

Additional Counsel Not Required for Inextricably Intertwined Offenses. — Where indigent defendant had court appointed attorneys in felony murder case, defendant's contention that entry of judgment for armed robbery was improper because no counsel had been appointed for that charge was without merit as the offenses were inextricably intertwined such that representation for one was tantamount to representation for the other. State v. Quick, 125 N.C. App. 654, 483 S.E.2d 721 (1997).

III. RIGHT TO COUNSEL AT CRITICAL STAGES OF PROCEEDINGS.

A. In-Custody Interrogation.

The entitlement to counsel begins as soon as possible after the defendant is taken into custody and continues through any critical stage of the proceeding, including an in-custody interrogation. State v. Jackson, 12 N.C. App. 566, 183 S.E.2d 812 (1971).

In-custody interrogation is a critical stage in proceedings, at which time the defendant is entitled to counsel. State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2875, 33 L. Ed. 2d 762 (1972).

The standard for determining when an "in-custody interrogation" occurs under this section is a question of State law which is not inextricably linked to the evolving federal standard for an "in-custody interrogation" actionable under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966). Chance v. Garrison, 537 F.2d 1212 (4th Cir. 1976).

Custodial interrogation means questioning initiated by law-enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. State v. Haddock, 281 N.C. 675, 190 S.E.2d 208 (1972).

And Where There Was No "In-Custody Interrogation" Counsel Was Not Required. — Where it was clear that defendant was in custody, but equally clear that no statements were made as a result of questions from police officers and that statements made by defendant were volunteered, the Supreme Court held that there was no "in-custody interrogation"; thus the presence of counsel was not required, and the trial judge correctly admitted into evidence the statements made by defendant. State v. Chance, 279 N.C. 643, 185 S.E.2d 227 (1971), death sentence vacated, 408 U.S. 940, 92 S. Ct. 2878, 33 L. Ed. 2d 764 (1972).

Since Voluntary Statements Are Not Barred. — The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by U.S. Const., Amend. V. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

Volunteered statements are competent evidence, and their admission is not barred under any theory of the law, State or federal. And a voluntary in-custody statement does not become the product of an "in-custody interrogation" simply because an officer, in the course of defendant's narration, asks defendant to explain or clarify something he has already said voluntarily. State v. Haddock, 281 N.C. 675, 190 S.E.2d 208 (1972).

Where defendant's narrative confession was not the result of an in-custody interrogation, even if his indigency was assumed, the presence of counsel was not required at that time. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

When Article Renders Statements Made on Interrogation Inadmissible. — If, at the time of his custody interrogation, defendant was indigent and had not signed a written waiver of counsel, this Article would render his statements made on interrogation inadmissible; and this is true whether the evidence offered to prove them was the testimony of a witness who was present or a sound recording of the interrogation itself. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

Admission of Statement Where Defendant Had Previously Testified to Same Facts While Represented by Counsel. — Admission over objection of an in-custody statement made by defendant without the presence of counsel was harmless error where defendant, while represented by counsel, had testified to the same facts at the trial of his alleged accomplice. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652, death sentence vacated, 409 U.S. 1004, 93 S. Ct. 453, 34 L. Ed. 2d 295 (1972).

Admission of Confession Made Without Counsel Held Error. — The trial court erred in the admission of a confession made by defendant in a prosecution for the capital crime of rape at a time when he was indigent and without counsel. State v. Wright, 281 N.C. 38, 187 S.E.2d 761 (1972).

Confession Following Waiver of Counsel. — Undisputed evidence on voir dire examination fully supported findings by the trial court to the effect that the defendant voluntarily went to the police station and waived in writing his right to counsel and his right to remain silent, and made, voluntarily, with full understanding of his rights, and while not under arrest, in the presence of his parents, an oral confession, which was subsequently reduced to writing, and voluntarily signed the written statement of it. Under these circumstances, there was no error in the admission in evidence of either the written confession or the written waiver. State v. Williams, 279 N.C. 515, 184 S.E.2d 282 (1971).

Same — By Minor. — A minor who has arrived at the age of accountability for crime may waive counsel in the manner provided by law and make a voluntary confession without the presence of either counsel or an adult member of his family, provided he fully understands his constitutional rights and the meaning and consequences of his statement. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

Defendant Indigent on Day of Interrogation Has Right to Counsel. — If defendant is indigent on the day of the interrogation, he is entitled to the services of counsel at the interrogation. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

B. Pretrial Identification.

Accused Is Entitled to Counsel at Pretrial In-Custody Lineup. — A pretrial in-custody lineup for identification purposes is a critical stage in the proceedings, and an accused so exposed is entitled to the presence of counsel. State v. Bass, 280 N.C. 435, 186 S.E.2d 384 (1972).

But Not When Eyewitnesses Are Viewing Photographs for Purposes of Identification. — A suspect has no constitutional right to the presence of counsel when eyewitnesses are viewing photographs for purposes of identification, and this is true regardless of whether he is at liberty or in custody at the time. Such pretrial identification procedure is not a critical stage of the proceeding. State v. Stepney, 280 N.C. 306, 185 S.E.2d 844 (1972).

Counsel Required at Pretrial Identification Proceedings Only After Formal Charges Preferred. — The General Assembly amended subdivision (b)(2) of this section to require counsel for indigents at pretrial identification proceedings only after formal charges have been preferred and at which the presence of the indigent was required. This amendment apparently stems from the holding in Kirby v. Illinois, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972). State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976).

Waiver of Right. — One who, under G.S. 7A-457 as it stood before the 1971 amendment thereto, was precluded in a capital case from waiving the right to counsel during an in-custody, pretrial lineup stood in the same position as an accused who did not knowingly, understandingly and voluntarily waive the right to counsel before the enactment of this Article. But where the State, on voir dire, showed by clear and convincing evidence that an in-court identification was of independent origin and was not tainted by the lineup procedures, the in-court identification evidence was competent. State v. Chance, 279 N.C. 643, 185 S.E.2d 227 (1971), death sentence vacated, 408 U.S. 940, 92 S. Ct. 2878, 33 L. Ed. 2d 764 (1972).

C. Preliminary Hearing.

Editor's Note. — *The notes below were decided prior to the 1985 amendment to subdivision (b)(4) substituting "probable cause hearing" for "preliminary hearing."*

Prior to the enactment of this section a defendant did not have the right to an attorney at a preliminary hearing. Dawson v. State, 8

N.C. App. 566, 174 S.E.2d 610 (1970).

A preliminary hearing is not an essential prerequisite to a bill of indictment; however, since this section declares a preliminary hearing to be "a critical stage of the action," it follows that an indigent defendant is entitled to the appointment of counsel if such a hearing is held. State v. Gainey, 280 N.C. 366, 185 S.E.2d 874 (1972).

The initial appearance before a district court judge is not a critical stage because it is not an adversarial judicial proceeding where rights and defenses are preserved or lost or a plea taken. Therefore, the reference in subdivision (b)(4) of this section to a preliminary hearing does not mean that a defendant has a right to counsel under U.S. Const., Amend. VI at the initial appearance before the district court judge. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Defendant Found Not Indigent for Purpose of Preliminary Hearing Has No Right to Appointed Counsel. — If found not indigent for the purpose of the preliminary hearing, a defendant does not have the right to appointed counsel, and he can waive counsel and elect to defend himself. State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, cert. denied, 409 U.S. 888, 93 S. Ct. 194, 34 L. Ed. 2d 145 (1972).

Failure to Appoint Counsel for Preliminary Hearing Held Harmless Error. — The failure to appoint counsel to represent an indigent defendant at her preliminary hearing on charges of forgery and uttering a forged check was harmless error beyond a reasonable doubt where the testimony at the hearing was not transcribed and was never put before the trial court, the jury which convicted defendant never knew that a preliminary hearing had been conducted, the record did not show that defendant pled guilty or made any disclosures at the preliminary hearing which were used against her at the trial, and the record did not show the loss of any defenses or pleas or motions by failure to assert them at the preliminary hearing. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972).

Subsequent Pleas of Guilty Not Invalidated. — Failure to accord an indigent defendant his statutory right to counsel at the time he waived preliminary hearing did not invalidate his subsequent pleas of guilty, where the pleas were given at a time when defendant was represented by counsel and the trial court fully inquired into the voluntariness of the pleas. State v. Elledge, 13 N.C. App. 462, 186 S.E.2d 192 (1972).

D. On Appeal.

New Affidavit of Indigency Not Required on Appeal. — Absent a determination by the court that the issue of indigency should be redetermined, the respondent's entitlement to counsel continues on appeal, without the necessity of a new affidavit of indigency. In re D.Q.W., 167 N.C. App. 38, 604 S.E.2d 675, 2004 N.C. App. LEXIS 2077 (2004).

§ 7A-451.1. Counsel fees for outpatient involuntary commitment proceedings.

The State shall pay counsel fees for persons appointed pursuant to G.S. 122C-267(d). (1983, c. 638, s. 24; c. 864, s. 4; 1985, c. 589, s. 4; 1991, c. 761, s. 3.)

Legal Periodicals. — For survey of 1983 constitutional law, see 62 N.C.L. Rev. 1149 (1984).

§ 7A-452. Source of counsel; fees; appellate records.

(a) Upon the court's determination that a person is indigent and entitled to counsel under this Article, counsel shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services. In noncapital cases, the court shall assign counsel pursuant to rules adopted by the Office of Indigent Defense Services. In capital cases, the Office of Indigent Defense Services or designee of the Office of Indigent Defense Services shall assign counsel; at least one member of each capital defense team, where practicable, shall be a member of the bar in that division. In the courts of those counties which have a public defender, however, the public defender may tentatively assign himself or an assistant public defender to represent an indigent person, subject to subsequent determination of entitlement to counsel by the court and approval by the court in noncapital cases and by the Office of Indigent Defense Services in capital cases.

(b) Fees of assigned counsel and salaries and other operating expenses of the offices of the public defenders shall be borne by the State.

(c)(1) The clerk of superior court is authorized to make a determination of indigency and entitlement to counsel, as authorized by this Article. The word "court," as it is used in this Article and in any rules pursuant to this Article, includes the clerk of superior court.

(2) A judge of superior or district court having authority to determine entitlement to counsel in a particular case may give directions to the clerk with regard to the determination of entitlement to counsel in that case; may, if he finds it appropriate, change or modify the determination made by the clerk; and may set aside a finding of waiver of counsel made by the clerk.

(d) Unless a public defender or assistant public defender is appointed to serve, standby counsel appointed under G.S. 15A-1243 shall receive reasonable compensation to be paid by the State.

(e) In cases in which an indigent person has entered notice of appeal and appellate counsel has been appointed by the Office of Indigent Defense Services, the clerk of superior court shall make a copy of the complete trial division file in the case, make a copy of documentary exhibits upon request, and furnish those files and any requested documentary exhibits to the appointed attorney. (1969, c. 1013, s. 1; 1971, c. 377, s. 32; 1973, c. 1286, s. 8; 1977, c. 711, s. 9; 1987 (Reg. Sess., 1988), c. 1037, s. 29; 2000-144, s. 7; 2005-148, s. 1.)

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Legal Periodicals. — For note, "North Carolina County Jail Inmates' Right of Access to Courts," see 66 N.C.L. Rev. 583 (1988).

CASE NOTES

Cited in State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972); In re Wharton, 54 N.C. App. 447, 283 S.E.2d 528 (1981); In re Wharton, 305 N.C. 565, 290 S.E.2d 688 (1982); State v. Franklin, 308 N.C. 682, 304 S.E.2d 579 (1983).

§ 7A-453. Duty of custodian of a possibly indigent person; determination of indigency.

(a) In counties designated by the Office of Indigent Defense Services, the authority having custody of a person who is without counsel for more than 48 hours after being taken into custody shall so inform the designee of the Office of Indigent Defense Services. The designee of the Office of Indigent Defense Services shall make a preliminary determination as to the person's entitlement to his services, and proceed accordingly. The court shall make the final determination.

(b) In counties that have not been designated by the Office of Indigent Defense Services, the authority having custody of a person who is without counsel for more than 48 hours after being taken into custody shall so inform the clerk of superior court.

(c) In any county, if a defendant, upon being taken into custody, states that he is indigent and desires counsel, the authority having custody shall immediately inform the designee of the Office of Indigent Defense Services or the clerk of superior court, as the case may be, who shall take action as provided in this Article.

(d) The duties imposed by this section upon authorities having custody of persons who may be indigent are in addition to the duties imposed upon arresting officers under G.S. 15-47. (1969, c. 1013, s. 1; 1973, c. 1286, s. 8; 1987 (Reg. Sess., 1988), c. 1037, s. 30; 2000-144, s. 8.)

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Editor's Note. — Section 15-47, referred to in subsection (d) of this section, was repealed by Session Laws 1973, c. 1286. See now G.S. 15A-401 through 15A-405.

CASE NOTES

The court makes the final determination of indigency, and this may be determined or redetermined by the court at any stage of the proceeding at which the indigent is entitled to representation. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972).

Applied in State v. Cradle, 13 N.C. App. 120, 185 S.E.2d 35 (1971); State v. Avery, 286 N.C. 459, 212 S.E.2d 142 (1975).

Cited in State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971); State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972); State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997), cert. denied, 522 U.S. 1092, 118 S. Ct. 886, 139 L. Ed. 2d 873 (1998).

§ 7A-454. Supporting services.

Fees for the services of an expert witness for an indigent person and other necessary expenses of counsel shall be paid by the State in accordance with rules adopted by the Office of Indigent Defense Services. (1969, c. 1013, s. 1; 2000-144, s. 9.)

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Legal Periodicals. — For note on providing indigent criminal defendants state-paid investigators, see 13 Wake Forest L. Rev. 655 (1977).

For note on an indigent's constitutional right to a state-paid expert, see 16 Wake Forest L. Rev. 1031 (1980).

CASE NOTES

The basis for this section is to provide a fair trial, but the defendant must show that specific evidence is reasonably available and necessary for a proper defense. State v. Sandlin, 61 N.C. App. 421, 300 S.E.2d 893, cert. denied, 308 N.C. 679, 304 S.E.2d 760, 464 U.S. 995, 104 S. Ct. 491, 78 L. Ed. 2d 685 (1983).

This section permits but does not compel providing an expert to the accused at State expense. State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

For the applicable standard for appointment of expert assistance to indigent defendants, see State v. Sandlin, 61 N.C. App. 421, 300 S.E.2d 893, cert. denied, 308 N.C. 679, 304 S.E.2d 760, 464 U.S. 995, 104 S. Ct. 491, 78 L. Ed. 2d 685 (1983); State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2835, 100 L. Ed. 2d 935 (1988).

Expert assistance must be provided only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial. State v. Hefler, 60 N.C. App. 466, 299 S.E.2d 456 (1983), aff'd, 310 N.C. 135, 310 S.E.2d 310 (1984); State v. Chatman, 308 N.C. 169, 301 S.E.2d 71 (1983).

Expert assistance need only be provided by the State when the defendant can show that it is probable that he will not receive a fair trial without the requested assistance, or upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense. Mere hope or suspicion that favorable evidence is available is not sufficient. State v. Watson, 310 N.C. 384, 312 S.E.2d 448 (1984).

When Private Investigators or Expert Assistance Will Be Provided. — Section 7A-450(b) and this section require that private investigators or expert assistance be provided only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial. Neither the State nor the federal Constitution requires more. State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977); State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981), overruled on other grounds in State v. Freeman, 314 N.C. 432, 333 S.E.2d 743 (1985); State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981); State v. Corbett, 307 N.C. 169, 297 S.E.2d 553 (1982); State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985); State v. Fletcher, 125 N.C. App. 505, 481 S.E.2d 418 (1997), cert. denied, 346 N.C. 285, 487 S.E.2d 560 (1997), cert. denied, 522 U.S. 957, 118 S. Ct. 383, 139 L. Ed. 2d 299 (1997).

Defendant's constitutional and statutory right to a state-appointed expert arises only upon a showing that there is a reasonable likelihood that such an expert would discover evidence which would materially assist defendant in the preparation of his defense. There is no requirement that an indigent defendant be provided with investigative assistance merely upon the defendant's request. State v. Brown, 59 N.C. App. 411, 296 S.E.2d 839 (1982), cert. denied, 310 N.C. 155, 311 S.E.2d 294 (1984).

The appointment of private investigators should be made with caution and only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense, since there is no criminal case in which defense counsel would not welcome an investigator to comb the countryside for favorable evidence. State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985).

The appointment of an investigator as an expert witness should be made with caution and only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981).

There is no constitutional requirement that private investigators or experts always be made available, and G.S. 7A-450(b) and this section require such assistance only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that the defendant will not receive a fair trial. State v. Newton, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

A private investigator need not be provided when no unique skill is required or when there is no unduly burdensome time requirement that would prevent defense counsel from adequately conducting the investigation himself. State v. Newton, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

Evidence that an indigent defendant is mildly retarded is not a sufficient basis to require the appointment of a private psychiatrist, at least where the defendant has already been examined by a psychiatrist at State expense. State v. Massey, 316 N.C. 558, 342 S.E.2d 811 (1986).

Mere hope or suspicion that favorable evidence is available is not enough under the State or federal Constitutions to require that expert assistance or private investigators be provided to an indigent defendant. State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2835, 100 L. Ed. 2d 935 (1988).

Defendant Not Required to Affirmatively Discredit State's Witness as Threshold Requirement. — While the threshold showing of specific necessity for the appointment of a technical expert is not a light burden, it is not so severe as to require that a defendant affirmatively discredit the State's expert witness before gaining access to his own. State v. Moore, 321 N.C. 327, 364 S.E.2d 648 (1988).

When Fingerprint Expert Must Be Appointed. — While it is within the trial court's discretion to approve a fee for the appointment of an expert witness to testify for an indigent defendant under this section, it is error of constitutional magnitude to refuse such funds when the defendant has made a threshold showing of specific need and when expert assistance is of material importance to his defense or when its absence would deprive him of a fair trial. These requisites are met when it is apparent that fingerprint evidence is crucial to the State's attempt to prove that defendant was the perpetrator of the charged offense and when denial of a motion for funds precludes an indigent defendant from seeking the assistance of an independent expert in assessing that evidence. State v. Bridges, 325 N.C. 529, 385 S.E.2d 337 (1989).

To establish a particularized need for expert assistance, a defendant must show: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that the expert will materially assist him in the preparation of his case. State v. Page, 346 N.C. 689, 488 S.E.2d 225 (1997), cert. denied, 522 U.S. 1056, 118 S. Ct. 710, 139 L. Ed. 2d 651 (1998).

In order to show a "particularized need" for the assistance of a fingerprint expert, defendant was not required to present a specific basis for questioning the accuracy of the State's determination that the print found at the scene of the offense matched a print taken from defendant. State v. Moore, 321 N.C. 327, 364 S.E.2d 648 (1988).

Defendant made the requisite threshold showing of specific necessity for a fingerprint expert where he showed that absent a fingerprint expert he would be unable to assess adequately the State's expert's conclusion that defendant's palm print, the one item of hard evidence implicating him in the crimes charged, was found at the scene of the attack, that because the victim could not identify her assailant, this testimony by the State's expert was crucial to the State's ability to identify defendant as the perpetrator of the crimes charged against him, and moreover, that due to his mental retardation, he had extremely limited communication and reasoning abilities, and thus could provide defense counsel with little assistance in making a defense. State v. Moore, 321 N.C. 327, 364 S.E.2d 648 (1988).

Where without his own expert to examine items found at the scene of the crime, defendant could not adequately assess State experts' conclusions that latent prints found at the scene were his, and fingerprint evidence was the only direct evidence linking defendant to the offense, defendant made a threshold showing of specific need and demonstrated that such testimony would be of material assistance in preparing his defense. State v. Bridges, 325 N.C. 529, 385 S.E.2d 337 (1989).

Discretion of Trial Judge. — This section and the better reasoned decisions place the question of whether an expert should be appointed at State expense to assist an indigent defendant within the sound discretion of the trial judge. State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976); State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981); State v. Brown, 59 N.C. App. 411, 296 S.E.2d 839 (1982), cert. denied, 310 N.C. 155, 311 S.E.2d 294 (1984); State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985).

The language contained in this section is consistent with the rule that appointment of experts lies within the discretion of the trial judge. State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976).

The decision whether to provide a defendant with an investigator under the provisions of those statutes is a matter within the discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion. State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981), overruled on other grounds in State v. Freeman, 314 N.C. 432, 333 S.E.2d 743 (1985); State v. Corbett, 307 N.C. 169, 297 S.E.2d 553 (1982).

The grant or denial of motions for appointment of associate counsel or expert witnesses lies within the trial court's discretion and a trial court's ruling should be overruled only upon a showing of abuse of discretion. State v. Sandlin, 61 N.C. App. 421, 300 S.E.2d 893, cert. denied, 308 N.C. 679, 304 S.E.2d 760, 464 U.S. 995, 104 S. Ct. 491, 78 L. Ed. 2d 685 (1983).

All defendants in criminal cases shall enjoy the right to effective assistance of counsel and that the State must provide indigent defendants with the basic tools for an adequate trial defense or appeal. However, the State has no constitutional duty to provide an expert witness to assist in the defense of an indigent. This is a question properly left within the sound discretion of the trial judge. State v. Watson, 310 N.C. 384, 312 S.E.2d 448 (1984).

Denial of Motion for Psychiatrist Upheld. — Where the motion to the court submitted by defendant's counsel simply stated, "That the defendant is an indigent person with court-appointed counsel, and, in the opinion of counsel, psychiatric evidence will be necessary and proper in behalf of the defense of the charges of murder against the defendant," without more, there was no abuse of the trial court's discretion in denying the motion. State v. Grainger, 29 N.C. App. 694, 225 S.E.2d 595 (1976).

Where although there was clear and uncontroverted evidence that defendant was mildly retarded, there was no serious contention that defendant's sanity at the time murder was committed would be a significant factor at trial, there was no abuse of discretion in the judge's failure to appoint a private psychiatrist for defendant following his examination by one psychiatrist at State expense. State v. Massey, 316 N.C. 558, 342 S.E.2d 811 (1986).

Denial of Neuropsychologist Upheld. — Defendant did not establish a particularized showing that without an evaluation by a neuropsychologist, defendant would be deprived of a fair trial or that there was a reasonable likelihood that a neuropsychologist would materially assist him in the preparation of his case. State v. Rose, 339 N.C. 172, 451 S.E.2d 211 (1994), cert. denied, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995).

Denial of Motion for Medical Expert Upheld. — Trial court's denial of defendant's motions, alleging a question as to the cause of death, for the appointment of a pathologist or other medical experts was not error where, although the defendant arguably made a threshold showing of a specific necessity for the assistance of such experts, he was provided with a copy of the autopsy report, and also had available and used ample medical expertise (including the favorable testimony of two specialists) in preparing and presenting his defense. State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986).

Denial of Motion for DNA Expert Upheld. — Notwithstanding any failure to show a particularized need at the time of his motion for the DNA expert, defendant, at oral argument, contended that such need became evident during the course of the trial. However, defendant did not renew his motion for appointment of a DNA expert, nor did he call to the court's attention specific circumstances showing a particularized need; therefore, the trial court did not err in denying defendant's motion. State v. Mills, 332 N.C. 392, 420 S.E.2d 114 (1992).

Defendant was not entitled to funds to conduct DNA testing or to hire a DNA expert witness since neither defendant nor the State questioned the identity of victim's alleged attacker; thus, defendant failed to demonstrate the necessary particularized need in order to qualify for such funds or appointment of the DNA expert witness. State v. Sines, 158 N.C. App. 79, 579 S.E.2d 895, 2003 N.C. App. LEXIS 943 (2003), cert. denied, 357 N.C. 468, 587 S.E.2d 69 (2003).

Denial of Motion for Expert Witness in Termination Proceeding Upheld. — Trial court in a termination of parental rights hearing did not err by denying a father's motion for funds to employ an expert witness to examine the child, review his medical records, and assist in preparation for the hearing as there was not a reasonable likelihood that an expert would have materially assisted the parents in the preparation of their defense, or that without such help it was probable that they would not have received a fair trial. In re D.R., 172 N.C. App. 300, 616 S.E.2d 300, 2005 N.C. App. LEXIS 1578 (2005).

Denial of Motion for Pathologist Upheld. — Even though defendant's identity as the perpetrator of the crime charged was critical, and the state's case was built on circumstantial evidence, defendant failed to satisfy his burden of showing either that the assistance of a pathologist would have materially aided him in the preparation of his defense or that the lack thereof deprived him of a fair trial. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994), cert. denied, 514 U.S. 1091, 115 S. Ct. 1815, 131 L. Ed. 2d 738 (1995).

Denial of Motion for Medical Expert and Ballistics Expert Upheld. — In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, where the victim testified that she was shot at point-blank range, but defendant testified that he accidentally shot her when he picked up his shotgun in the den where he had placed it after a hunting trip and pulled the lever to see if it was loaded, and that he was some distance away from the victim when it discharged, the trial judge did not abuse his discretion in denying defendant's request for a medical expert and a ballistics expert. Defense counsel could educate himself on the likely effects of a point-blank gunshot to adequately cross-examine the State's witness. State v. Newton, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

Denial of Motion for Statistician Upheld. — The trial judge in a murder trial did not err in denying defendant's motion for funds to employ a statistician to review the jury venire in the county over a substantial period of time to determine whether the jury commission failed to perform its statutory duty when compiling the jury venire from which defendant's jury would be selected, where defendant presented no evidence that the new jury selection process in the county was discriminatory, or that the services of a statistician would have resulted in the selection of a more favorable jury. State v. Massey, 316 N.C. 558, 342 S.E.2d 811 (1986).

Denial of Motion for Investigator Upheld. — The trial judge did not abuse his discretion in refusing to appoint a private investigator to assist defendant, where defense counsel requested the appointment of a private investigator because he did not have time to singlehandedly gather available evidence and interview potential witnesses in preparation for the trial. State v. Massey, 316 N.C. 558, 342 S.E.2d 811 (1986).

The statutory plan established in G.S. 7A-450 and this section and the plan of former G.S. 7A-468 for State provision of investigative or expert assistance were substantially equivalent. There was no real distinction between indigent defendants represented by a public defender and those with court-appointed counsel with respect to the availability of state-provided investigative assistance. Therefore, the denial of defendant's motion for the appointment of an investigator did not violate his constitutionally guaranteed rights to equal protection of the laws. State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976).

Defendant's mere general desire to search for possible evidence which might be of use in impeaching a key witness who provided evidence to support the elements of premeditation and deliberation in murder prosecution was not such a significant factor in the defendant's defense as to justify the appointment of an investigator. State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986).

Denial of Funds for Telephone Deposition In Termination Case Was Proper. — Trial court did not err by denying a father's motion for funds for a telephone deposition in a termination proceeding since the father did not include in his motion his reasons for deposing the foster parents, the information he sought, or that there was a reasonable likelihood that it would have materially assisted in the preparation of the parents' defense. In re D.R., 172 N.C. App. 300, 616 S.E.2d 300, 2005 N.C. App. LEXIS 1578 (2005).

Applied in State v. Setzer, 42 N.C. App. 98, 256 S.E.2d 485 (1979); State v. Seaberry, 97 N.C. App. 203, 388 S.E.2d 184 (1990); State v. Taylor, 327 N.C. 147, 393 S.E.2d 801 (1990); State v. Tucker, 329 N.C. 709, 407 S.E.2d 805 (1991).

Cited in State v. Lewis, 7 N.C. App. 178, 171 S.E.2d 793 (1970); In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976); State v. Woods, 293 N.C. 58, 235 S.E.2d 47 (1977); State v. Shook, 38 N.C. App. 465, 248 S.E.2d 425 (1978); State v. Phipps, 331 N.C. 427, 418 S.E.2d 178 (1992); State v. Horn, 337 N.C. 449, 446 S.E.2d 52 (1994).

§ 7A-455. Partial indigency; liens; acquittals.

(a) If, in the opinion of the court, an indigent person is financially able to pay a portion, but not all, of the value of the legal services rendered for that person by assigned counsel, the public defender, or the appellate defender, and other necessary expenses of representation, the court shall order the partially indigent person to pay such portion to the clerk of superior court for transmission to the State treasury.

(b) In all cases the court shall direct that a judgment be entered in the office of the clerk of superior court for the money value of services rendered by assigned counsel, the public defender, or the appellate defender, plus any sums allowed for other necessary expenses of representing the indigent person, including any fees and expenses that may have been allowed prior to final determination of the action to assigned counsel pursuant to G.S. 7A-458, which shall constitute a lien as prescribed by the general law of the State applicable to judgments. Any reimbursement to the State as provided in subsection (a) of this section or any funds collected by reason of such judgment shall be deposited in the State treasury and credited against the judgment. The value of services shall be determined in accordance with rules adopted by the Office of Indigent Defense Services. The money value of services rendered by the public defender and the appellate defender shall be based upon the factors normally involved in fixing the fees of private attorneys, such as the nature of the case, the time, effort, and responsibility involved, and the fee usually charged in similar cases. A district court judge shall direct entry of judgment for actions or proceedings finally determined in the district court and a superior court judge shall direct entry of judgment for actions or proceedings originating in, heard on appeal in, or appealed from the superior court. Even if the trial, appeal, hearing, or other proceeding is never held, preparation therefor is nevertheless compensable.

(b1) In every case in which the State is entitled to a lien pursuant to this section, the public defender shall at the time of sentencing or other conclusion of the proceedings petition the court to enter judgment for the value of the legal services rendered by the public defender, and the appellate defender shall upon completion of the appeal petition or request the trial court to enter judgment for the value of the legal services rendered by the appellate defender.

(c) No order for partial payment under subsection (a) of this section and no judgment under subsection (b) of this section shall be entered unless the indigent person is convicted. If the indigent person is convicted, the order or judgment shall become effective and the judgment shall be docketed and indexed pursuant to G.S. 1-233 et seq., in the amount then owing, upon the later of (i) the date upon which the conviction becomes final if the indigent person is not ordered, as a condition of probation, to pay the State of North Carolina for the costs of his representation in the case or (ii) the date upon which the indigent person's probation is terminated or revoked if the indigent person is so ordered. No order for partial payment under subsection (a) of this section and no judgment under subsection (b) of this section shall be entered for the value of legal services rendered to perfect an appeal to the Appellate Division or in postconviction proceedings, if all of the matters that the person raised in the proceeding are vacated, reversed, or remanded for a new trial or resentencing.

(d) In all cases in which the entry of a judgment is authorized under G.S. 7A-450.1 through G.S. 7A-450.4 or under this section, the attorney, guardian ad litem, public defender, or appellate defender who rendered the services or incurred the expenses for which the judgment is to be entered shall obtain the social security number, if any, of each person against whom judgment is to be entered. This number, or a certificate that the person has no social security number, shall be included in each fee application submitted by an assigned attorney, guardian ad litem, public defender, or appellate defender, and no order for payment entered upon an application which does not include the required social security number or certification shall be valid to authorize payment to the applicant from the Indigent Persons' Attorney Fee Fund. Each judgment docketed against any person under this section or under G.S. 7A-450.3 shall include the social security number, if any, of the judgment debtor. (1969, c. 1013, s. 1; 1983, c. 135, s. 2; 1983 (Reg. Sess., 1984), c. 1109, s. 12; 1985, c. 474, s. 9; 1989 (Reg. Sess., 1990), c. 946, ss. 5, 6; 1991, c. 761, s. 4; 1991 (Reg. Sess., 1992), c. 900, s. 116(a); 2000-144, s. 10; 2005-254, s. 1.)

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

CASE NOTES

Constitutionality. — The interlocking statutes and court decisions that regulate North Carolina's ability to recover the costs of court-appointed counsel meet constitutional requirements. The indigent defendant's fundamental right to counsel is preserved under the system; he is given ample opportunity to challenge the decision to require repayment at all critical stages; and he is protected against heightened civil or criminal penalties based solely on his inability to pay. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

Like its civil recoupment statute, North Carolina's procedures for imposing the reimbursement of court-appointed counsel fees as a condition of parole are narrowly drawn to avoid unfairness and discriminatory effects. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

Though far from a paragon of clarity and detail as a complete program, the North Carolina statutes relating to the repayment of attorneys' fees by restitution embody all the required features of a constitutionally acceptable approach. The indigent defendant's fundamental right to counsel is preserved under the North Carolina statute and no preconditions are placed on the exercise of that right beyond a reasonable and minimally intrusive procedure designed to establish the fact of indigency. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

State Will Not Pay What Defendant Can. — It is not the public policy of this State to subsidize any portion of a defendant's defense which he himself can pay. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Right of State to Recoup Expenses. — North Carolina is not barred from structuring a program to collect the amount it is owed from a financially-able defendant through reasonable and fairly administered procedures. The State's initiatives in this area naturally must be narrowly drawn to avoid either chilling the indigent's exercise of the right to counsel, or creating discriminating terms of repayment based solely on the defendant's poverty. Beyond these threshold requirements, however, the State has wide latitude to shape its attorneys' fees recoupment or restitution program along the lines it deems most appropriate for achieving lawful State objectives. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

North Carolina, like every jurisdiction, has an irrevocable constitutional duty to provide court-appointed counsel to an indigent defendant once he requests it. The developing jurisprudence in this area, however, does not require the State to absorb the expenses of providing such counsel when the defendant has acquired the financial ability to pay. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

No Chilling Effect. — Informing defendant that he may be required to reimburse the State for the costs of his attorney also does not chill his right to have counsel provided. State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997), cert. denied, 522 U.S. 1092, 118 S. Ct. 886, 139 L. Ed. 2d 873 (1998).

Applicability of Section. — This section by its terms applies only when an indigent person is determined by the court to be able to pay some but not all of the value of legal services rendered by a public defender. State v. Hunter, 71 N.C. App. 602, 323 S.E.2d 43 (1984), aff'd in part and rev'd in part on other grounds, 315 N.C. 371, 338 S.E.2d 99 (1986).

Repayment Not Required Unless Defendant Is Able. — An indigent receiving court-appointed counsel will never be required to repay the State unless he becomes financially able. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

Lien Against Future Earnings Reserved. — Legal assistance is extended unconditionally once indigency is established, although North Carolina, like many other jurisdictions, reserves to itself a general lien against the petitioner's future earnings should he later become able to pay. The lien is perfected through independent civil proceedings and cannot be enforced unless the indigent had notice of, and the opportunity to participate in, the proceedings. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

Legal assistance is unconditional once indigency is established, although the State reserves to itself a general lien against defendant's future earnings if defendant is convicted and should later become able to pay. State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997), cert. denied, 522 U.S. 1092, 118 S. Ct. 886, 139 L. Ed. 2d 873 (1998).

Notice and Opportunity to Be Heard Required. — This section provides that the court may enter a civil judgment against a convicted indigent for attorneys' fees and costs. The courts have upheld the validity of such a judgment provided the defendant is given notice of the hearing held in reference thereto and an opportunity to be heard. State v. Washington, 51 N.C. App. 458, 276 S.E.2d 470 (1981).

The State assumes the status of a judgment lien creditor against the assets of an indigent defendant who has accepted court-appointed counsel and been found guilty of the offense. The lien is not valid unless the indigent defendant was given both notice of the State claim and the opportunity to resist its perfection in a hearing before the trial court. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

Imposition of attorney's fees was erroneous where the trial court did not give defendant an opportunity to be heard regarding the appointed attorney's total hours or the total amount of the fees imposed. State v. Jacobs, 172 N.C. App. 220, 616 S.E.2d 306, 2005 N.C. App. LEXIS 1586 (2005).

Though the record showed that a defendant was given notice of the trial court's intention to impose attorney fees upon him for the cost of his court-appointed counsel in a criminal proceeding, because the defendant was never given an opportunity to be heard regarding the attorney's total hours or the total amount of the fees imposed, the trial court's order imposing attorney fees against the defendant was vacated and the matter was remanded to the trial court for the state to apply for a judgment in accordance with G.S. 7A-455. State v. Jacobs, 174 N.C. App. 1, 620 S.E.2d 204, 2005 N.C. App. LEXIS 2279 (2005).

Vacation of Judgment for Cost of Public Defender Services. — Judgment, after criminal conviction, for cost of public defender services will be vacated where court finds that the judgment is not supported in the record by sufficient findings of fact or conclusions of law. State v. Crews, 284 N.C. 427, 201 S.E.2d 840 (1974).

Where defendant's first-degree murder conviction was reversed and remanded for a new trial due to a presumed ineffective assistance of counsel, defendant was not convicted in the initial trial; therefore, pursuant to that G.S. 7A-455(c), defendant was not liable for the attorneys' fees in the first trial. State v. Rogers, 161 N.C. App. 345, 587 S.E.2d 906, 2003 N.C. App. LEXIS 2051 (2003).

Applied in State v. Stafford, 45 N.C. App. 297, 262 S.E.2d 695 (1980); State v. Bass, 53 N.C. App. 40, 280 S.E.2d 7 (1981).

Cited in State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972); State v. Boyd, 332 N.C. 101, 418 S.E.2d 471 (1992); State v. Richardson, 342 N.C. 772, 467 S.E.2d 685 (1996).

§ 7A-455.1. Appointment fee in criminal cases.

(a) Each person for whom counsel is appointed in a criminal case at the trial level shall pay to the clerk of court an appointment fee of fifty dollars ($50.00). No fee shall be due unless the person is convicted.

(b) The fifty-dollar ($50.00) fee shall be added to any amounts the court determines to be owed for the value of legal services rendered to the defendant and shall be collected in the same manner as attorneys' fees are collected for such representation.

(c) Repealed by Session Laws 2005-250 s. 3, effective August 4, 2005.

(d) Inability, failure, or refusal to pay the appointment fee shall not be grounds for denying appointment of counsel, for withdrawal of counsel, or for contempt.

(e) The appointment fee required by this section shall be assessed only once for each attorney appointment, regardless of the number of cases to which the attorney was assigned. An additional appointment fee shall not be assessed if the charges for which an attorney was appointed were reassigned to a different attorney.

(f) Of each appointment fee collected under this section, the sum of forty-five dollars ($45.00) shall be credited to the Indigent Persons' Attorney Fee Fund and the sum of five dollars ($5.00) shall be credited to the Court Information Technology Fund under G.S. 7A-343.2. These fees shall not revert.

(g) The Office of Indigent Defense Services shall adopt rules and develop forms to govern implementation of this section. (2002-126, s. 29A.9(a); 2003-284, s. 13.11; 2005-250, s. 3.)

Editor's Note. — Session Laws 2002-126, s. 29A.9(c), made this section effective December 1, 2002, and applicable to all requests for the appointment of counsel made on or after that date.

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6, contains a severability clause.

CASE NOTES

Constitutionality. — G.S. 7A-455.1 is unconstitutional because the portion of the appointment fee under G.S. 7A-455.1(a) that is paid to the North Carolina Indigent Persons' Attorney Fee Fund does not fall within the definition of "fees" since it is not directly related to the individual defendant who is resisting prosecution or defending against a particular criminal charge, but helps support that part of the criminal justice system that enables the State constitutionally to prosecute indigent defendants who qualify for court-appointed counsel; N.C. Const. art. I, § 23 does not insulate acquitted defendants from bearing the burden of paying for their own counsel, but it does shield an acquitted defendant from having to pay for a system designed to reimburse the State for expenses necessarily incurred in the conduct of the prosecution. State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

Inclusion of virtually identical language to former N.C. Const. art. I, § 11 in N.C. Const. art. I, § 23 convincingly demonstrates North Carolina's continuing dedication to the principle that acquitted defendants should not be required to pay the costs of their prosecution; thus, requiring acquitted defendants to pay the appointment fee under G.S. 7A-455.1, which was a cost of prosecution, would defeat the intent and purpose of either Constitution's provision. State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

Costs are imposed only at sentencing, so any convicted indigent defendant is given notice of the appointment fee under G.S. 7A-455.1 at the sentencing hearing and is also given an opportunity to be heard and object to the imposition of this cost; therefore, the constitutional requirement of notice and an opportunity to be heard are satisfied, and the imposition of the appointment fee on convicted indigent defendants passes federal constitutional muster. State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

Plain Language of N.C. Constitution Prohibits Imposition of Appointment Fee Upon Defendant Unless He Has Been Convicted or Pled Guilty or Nolo Contendere. — Plain language of N.C. Const. art. I, § 23, prohibiting the assessment of costs against acquitted defendants, encompasses the appointment fee provided for by G.S. 7A-455.1(a); by requiring payment of the appointment fee by acquitted defendants, the General Assembly devised a statutory framework that does not comport with the constitutional limitation prohibiting a criminal defendant from paying costs unless found guilty, and as such it may not stand. Accordingly, the appointment fee set out in G.S. 7A-455.1 is a cost of prosecution and may not be imposed upon a defendant in a criminal matter until that defendant has been convicted or pled guilty or nolo contendere. State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

Appointment Fee Provision Severable. — Inclusion of a 2002 N.C. Sess. Laws 126, § 31.6, a severability clause, in the session law adding N.C. Gen. Stat. ch. 7A, evinces the legislative intent that the remaining portions of G.S. 7A-455.1 continue in effect, if possible. State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

G.S. 7A-455.1(b), which required payment of the appointment fee regardless of the outcome of the proceedings, was severed in order to allow the State to assess the appointment fee against convicted defendants as constitutionally allowed under N.C. Const. art. I, § 23; G.S.

7A-455.1(a), requiring payment at the time of the appointment was also severed, as it was inconsistent with the ruling that the appointment fee was a cost, and as pursuant to G.S. 7A-304(a), costs, including the pretrial release services fee under G.S. 7A-304(a)(5) and and the North Carolina State Bureau of Investigation laboratory fee under G.S. 7A-304(a)(7), were assessed only after a defendant was convicted or entered a plea of guilty or nolo contendere. State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

General Assembly effectively acknowledged that the appointment fee would be prepaid infrequently when it provided that counsel could not be denied for failure to pay the appointment fee in advance under G.S. 7A-455.1(d); requiring the State to collect the appointment fee only after a final determination of guilt does not obstruct the objective of G.S. 7A-455.1, and the portion of G.S. 7A-455.1(a) requiring payment "at the time of appointment" shall be severed. State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

Severance of the provisions in G.S. 7A-455.1(b) that grant a credit against any attorney's fees owed for any defendant who pays the appointment fee in advance is mandated; because the provision requiring payment at the time of appointment has been severed, no costs are imposed, or can be imposed, until after there is a conviction, and the provisions entitling a defendant to a pre-payment credit shall also be severed. State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

Purposes of G.S. 7A-455.1 do not depend on requiring payment at the time of appointment and providing a pre-payment credit to those defendants who pay in advance, and allowing the State to collect the appointment fee from convicted indigent defendants upon final disposition permits the State to recoup a portion of its expenses associated with providing a system that enables indigent defendants to be prosecuted; therefore, because the remaining provisions of G.S. 7A-455.1 can be enforced independently of the unconstitutional portions of the section, the unconstitutional provisions of G.S. 7A-455.1 shall be severed and the balance of the section enforced. The State is still permitted to collect the appointment fee from convicted defendants. State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

Portion of Fee for Indigent Persons' Attorney Fee Fund Is Cost of Prosecution. — Because the appointment fee provided for by G.S. 7A-455.1(a) functions to reimburse the State for expenses associated with keeping its system that provides for court-appointed counsel operational, the portion of the appointment fee allocated for the North Carolina Indigent Persons' Attorney Fee Fund is a cost of prosecution, and cannot be characterized as being, in part, an attorney's fee. State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

Portion of Fee for Court Information Technology Fund Is Facilities Fee. — Portion of the appointment fee provided for by G.S. 7A-455.1(a) allocated to the North Carolina Court Information Technology Fund is effectively indistinguishable from the facilities fee imposed under G.S. 7A-304(a)(2); the appointment fee operates to supplement funds otherwise available to the North Carolina Judicial Department for court information technology and office automation needs, thus defraying expenses incurred by the State in the operation and maintenance of the court system under G.S. 7A-343.2, and it should be assessed in the same manner as the facilities fee and any other cost of prosecution — against convicted defendants only. State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

Appointment fee is not fee, but costs. — Mere use of the term "fee" does not determine the true nature of an appointment fee under G.S. 7A-455.1, as every aspect of the appointment fee is one associated with a cost; in fact, each amount listed on the North Carolina Criminal Bill of Costs submitted in a criminal matter is denominated a "fee," for example, process fee, general court of justice fee, facilities fee, and these fees are, like costs, imposed only upon convicted defendants. Furthermore, the definition of "costs" includes "fees" as a synonym. State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

§ 7A-456. False statements; penalty.

(a) A false material statement made by a person under oath or affirmation in regard to the question of his indigency constitutes a Class I felony.

(b) A judicial official making the determination of indigency shall notify the person of the provisions of subsection (a) of this section.

(c) Repealed by Session Laws 1987 (Reg. Sess., 1988), c. 1100, s. 11.1. (1969, c. 1013, s. 1; 1987 (Reg. Sess., 1988), c. 1086, s. 113(c); c. 1100, s. 11.1; 1993 (Reg. Sess., 1994), c. 767, s. 19.)

CASE NOTES

Insufficient Evidence. — When defendant was charged with false statements for executing an affidavit of indigency stating that he had no interest in real property when his girlfriend had placed his name on a deed of trust on property she owned, his conviction was not supported by sufficient evidence because the affidavit asked for assets in realty but did not ask if he owned land, and there was no evidence he had assets in the property he co-owned with his girlfriend or that he was asked to clarify his answer on his affidavit. State v. Denny, — N.C. App. —, 635 S.E.2d 438, 2006 N.C. App. LEXIS 2158 (2006).

§ 7A-457. Waiver of counsel; pleas of guilty.

(a) An indigent person who has been informed of his right to be represented by counsel at any in-court proceeding, may, in writing, waive the right to in-court representation by counsel in accordance with rules adopted by the Office of Indigent Defense Services. Any waiver of counsel shall be effective only if the court finds of record that at the time of waiver the indigent person acted with full awareness of his rights and of the consequences of the waiver. In making such a finding, the court shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged.

(b) If an indigent person waives counsel as provided in subsection (a), and pleads guilty to any offense, the court shall inform him of the nature of the offense and the possible consequences of his plea, and as a condition of accepting the plea of guilty the court shall examine the person and shall ascertain that the plea was freely, understandably and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency.

(c) An indigent person who has been informed of his right to be represented by counsel at any out-of-court proceeding, may, either orally or in writing, waive the right to out-of-court representation by counsel. (1969, c. 1013, s. 1; 1971, c. 1243; 1973, c. 151, s. 3; 2000-144, s. 11.)

Cross References. — As to scope of entitlement to counsel, see G.S. 7A-451. For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Legal Periodicals. — For note on waiver of Miranda rights, see 16 Wake Forest L. Rev. 219 (1980).

CASE NOTES

I. General Consideration.
II. Waiver of Counsel.
  A. In General.
  B. Requirement of Writing.
  C. Voluntary Statements.
  D. Self-Representation.
III. Guilty Pleas.

I. GENERAL CONSIDERATION.

Prior to the passage of this Article it was unquestioned that an accused could waive his right to counsel at in-custody proceedings, either orally or in writing, if he did so freely, voluntarily and understandingly. State v. Chance, 279 N.C. 643, 185 S.E.2d 227 (1971), death sentence vacated, 408 U.S. 940, 92 S. Ct. 2878, 33 L. Ed. 2d 764 (1972).

Prior to the enactment of G.S. 7A-450 et seq., there was no difference in the requirements for a waiver of counsel by indigents and nonindigents. Each could waive the right either orally or in writing. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

The purpose of the statutory provision for appointment of counsel, at public expense, for indigent defendants is to put indigent defendants on an equality with affluent defendants in trials upon criminal charges. To deny or restrict the right of the indigent to waive counsel, i.e., to represent himself, while permitting the affluent defendant to exercise such right, has no reasonable relation to the objective of equal opportunity to prevail at the trial of the case. Such classification is beyond the power of the legislature. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Applied in State v. Griffin, 10 N.C. App. 134, 177 S.E.2d 760 (1970); State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971); State v. Wright, 281 N.C. 38, 187 S.E.2d 761 (1972); State v. Edwards, 282 N.C. 201, 192 S.E.2d 304 (1972); State v. Simmons, 286 N.C. 681, 213 S.E.2d 280 (1975); State v. Monroe, 27 N.C. App. 405, 219 S.E.2d 270 (1975); State v. Hodge, 27 N.C. App. 502, 219 S.E.2d 568 (1975); State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978).

Cited in State v. Blackmon, 280 N.C. 42, 185 S.E.2d 123 (1971); State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972); In re Martin, 286 N.C. 66, 209 S.E.2d 766 (1974); State v. Boyd, 31 N.C. App. 328, 229 S.E.2d 229 (1976); State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978); State v. Cunningham, 344 N.C. 341, 474 S.E.2d 772 (1996); State v. Fulp, 144 N.C. App. 428, 548 S.E.2d 785, 2001 N.C. App. LEXIS 436 (2001), cert. granted, 354 N.C. 71, 553 S.E.2d 205 (2001).

II. WAIVER OF COUNSEL.

A. In General.

The rule is that one may waive counsel if he does so freely and voluntarily and with full understanding that he has the right to be represented by an attorney. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

But Waiver Must Be Specifically Made After Miranda Warnings. — No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the Miranda warnings. Silence and waiver are not synonymous. Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver. State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973).

And waiver of counsel may not be presumed from a silent record. State v. Moses, 16 N.C. App. 174, 191 S.E.2d 368 (1972); State v. Brown, 325 N.C. 427, 383 S.E.2d 910 (1989).

This section presupposes that a defendant has been informed of his rights and given an opportunity to act on the information as provided in § 15A-603. This involves a determination of defendant's indigency and entitlement to court appointed counsel. However, whether or not a defendant is indigent, any waiver must be in accordance with this section, notwithstanding the limiting language thereof. State v. Williams, 65 N.C. App. 498, 309 S.E.2d 721 (1983).

A defendant who appears without counsel at his arraignment must be properly informed of his rights in the manner required by G.S. 15A-603. Where the defendant nevertheless wishes to waive counsel, the court must find that G.S. 15A-603 has been complied with before a valid waiver can be made. State v. Williams, 65 N.C. App. 498, 309 S.E.2d 721 (1983).

Waiver Was Knowing and Voluntary. — The defendant's waiver of appointed counsel and his decision to proceed pro se were knowing and voluntary, where he completed a waiver of counsel form that followed the statute and was certified by the trial court. State v. Love, 131 N.C. App. 350, 507 S.E.2d 577 (1998), aff'd, 350 N.C. 586, 516 S.E.2d 382 (1999).

Trial court did not err in allowing defendant to represent himself because the court complied with the statutory requirements of G.S. 7A-457 prior to allowing such self-representation, by obtaining a written waiver of counsel after considering the statutory requirements. State v. Davis, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 1193 (Aug. 6, 2002), cert. denied, 356 N.C. 170, 568 S.E.2d 623 (2002).

Trial Court's Findings of Waiver. — Section 7A-457 does not require a trial court, accepting an indigent defendant's waiver of counsel, to specifically find and state that it considered defendant's age, education, familiarity with the English language, mental condition and the complexity of the crime charged but, rather, requires the trial court only to consider those factors when determining whether defendant's waiver of counsel was made knowingly, intelligently, and voluntarily. State v. Fulp, 355 N.C. 171, 558 S.E.2d 156, 2002 N.C. LEXIS 19 (2002).

Necessity for Evidence or Findings of Waiver. — Admission of a defendant's inculpatory statement to the police was erroneous where there was neither evidence nor findings to show that defendant had waived his right to counsel as provided by this section. State v. Hudson, 281 N.C. 100, 187 S.E.2d 756 (1972), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

Waiver Is Required Only Where Defendant Is Subjected to In-Custody Interrogation. — Miranda warnings and waiver of counsel are only required where defendant is being subjected to custodial interrogation. State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973).

And the standard for determining when an "in-custody interrogation" occurs under this section is a question of State law which is not inextricably linked to the evolving federal standard for an "in-custody interrogation" actionable under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10

A.L.R.3d 974 (1966). Chance v. Garrison, 537 F.2d 1212 (4th Cir. 1976).

Waiver in Capital Case Prior to 1971 Amendment. — See State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2875, 33 L. Ed. 2d 762 (1972); State v. Chance, 279 N.C. 643, 185 S.E.2d 227 (1971), death sentence vacated, 408 U.S. 940, 92 S. Ct. 2878, 33 L. Ed. 2d 764 (1972); State v. Bass, 280 N.C. 435, 186 S.E.2d 384 (1972); State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

B. Requirement of Writing.

Stringency of Requiring Waiver in Writing. — In imposing the requirement that an indigent's waiver of counsel must be in writing, the North Carolina General Assembly imposed a more stringent requirement than the federal courts have done. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

Words "in writing" in subsection (a) are directory only and not mandatory. State v. Smith, 24 N.C. App. 498, 211 S.E.2d 539 (1975).

Lack of Written Waiver. — The fact that there is no written waiver neither alters the conclusion that the waiver was knowing and voluntary, nor invalidates the waiver. State v. Heatwole, 344 N.C. 1, 473 S.E.2d 310 (1996), cert. denied, 520 U.S. 1122, 117 S. Ct. 1259, 137 L. Ed. 2d 339 (1997).

Indigent defendant's waiver of counsel was not invalid because there was no written record of the waiver, in spite of G.S. 7A-457's requirement of a written waiver, because the requirement is directory, rather than mandatory, as long as the provisions of the statute were otherwise followed. State v. Fulp, 355 N.C. 171, 558 S.E.2d 156, 2002 N.C. LEXIS 19 (2002).

Waiver at Out-of-Court Proceeding No Longer Required to Be in Writing. — The General Assembly, by Session Laws 1971, c. 1243, amended this section so as to relax the requirement that a waiver of counsel must be in writing. State v. Turner, 281 N.C. 118, 187 S.E.2d 750 (1972).

Printing Name Rather Than Writing It. — The fact that defendant printed his name instead of signing it to a waiver of rights form was without legal significance and did not warrant suppression of in-custody statements of defendant. State v. Roberts, 293 N.C. 1, 235 S.E.2d 203 (1977).

Refusal to Sign Waiver of Counsel Will Not Defeat Determination That Counsel Was Properly Waived. — When all of the provisions of this section have been otherwise fully complied with, and the indigent defendant has refused to accept court-appointed counsel, his refusal to sign a waiver of counsel will not defeat a determination that such defendant freely, voluntarily and understandingly waived in-court representation by counsel, and in such case the State may proceed with the trial of the indigent defendant without counsel. State v. Smith, 24 N.C. App. 498, 211 S.E.2d 539 (1975), overruled on other grounds, State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989).

Refusal to sign a written waiver is a fact which may tend to show that no waiver occurred, but it is not conclusive in the face of other evidence tending to show waiver. State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

A refusal to sign a waiver form does not necessarily preclude a valid oral waiver. State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

The waiver in writing once given is good and sufficient until the proceeding is finally terminated, unless the defendant himself makes known to the court that he desires to withdraw the waiver and have counsel assigned to him. State v. Watson, 21 N.C. App. 374, 204 S.E.2d 537, cert. denied, 285 N.C. 595, 206 S.E.2d 866 (1974).

The burden of showing the change in the desire of the defendant for counsel rests upon the defendant. State v. Watson, 21 N.C. App. 374, 204 S.E.2d 537, cert. denied, 285 N.C. 595, 206 S.E.2d 866 (1974).

This section does not require successive waivers in writing at every court level of the proceeding, and trial in district court and trial in superior court on appeal constitute one in-court proceeding. State v. Watson, 21 N.C. App. 374, 204 S.E.2d 537, cert. denied, 285 N.C. 595, 206 S.E.2d 866 (1974).

C. Voluntary Statements.

No waiver is involved with respect to volunteered statements. State v. Haddock, 281 N.C. 675, 190 S.E.2d 208 (1972).

A volunteered confession is admissible by constitutional standards even in the absence of warning or waiver of rights, since an indigent's right to or waiver of counsel under this section does not arise and is not involved with respect to volunteered statements. State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973).

Defendant's volunteered confession would have been admissible by constitutional standards even in the absence of warning or waiver of his rights. State v. Haddock, 281 N.C. 675, 190 S.E.2d 208 (1972).

Any statement given freely and voluntarily without any compelling influence is admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. State v. Haddock, 281 N.C. 675, 190 S.E.2d 208 (1972).

Assuming defendant's indigency, the presence of counsel was not required, because defendant's statement at the police station was not the result of an in-custody interrogation initiated by the officers. Rather, it was defendant's own voluntary narration, freely and understandingly related. State v. Haddock, 281 N.C. 675, 190 S.E.2d 208 (1972).

Although defendant was in custody at the time he made the incriminating statements, where his statements were not made in response to police "interrogation," as that word is defined in Miranda, but were more in the nature of volunteered assertions and narrations, his statements were admissible. State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973).

Where there was no evidence of any interrogation or other police procedure tending to overbear defendant's will and defendant spoke in the voluntary exercise of his own will and without the slightest compulsion of in-custody interrogation procedures, his statements were properly admitted into evidence as volunteered statements made under circumstances requiring neither warnings nor the presence of counsel. State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973).

D. Self-Representation.

Right of Defendant to Represent Himself. — A defendant in a criminal proceeding has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

The United States Constitution does not deny to a defendant the right to defend himself. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Having been fully advised by the court that an attorney would be appointed to represent him if he so desired, the defendant had the right to reject the offer of such appointment and to represent himself in the trial and disposition of his case. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Appointment of Counsel for Limited Purpose Where Defendant Represents Himself. — Defendant was not prejudiced in any respect by the appointment of counsel for the limited purpose of furnishing advice to him if so requested, even though defendant waived counsel and conducted his own defense. State v. Harper, 21 N.C. App. 30, 202 S.E.2d 795, cert. denied, 285 N.C. 375, 205 S.E.2d 100 (1974).

III. GUILTY PLEAS.

Failure to Interrogate Defendant Entering Plea of Guilty. — Failure on the part of the trial judge to follow the recommended procedure that he interrogate every defendant, whether represented by counsel or not, who enters a plea of guilty, in order to be sure that he has freely, voluntarily and intelligently consented to and authorized the entry of such plea, is not fatal to a conviction. This rule has not been modified by this section. However, when a defendant who is represented by counsel tenders a plea of guilty or a plea of nolo contendere it must appear affirmatively in the record that he did so voluntarily and understandingly. State v. Ford, 281 N.C. 62, 187 S.E.2d 741 (1972).

Failure to Inform Defendant Pleading Nolo Contendere of Minimum Sentence. — Where the trial court informed defendant that he could be imprisoned for as much as 30 years upon his plea of nolo contendere to a charge of armed robbery, the failure of the court to inform defendant that the minimum sentence was five years did not vitiate defendant's plea of nolo contendere. State v. Blake, 14 N.C. App. 367, 188 S.E.2d 607 (1972).

§ 7A-458. Counsel fees.

The fee to which an attorney who represents an indigent person is entitled shall be fixed in accordance with rules adopted by the Office of Indigent Defense Services. Fees shall be based on the factors normally considered in fixing attorneys' fees, such as the nature of the case, and the time, effort and responsibility involved. Fees shall not be set or ordered at rates higher than those established by the rules adopted under this section without the approval of the Office of Indigent Defense Services. Even if the trial, appeal, hearing or other proceeding is never held, preparation therefor is nevertheless compensable and, in capital cases and other extraordinary cases pending in superior court, a fee for services rendered and payment for expenses incurred may be allowed pending final determination of the case. (1969, c. 1013, s. 1; 1987 (Reg. Sess., 1988), c. 1086, s. 113(b); 1991 (Reg. Sess., 1992), c. 900, s. 116(b); 2000-144, s. 12; 2005-276, s. 14.13.)

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

CASE NOTES

Amount Discretionary. — Amount of an award of indigent counsel fees is discretionary with the trial court. State v. Williamson, 122 N.C. App. 229, 468 S.E.2d 840 (1996).

Cited in Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

§ **7A-459:** Repealed by Session Laws 2000-144, s. 13, as amended by Session Laws 2001-424, s. 22.11(c), effective July 1, 2001.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

§§ **7A-460 through 7A-464:** Reserved for future codification purposes.

ARTICLE 37.

The Public Defender.

§§ **7A-465 through 7A-467:** Repealed by Session Laws 2000-144, s. 13, as amended by Session Laws 2001-424, s. 22.11(c), effective July 1, 2001.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

§ **7A-468:** Repealed by Session Laws 1987 (Regular Session, 1988), c. 1056, s. 13.

§§ **7A-469 through 7A-471:** Repealed by Session Laws 2000-144, s. 13, as amended by Session Laws 2001-424, s. 22.11(c), effective July 1, 2001.

§§ **7A-472 through 7A-474:** Reserved for future codification purposes.

ARTICLE 37A.

Access to Civil Justice Act.

§ 7A-474.1. Legislative findings and purpose.

The General Assembly of North Carolina declares it to be its purpose to provide access to legal representation for indigent persons in certain kinds of civil matters. The General Assembly finds that such representation can best be provided in an efficient, effective, and economic manner through the established legal services programs in this State. (1989, c. 795, s. 25; 2001-424, s. 22.14(e); 2007-323, s. 30.8(g).)

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 30.8(g), effective July 1, 2007, substituted "the established legal services" for "five geographically based field" near the end of the last sentence.

§ 7A-474.2. Definitions.

The following definitions shall apply throughout this Article, unless the context otherwise requires:

(1) "Eligible client" means a resident of North Carolina financially eligible for representation under the Legal Services Corporation Act, regulations, and interpretations adopted thereunder (45 C.F.R. § 1611, and subsequent revisions), or a person entitled to State benefits or services pursuant to G.S. 14-43.11(d).

(1a) "Established legal services programs" means the following not-for-profit corporations using State funds to serve the counties listed: Legal Services of the Southern Piedmont, serving Cabarrus, Gaston, Mecklenburg, Stanly, and Union Counties; Legal Aid Society of Northwest North Carolina, serving Davie, Forsyth, Iredell, Stokes, Surry, and Yadkin Counties; Pisgah Legal Services, serving Buncombe, Henderson, Madison, Polk, Rutherford, and Transylvania Counties; and Legal Aid of North Carolina, a statewide program; or any successor entity or entities of the named organizations, or, should any of the named organizations dissolve, the entity or entities providing substantially the same services in substantially the same service area.

(2) "Legal assistance" means the provision of any legal services, as defined by Chapter 84 of the General Statutes, consistent with this Article. Provided, that all legal services provided hereunder shall be performed consistently with the Rules of Professional Conduct promulgated by the North Carolina State Bar. Provided, further, that no funds appropriated under this Article shall be used for lobbying to influence the passage or defeat of any legislation before any municipal, county, state, or national legislative body.

(3) Repealed by Session Laws 2001-424, s. 22.14(f), effective January 1, 2002.

(4) Recodified as subdivision (1a). (1989, c. 795, s. 25; 2001-424, s. 22.14(f); 2007-323, s. 30.8(h); 2007-547, s. 9.)

Editor's Note. — Subdivision (4), as amended by Session Laws 2007-323, s. 30.8(h), was redesignated as subdivision (1a) at the direction of the Revisor of Statutes to maintain alphabetical order.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 30.8(h), effective July 1, 2007, in subdivision (4), substituted "established legal services" for "Geographically based field," deleted "North Central Legal Assistance Program, serving Durham, Franklin, Granville, Person, Vance, and Warren Counties" following "Yadkin Counties" and substituted "Legal Aid of North Carolina, a statewide program" for "Legal Services of North Carolina, serving 83 counties in North Carolina."

Session Laws 2007-547, s. 9, effective December 1, 2007, and applicable to offenses committed on or after that date, added "or a person entitled to State benefits or services pursuant to G.S. 14-43.11(d)" at the end of subdivision (1).

§ 7A-474.3. Eligible activities and limitations.

(a) Eligible Activities. Funds appropriated under this Article shall be used only for the following purposes:

(1) To provide legal assistance to eligible clients;
(2) To provide education to eligible clients regarding their rights and duties under the law;
(3) To involve the private bar in the representation of eligible clients pursuant to this Article.

(b) Eligible Cases. Legal assistance shall be provided to eligible clients under this Article only in the following types of cases:

(1) Family violence or spouse abuse;
(2) Assistance for the disabled in obtaining federal Social Security benefits;
(2a) Assistance for eligible clients in obtaining benefits or assistance under any federal law or program providing benefits or assistance for human trafficking victims.
(3) Representation of eligible farmers faced with the potential of farm foreclosure;
(4) Representation of eligible clients over the age of 60 regarding the following matters:
  a. Wills and estates;
  b. Safe and sanitary housing;
  c. Pensions and retirement rights;
  d. Social Security and Medicare rights;
  e. Access to health care;
  f. Food and nutrition; and
  g. Transportation.
(5) Representation of eligible clients designed to enable them to obtain the necessary skills and means to obtain meaningful employment at a decent wage and reduce the public welfare rolls; and
(6) Representation of eligible clients under the age of 21 or eligible families with legal problems affecting persons under the age of 21 regarding the following matters:
  a. Financial support and custody of children;
  b. Child care;
  c. Child abuse or neglect;
  d. Safe and sanitary housing;
  e. Food and nutrition; and
  f. Access to health care.

(c) Limitations. No funds appropriated under this Article shall be used for any of the following purposes:

(1) To provide legal assistance with respect to any proceeding or litigation which seeks to procure a nontherapeutic abortion or to compel any individual or institution to perform an abortion, or assist in the performance of an abortion, or provide facilities for the performance of an abortion;
(2) To provide legal assistance with respect to any criminal proceeding;
(3) To provide legal assistance to any agricultural employee or migrant farmworker employed in North Carolina with regard to the terms of the worker's employment, including conditions relating to housing;
(4) To provide legal assistance to any prisoner within the North Carolina Department of Correction with regard to the terms of that person's incarceration; or
(5) To provide legal assistance to persons with mental handicaps residing in State institutions with regard to the terms and conditions of the

treatment or services provided to them by the State. (1989, c. 795, s. 25; 1997-506, s. 29; 2007-547, s. 10.)

Effect of Amendments. — Session Laws 2007-547, s. 10, effective December 1, 2007, and applicable to offenses committed on or after that date, added subdivision (b)(2a).

§ 7A-474.4. Funds.

Funds to provide representation pursuant to this Article shall be provided to the North Carolina State Bar for provision of direct services by and support of the established legal services programs. The North Carolina State Bar shall allocate these funds directly to each of the established legal services programs based upon the eligible client population in each area, with Pisgah Legal Services receiving the allocation for Buncombe, Henderson, Madison, Polk, Rutherford, and Transylvania Counties; Legal Aid Society of Northwest North Carolina receiving half of the allocation for Davie, Forsyth, Iredell, Stokes, Surry, and Yadkin Counties; and Legal Services of Southern Piedmont receiving half of the allocation for Cabarrus, Gaston, Mecklenburg, Stanly, and Union Counties. The North Carolina State Bar shall not use any of these funds for its administrative costs. (1989, c. 795, s. 25; 2001-424, s. 22.14(g); 2007-323, s. 30.8(i).)

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 30.8(i), effective July 1, 2007, rewrote the section.

§ 7A-474.5. Records and reports.

The established legal services programs shall keep appropriate records and make periodic reports, as requested, to the North Carolina State Bar. (1989, c. 795, s. 25; 2001-424, s. 22.14(h); 2007-323, s. 30.8(j).)

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 30.8(j), effective July 1, 2007, substituted "established legal services" for "geographically based field" near the beginning of the section.

§§ 7A-474.6 through 7A-474.15: Reserved for future codification purposes.

ARTICLE 37B.

Domestic Violence Victim Assistance Act.

§ 7A-474.16. Legislative findings and purpose.

The General Assembly of North Carolina declares it to be its purpose to provide access to legal representation for domestic violence victims in certain kinds of civil matters. The General Assembly finds that such representation can best be provided in an efficient, effective, and economic manner through established legal services programs in this State. (2004-186, s. 4.1.)

Editor's Note. — Session Laws 2004-186, s. 4.1, originally enacted this Article as G.S. 7A-474.6 through 7A-474.10. It has been renumbered as G.S. 7A-474.16 through 7A-474.20 at the direction of the Revisor of Statutes.

§ 7A-474.17. Definitions.

The following definitions shall apply throughout this Article, unless the context otherwise requires:

(1) "Domestic violence victim" means a resident of North Carolina that has been subjected to acts of domestic violence as defined in G.S. 50B-1. A resident is not required to seek a protective order under Chapter 50B of the General Statutes to qualify as a domestic violence victim under this Article.

(2) "Legal assistance" means the provision of any legal services, as defined by Chapter 84 of the General Statutes, consistent with this Article. Provided, that all legal services provided hereunder shall be performed consistently with the Rules of Professional Conduct promulgated by the North Carolina State Bar. Provided, further, that no funds appropriated under this Article shall be used for lobbying to influence the passage or defeat of any legislation before any municipal, county, state, or national legislative body.

(3) "Established legal services program" means the following not-for-profit corporations using State funds to serve the counties listed: Legal Aid Society of Northwest North Carolina, serving Davie, Forsyth, Iredell, Stokes, Surry, and Yadkin Counties; Pisgah Legal Services, serving Buncombe, Henderson, Madison, Polk, Rutherford, and Transylvania Counties; and Legal Aid of North Carolina; or any successor entity or entities of the named organizations, or, should any of the named organizations dissolve, the entity or entities providing substantially the same services in substantially the same service area. (2004-186, s. 4.1.)

§ 7A-474.18. Eligible activities and limitations.

(a) Eligible Activities. — Funds appropriated under this Article shall be used only for the following purposes:

(1) To provide legal assistance to domestic violence victims.

(2) To provide education to domestic violence victims regarding their rights and duties under the law.

(3) To involve the private bar in the representation of domestic violence victims pursuant to this Article.

(b) Eligible Cases. — The funds shall be prioritized by each legal services program to serve the greatest number of eligible clients, with emphasis placed on representation of clients needing legal assistance with proceedings pursuant to Chapter 50B of the General Statutes. Legal assistance shall be provided to eligible clients under this Article only in the following types of cases:

(1) Actions for protective orders issued pursuant to Chapter 50B of the General Statutes;

(2) Child custody and visitation issues; and

(3) Legal services which ensure the safety of the client and the client's children.

(c) Limitations. — No funds appropriated under this Article shall be used for any of the following purposes:

(1) To provide legal assistance with respect to any criminal proceeding; or

(2) To provide legal assistance to any prisoner within the North Carolina Department of Correction with regard to the terms of that person's incarceration. (2004-186, s. 4.1.)

§ 7A-474.19. Funds.

Funds to provide representation pursuant to this Article shall be provided to the North Carolina State Bar for provision of direct services by and support of the established legal services programs. The North Carolina State Bar shall allocate these funds directly to each of the established legal services programs with Pisgah Legal Services receiving the allocation for Buncombe, Henderson, Madison, Polk, Rutherford, and Transylvania Counties, and Legal Aid Society of Northwest North Carolina receiving the allocation for Davie, Forsyth, Iredell, Stokes, Surry, and Yadkin Counties. Funds shall be allocated to each program based on the counties served by that program using the following formula:

(1) Twenty percent (20%) based on a fixed equal dollar amount for each county.

(2) Eighty percent (80%) based on the rate of civil actions filed pursuant to Chapter 50B of the General Statutes in that county.

The North Carolina State Bar shall not use any of these funds for its administrative costs. (2004-186, s. 4.1.)

§ 7A-474.20. Records and reports.

The established legal services programs shall keep appropriate records and make periodic reports, as requested, to the North Carolina State Bar. The North Carolina State Bar shall report annually to the General Assembly on the amount of the funds disbursed and the use of the funds by each legal services program receiving funds. The report to the General Assembly shall be made by January 15 of each year beginning January 15, 2006. (2004-186, s. 4.1.)

Article 38.

Appellate Defender Office.

§§ 7A-475 through 7A-485: Expired.

Cross References. — For current provision regarding the appellate defender office, see G.S. 7A-498.8.

Editor's Note. — This Article expired, pursuant to the terms of G.S. 7A-483, as amended by Session Laws 1985, c. 503, s. 2, on July 15, 1985.

Expired G.S. 7A-476 was amended by Session Laws 1985, c. 503, s. 1. Expired G.S. 7A-483 was amended by Session Laws 1985, c. 503, s. 2.

Session Laws 1985, c. 698, s. 21(b), effective July 11, 1985, purported to add a new G.S. 7A-484 at the end of this Article. However, Session Laws 1985, c. 791, s. 40, effective retroactive to July 1, 1985, amended s. 21(b) of c. 698 to designate the new section as G.S. 7A-486.7 of Article 38A of Chapter 7A.

Article 38A.

Appellate Defender Office.

§§ 7A-486 through 7A-486.7: Repealed by Session Laws 2000-144, s. 13, as amended by Session Laws 2001-424, s. 22.11(c), effective July 1, 2001.

Cross References. — For current provisions regarding Appellate Defender, see G.S. 7A-498.8.

§§ **7A-487, 7A-488:** Reserved for future codification purposes.

ARTICLE 39.

Guardian Ad Litem Program.

§§ **7A-489 through 7A-493:** Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999.

Cross References. — For the Juvenile Code, effective July 1, 1999, see now G.S. 7B-100 et seq. For guardian ad litem program, see G.S. 7B-1200 et seq.

ARTICLE 39A.

Custody and Visitation Mediation Program.

§ 7A-494. Custody and Visitation Mediation Program established.

(a) The Administrative Office of the Courts shall establish a Custody and Visitation Mediation Program to provide statewide and uniform services in accordance with G.S. 50-13.1 in cases involving unresolved issues about the custody or visitation of minor children. The Director of the Administrative Office of the Courts shall appoint such AOC staff support required for planning, organizing, and administering such program on a statewide basis.

The purposes of the Custody and Visitation Mediation Program shall be to provide the services of skilled mediators to further the goals expressed in G.S. 50-13.1(b).

(b) Beginning on July 1, 1989, the Administrative Office of the Courts shall establish in phases a statewide custody mediation program comprised of local district programs to be established in all judicial districts of the State. Each local district program shall consist of: a qualified mediator or mediators to provide mediation services; and such clerical staff as the Administrative Office of the Courts in consultation with the local district program deems necessary. Such personnel, to be employed by the Chief District Court Judge of the district, may serve as full-time or part-time State employees or, in the alternative, such activities may be provided on a contractual basis when determined appropriate by the Administrative Office of the Courts. The Administrative Office of the Courts may authorize all or part of a program in one judicial district to be operated in conjunction with that of another district or districts. The Director of the Administrative Office of the Courts is authorized to approve contractual agreements for such services as executed by order of the Chief District Court Judge of a district court district; such contracts to be exempt from competitive bidding procedures under Chapter 143 of the General Statutes. The Administrative Office of the Courts shall promulgate rules and regulations necessary and appropriate for the administration of the program. Funds appropriated by the General Assembly for the establishment and maintenance of mediation programs under this Article shall be administered by the Administrative Office of the Courts.

(c) For a person to qualify to provide mediation services under this Article, that person shall show that he or she:

(1) Has at minimum a master's degree in psychology, social work, family counselling, or a comparable human relations discipline; and

(2) Has at least 40 hours of training in mediation techniques by a qualified instructor of mediation as determined by the Administrative Office of the Courts; and

(3) Has had professional training and experience relating to child development, family dynamics, or comparable areas; and

(4) Meets such other criteria as may be specified by the Administrative Office of the Courts. (1989, c. 795, s. 15.)

Legal Periodicals. — For comment, "Good Faith Mediation: Improving Efficiency, Cost, and Satisfaction in North Carolina's Pre-Trial Process," 18 Campbell L. Rev. 281 (1996).

§ 7A-495. Implementation and administration.

(a) Local District Program. — The Administrative Office of the Courts shall, in cooperation with each Chief District Court Judge and other district personnel, implement and administer the program mandated by this Article.

(b) Advisory Committee Established. — The Director of the Administrative Office of the Courts shall appoint a Custody Mediation Advisory Committee consisting of at least five members to advise the Custody Mediation Program. The members of the Advisory Committee shall receive the same per diem and reimbursement for travel expenses as members of State boards and commissions generally. (1989, c. 795, s. 15.)

§§ 7A-496, 7A-497: Reserved for future codification purposes.

ARTICLE 39B.

Indigent Defense Services Act.

§ 7A-498. Title.

This Article shall be known and may be cited as the "Indigent Defense Services Act of 2000". (2000-144, s. 1.)

Cross References. — For rules and regulations relating to the appointment of counsel for indigent defendants in certain criminal cases, see the Annotated Rules of North Carolina.

Editor's Note. — Session Laws 2000-144, s. 49, as amended by Session Laws 2001-424, s. 22.11(a), provides: "Except as otherwise provided in this Part, this act becomes effective July 1, 2001. G.S. 7A-498, 7A-498.1, 7A-498.2, 7A-498.4, 7A-498.5, 7A-498.6, and 7A-498.7(g), as enacted in Section 1 of this act, and Section 13 of this act are effective when they become law [August 2, 2000]; however, except as otherwise provided in this Part, no rules, standards, or other regulations issued by the Commission on Indigent Defense Services, and no decisions regarding the actual delivery of services shall take effect prior to July 1, 2001, and all authority over the expenditure of funds shall remain with the Director of the Administrative Office of the Courts prior to that date. The Commission shall be responsible for the expenditure of funds for all cases pending on or after July 1, 2001."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 13.6, provides: "The Office of Indigent Defense Services shall study the establishment of additional public defender districts in the State, identifying the areas of the State in which savings could be realized by the establishment of such districts and the projected savings in each area. The Office of Indigent Defense Services shall report to the Chairs of the Senate and House of Representatives Appropriations Committees and the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety by March 1, 2004, on the results of its study."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5, contains a severability clause.

Legal Periodicals. — For comment on assigned counsel and public defender systems, see 49 N.C.L. Rev. 705 (1971).

For note discussing failure to communicate and effective assistance of counsel in light of State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981), see 13 N.C. Cent. L.J. 101 (1981).

CASE NOTES

Editor's Note. — *The cases below were decided under prior law.*

Constitutionality. — Attorneys did not show that the Indigent Defense Services Act and the Office of Indigent Defense Services violated the state constitution's separation of powers principles; appointing and compensating attorneys for indigent criminals was not committed to any one state government branch. Ivarsson v. Office of Indigent Def. Servs., 156 N.C. App. 628, 577 S.E.2d 650, 2003 N.C. App. LEXIS 208 (2003), cert. denied, 357 N.C. 250, 582 S.E.2d 269 (2003).

Appointment of additional counsel under former § 7A-459 clearly discretionary with the trial or appellate court, and failure to appoint or continue the appointment of associate counsel will be held error only when it amounts to a clear abuse of that discretion, i.e., only when it is denied in the face of a showing by defendant of a reasonable likelihood that additional counsel would materially assist in the preparation of his defense, or that without such help it was probable that defendant would not receive a fair trial. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

Division of Labor. — Defendant's contention that the division of labor between attorney and assistant counsel demonstrated that attorney's status as lead counsel was purely nominal and, as a result, defendant was deprived of his right to be represented by a lead counsel with five years experience in the general practice of law was without merit. State v. Howell, 335 N.C. 457, 439 S.E.2d 116 (1994).

OPINIONS OF ATTORNEY GENERAL

As to entitlement of public defender to district attorney's travel allowance and full-time duties, see opinion of Attorney General to Mr. Wallace C. Harrelson, Public Defender, Eighteenth Judicial District, 40 N.C.A.G. 142 (1969) (rendered under prior law.)

§ 7A-498.1. Purpose.

Whenever a person is determined to be indigent and entitled to counsel, it is the responsibility of the State under the federal and state constitutions to provide that person with counsel and the other necessary expenses of representation. The purpose of this Article is to:

(1) Enhance oversight of the delivery of counsel and related services provided at State expense;
(2) Improve the quality of representation and ensure the independence of counsel;
(3) Establish uniform policies and procedures for the delivery of services;
(4) Generate reliable statistical information in order to evaluate the services provided and funds expended; and
(5) Deliver services in the most efficient and cost-effective manner without sacrificing quality representation. (2000-144, s. 1.)

Editor's Note. — For effective date and applicability, see the editor's note at G.S. 7A-498.

CASE NOTES

Cited in State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

§ 7A-498.2. Establishment of Office of Indigent Defense Services.

(a) The Office of Indigent Defense Services, which is administered by the Director of Indigent Defense Services and includes the Commission on Indigent Defense Services and the Sentencing Services Program established in Article 61 of this Chapter, is created within the Judicial Department. As used in this Article, "Office" means the Office of Indigent Defense Services, "Director" means the Director of Indigent Defense Services, and "Commission" means the Commission on Indigent Defense Services.

(b) The Office of Indigent Defense Services shall exercise its prescribed powers independently of the head of the Administrative Office of the Courts. The Office may enter into contracts, own property, and accept funds, grants, and gifts from any public or private source to pay expenses incident to implementing its purposes.

(c) The Director of the Administrative Office of the Courts shall provide general administrative support to the Office of Indigent Defense Services. The term "general administrative support" includes purchasing, payroll, and similar administrative services.

(d) The budget of the Office of Indigent Defense Services shall be a part of the Judicial Department's budget. The Commission on Indigent Defense Services shall consult with the Director of the Administrative Office of the Courts, who shall assist the Commission in preparing and presenting to the General Assembly the Office's budget, but the Commission shall have the final authority with respect to preparation of the Office's budget and with respect to representation of matters pertaining to the Office before the General Assembly.

(e) The Director of the Administrative Office of the Courts shall not reduce or modify the budget of the Office of Indigent Defense Services or use funds appropriated to the Office without the approval of the Commission. (2000-144, s. 1; 2002-126, s. 14.7(b).)

Editor's Note. — For effective date and applicability, see the editor's note at G.S. 7A-498.

Session Laws 2002-126, s. 14.7(a), provides: "The statutory authority, powers, duties, and functions, records, personnel, property, unexpended balances of appropriations, allocations or other funds, including the functions of budgeting and purchasing, of the Administrative Office of the Courts to conduct the Sentencing Services Program, as provided by Article 61 of Chapter 7A of the General Statutes, are transferred to the Office of Indigent Defense Services. However, pursuant to the provisions of G.S. 7A-498.2(c), the Administrative Office of the Courts shall continue to have the responsibility of providing general administrative support to the Sentencing Services Program."

Session Laws 2002-126, s. 14.7(f), provides: "Each Sentencing Services Program shall review its procedures and implement methods of (i) minimizing the frequency with which plans are prepared but not presented to the court, and (ii) ensuring the efficient management of probation revocation cases when they are referred by a judge."

Session Laws 2002-126, s. 14.7(h), provides: "The Office of Indigent Defense Services shall report by January 1, 2003, to the Chairs of the Senate and House of Representatives Appropriations Committees and the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety on the reorganization of the Sentencing Services Program pursuant to this section. The report shall include the specific assignments for the State positions, the districts in which sentencing services will be available, the means by which those services will be provided, and an estimated number of plans and cost per plan for the 2002-2003 fiscal year."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6, contains a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

§ 7A-498.3. Responsibilities of Office of Indigent Defense Services.

(a) The Office of Indigent Defense Services shall be responsible for establishing, supervising, and maintaining a system for providing legal representation and related services in the following cases:

(1) Cases in which an indigent person is subject to a deprivation of liberty or other constitutionally protected interest and is entitled by law to legal representation;

(2) Cases in which an indigent person is entitled to legal representation under G.S. 7A-451 and G.S. 7A-451.1;

(2a) Cases in which the State is legally obligated to provide legal assistance and access to the courts to inmates in the custody of the Department of Correction; and

(3) Any other cases in which the Office of Indigent Defense Services is designated by statute as responsible for providing legal representation.

(b) The Office of Indigent Defense Services shall develop policies and procedures for determining indigency in cases subject to this Article, and those policies shall be applied uniformly throughout the State. Except in cases under subdivision (2a) of subsection (a) of this section, the court shall determine in each case whether a person is indigent and entitled to legal representation, and counsel shall be appointed as provided in G.S. 7A-452.

(c) In all cases subject to this Article, appointment of counsel, determination of compensation, appointment of experts, and use of funds for experts and other services related to legal representation shall be in accordance with rules and procedures adopted by the Office of Indigent Defense Services.

(d) The Office of Indigent Defense Services shall allocate and disburse funds appropriated for legal representation and related services in cases subject to this Article pursuant to rules and procedures established by the Office. (2000-144, s. 1; 2005-276, s. 14.9(a).)

Cross References. — As to annual report to the General Assembly by the Office of Indigent Defense Services, see G.S. 7A-346.2.

Editor's Note. — For effective date and applicability, see the editor's note at G.S. 7A-498.

Session Laws 2001-424, s. 22.12, provides: "The Office of Indigent Defense Services shall report to the Chairs of the Senate and House of Representatives Appropriations Committees and the Chairs of the Senate and House Representatives Appropriations Subcommittees on Justice and Public Safety by March 1 of each year on:

"(1) The volume and cost of cases handled in each district by assigned counsel or public defenders;

"(2) Actions taken by the Office to improve the cost-effectiveness and quality of indigent defense, including the capital case program;

"(3) Plans for changes in rules, standards, or regulations in the upcoming year; and

"(4) Any recommended changes in law or funding procedures that would assist the Office in improving the management of funds expended for indigent defense services."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5, contains a severability clause.

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 13.3, provides: "The Office of Indigent Defense Services shall report to the Chairs of the Senate and House of Representatives Appropriations Committees and the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety by March 1 of each year on:

"(1) The volume and cost of cases handled in each district by assigned counsel or public defenders;

"(2) Actions taken by the Office to improve the cost-effectiveness and quality of indigent defense, including the capital case program;

"(3) Plans for changes in rules, standards, or regulations in the upcoming year; and

"(4) Any recommended changes in law or funding procedures that would assist the Office in improving the management of funds expended for indigent defense services."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5, contains a severability clause.

Session Laws 2005-276, s. 14.9(b), provides: "Effective October 1, 2005, the State's responsibility for providing inmates in the custody of the Department of Correction with legal assistance and access to the courts shall be administered by the Office of Indigent Defense Services. The existing contract between the Department of Correction and Prisoner Legal Services, Inc., shall not be extended or renewed beyond that date.

"The Director of the Office of Indigent Defense Services shall contract with Prisoner Legal Services, Inc., to provide legal services and access to the courts for inmates for a period of two years, from October 1, 2005, through September 30, 2007. During this time, the Director of Indigent Defense Services shall evaluate the services provided by Prisoner Legal Services, Inc. The Office of Indigent Defense Services shall provide an interim report of its evaluation to the Chairs of the Senate and House of Representatives Appropriations Committees and Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety by May 1, 2006, and a final report of its evaluation by May 1, 2007. The interim report shall describe the evaluation process and criteria, the status of the evaluation, and any preliminary findings."

Session Laws 2005-276, s. 14.12, provides: "The Office of Indigent Defense Services shall report to the Chairs of the Senate and House of Representatives Appropriations Committees and the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety by March 1 of each year on:

"(1) The volume and cost of cases handled in each district by assigned counsel or public defenders;

"(2) Actions taken by the Office to improve the cost-effectiveness and quality of indigent defense, including the capital case program;

"(3) Plans for changes in rules, standards, or regulations in the upcoming year; and

"(4) Any recommended changes in law or funding procedures that would assist the Office in improving the management of funds expended for indigent defense services.

"The Office shall also consult with the Conference of District Attorneys of North Carolina, the Conference of District Court Judges, and the Conference of Superior Court Judges in formulating proposals aimed at reducing future costs, including the possibility of decriminalizing minor traffic offenses, changing the way that criminal district court is scheduled, and reevaluating the handling of capital cases. The Office shall include these proposals in its reports during the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 14.16, provides: "The State Auditor shall conduct an analysis of the fee payment practices of the Office of Indigent Defense Services and make recommendations for process improvements in payment of fee applications, including recommendations regarding automation. The State Auditor shall report the results of this analysis and the recommendations resulting from it to the Chairs of the House and Senate Appropriations Subcommittees on Justice and Public Safety by March 1, 2007."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-323, s. 14.5, provides: "The Office of Indigent Defense Services shall report to the Chairs of the House of Representatives and Senate Appropriations Committees and the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety by March 1 of each year on:

"(1) The volume and cost of cases handled in each district by assigned counsel or public defenders;

"(2) Actions taken by the Office to improve the cost-effectiveness and quality of indigent defense, including the capital case program;

"(3) Plans for changes in rules, standards, or regulations in the upcoming year;

"(4) Any recommended changes in law or funding procedures that would assist the Office in improving the management of funds expended for indigent defense services, including any recommendations concerning the feasibility and desirability of establishing regional public defender offices; and

"(5) The changes in operations implemented in response to the following findings and recommendations contained in the March 2007 State Audit Report:

"a. Attorney fee payment process lacks adequate controls. Measures should be implemented to ensure that attorneys are paid the correct amount and to minimize the incidence of overpayment resulting from accident, fraud, or other cause.

"b. Attorney fee payment process is inefficient and labor-intensive.

"c. The Office should automate the attorney fee payment process and require attorneys to register for electronic fund transfer."

Session Laws 2007-323, s. 14.17(a), provides: "The Office of Indigent Defense Services, in consultation with the Administrative Office of the Courts, shall study the potential for a statewide system of electronic fee submission and develop a proposal for statewide implementation of such a system. A report on this proposal shall be included as part of the report required under Section 14.5 of this act."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 7A-498.4. Establishment of Commission on Indigent Defense Services.

(a) The Commission on Indigent Defense Services is created within the Office of Indigent Defense Services and shall consist of 13 members. To create an effective working group, assure continuity, and achieve staggered terms, the Commission shall be appointed as provided in this section.

(b) The members of the Commission shall be appointed as follows:

(1) The Chief Justice of the North Carolina Supreme Court shall appoint one member, who shall be an active or former member of the North Carolina judiciary.

(2) The Governor shall appoint one member, who shall be a nonattorney.

(3) The General Assembly shall appoint one member, who shall be an attorney, upon the recommendation of the President Pro Tempore of the Senate.

(4) The General Assembly shall appoint one member, who shall be an attorney, upon the recommendation of the Speaker of the House of Representatives.

(5) The North Carolina Public Defenders Association shall appoint member, who shall be an attorney.

(6) The North Carolina State Bar shall appoint one member, who shall be an attorney.

(7) The North Carolina Bar Association shall appoint one member, who shall be an attorney.

(8) The North Carolina Academy of Trial Lawyers shall appoint one member, who shall be an attorney.

(9) The North Carolina Association of Black Lawyers shall appoint one member, who shall be an attorney.

(10) The North Carolina Association of Women Lawyers shall appoint one member, who shall be an attorney.

(11) The Commission shall appoint three members, who shall reside in different judicial districts from one another. One appointee shall be a

nonattorney, and one appointee may be an active member of the North Carolina judiciary. One appointee shall be Native American. The initial three members satisfying this subdivision shall be appointed as provided in subsection (k) of this section.

(c) The terms of members appointed pursuant to subsection (b) of this section shall be as follows:

(1) The initial appointments by the Chief Justice, the Governor, and the General Assembly shall be for four years.

(2) The initial appointments by the Public Defenders Association and State Bar, and one appointment by the Commission, shall be for three years.

(3) The initial appointments by the Bar Association and Trial Academy, and one appointment by the Commission, shall be for two years.

(4) The initial appointments by the Black Lawyers Association and Women Lawyers Association, and one appointment by the Commission, shall be for one year.

At the expiration of these initial terms, appointments shall be for four years and shall be made by the appointing authorities designated in subsection (b) of this section. No person shall serve more than two consecutive four-year terms plus any initial term of less than four years.

(d) Persons appointed to the Commission shall have significant experience in the defense of criminal or other cases subject to this Article or shall have demonstrated a strong commitment to quality representation in indigent defense matters. No active prosecutors or law enforcement officials, or active employees of such persons, may be appointed to or serve on the Commission. No active judicial officials, or active employees of such persons, may be appointed to or serve on the Commission, except as provided in subsection (b) of this section. No active public defenders, active employees of public defenders, or other active employees of the Office of Indigent Defense Services may be appointed to or serve on the Commission, except that notwithstanding this subsection, G.S. 14-234, or any other provision of law, Commission members may include part-time public defenders employed by the Office of Indigent Defense Services and may include persons, or employees of persons or organizations, who provide legal services subject to this Article as contractors or appointed attorneys.

(e) All members of the Commission are entitled to vote on any matters coming before the Commission unless otherwise provided by rules adopted by the Commission concerning voting on matters in which a member has, or appears to have, a financial or other personal interest.

(f) Each member of the Commission shall serve until a successor in office has been appointed. Vacancies shall be filled by appointment by the appointing authority for the unexpired term. Removal of Commission members shall be in accordance with policies and procedures adopted by the Commission.

(g) A quorum for purposes of conducting Commission business shall be a majority of the members of the Commission.

(h) The Commission shall elect a Commission chair from the members of the Commission for a term of two years.

(i) The Director of Indigent Defense Services shall attend all Commission meetings except those relating to removal or reappointment of the Director or allegations of misconduct by the Director. The Director shall not vote on any matter decided by the Commission.

(j) Commission members shall not receive compensation but are entitled to be paid necessary subsistence and travel expenses in accordance with G.S. 138-5 and G.S. 138-6 as applicable.

(k) The Commission shall hold its first meeting no later than September 15, 2000. All appointments to the Commission specified in subdivisions (1) through

(10) of subsection (b) of this section shall be made by the appointing authorities by September 1, 2000. The appointee of the Chief Justice shall convene the first meeting. No later than 30 days after its first meeting, the Commission shall make the appointments specified in subdivision (11) of subsection (b) of this section and shall elect its chair. (2000-144, s. 1; 2001-424, s. 22.11(b).)

Editor's Note. — For effective date and applicability, see the editor's note at G.S. 7A-498.

§ 7A-498.5. Responsibilities of Commission.

(a) The Commission shall have as its principal purpose the development and improvement of programs by which the Office of Indigent Defense Services provides legal representation to indigent persons.

(b) The Commission shall appoint the Director of the Office of Indigent Defense Services, who shall be chosen on the basis of training, experience, and other qualifications. The Commission shall consult with the Chief Justice and Director of the Administrative Office of the Courts in selecting a Director, but shall have final authority in making the appointment.

(c) The Commission shall develop standards governing the provision of services under this Article. The standards shall include:

(1) Standards for maintaining and operating regional and district public defender offices and appellate defender offices, including requirements regarding qualifications, training, and size of the legal and supporting staff;
(2) Standards prescribing minimum experience, training, and other qualifications for appointed counsel;
(3) Standards for public defender and appointed counsel caseloads;
(4) Standards for the performance of public defenders and appointed counsel;
(5) Standards for the independent, competent, and efficient representation of clients whose cases present conflicts of interest, in both the trial and appellate courts;
(6) Standards for providing and compensating experts and others who provide services related to legal representation;
(7) Standards for qualifications and performance in capital cases, consistent with any rules adopted by the Supreme Court; and
(8) Standards for determining indigency and for assessing and collecting the costs of legal representation and related services.

(d) The Commission shall determine the methods for delivering legal services to indigent persons eligible for legal representation under this Article and shall establish in each district or combination of districts a system of appointed counsel, contract counsel, part-time public defenders, public defender offices, appellate defender services, and other methods for delivering counsel services, or any combination of these services.

(e) In determining the method of services to be provided in a particular district, the Director shall consult with the district bar as defined in G.S. 84-19 and the judges of the district or districts under consideration. The Commission shall adopt procedures ensuring that affected local bars have the opportunity to be significantly involved in determining the method or methods for delivering services in their districts. The Commission shall solicit written comments from the affected local district bar, senior resident superior court judge, and chief district court judge. Those comments, along with the recommendations of the Commission, shall be forwarded to the members of the General Assembly who represent the affected district and to other interested parties.

(f) The Commission shall establish policies and procedures with respect to the distribution of funds appropriated under this Article, including rates of compensation for appointed counsel, schedules of allowable expenses, appointment and compensation of expert witnesses, and procedures for applying for and receiving compensation.

(g) The Commission shall approve and recommend to the General Assembly a budget for the Office of Indigent Defense Services.

(h) The Commission shall adopt such other rules and procedures as it deems necessary for the conduct of business by the Commission and the Office of Indigent Defense Services. (2000-144, s. 1; 2001-392, s. 2.)

Editor's Note. — For effective date and applicability, see the editor's note at G.S. 7A-498.

§ 7A-498.6. Director of Indigent Defense Services.

(a) The Director of Indigent Defense Services shall be appointed by the Commission for a term of four years. The Director may be removed during this term in the discretion of the Commission by a vote of two-thirds of all of the Commission members. The Director shall be an attorney licensed and eligible to practice in the courts of this State at the time of appointment and at all times during service as the Director.

(b) The Director shall:

(1) Prepare and submit to the Commission a proposed budget for the Office of Indigent Defense Services, an annual report containing pertinent data on the operations, costs, and needs of the Office, and such other information as the Commission may require;

(2) Assist the Commission in developing rules and standards for the delivery of services under this Article;

(3) Administer and coordinate the operations of the Office and supervise compliance with standards adopted by the Commission;

(4) Subject to policies and procedures established by the Commission, hire such professional, technical, and support personnel as deemed reasonably necessary for the efficient operation of the Office of Indigent Defense Services;

(5) Keep and maintain proper financial records for use in calculating the costs of the operations of the Office of Indigent Defense Services;

(6) Apply for and accept on behalf of the Office of Indigent Defense Services any funds that may become available from government grants, private gifts, donations, or bequests from any source;

(7) Coordinate the services of the Office of Indigent Defense Services with any federal, county, or private programs established to provide assistance to indigent persons in cases subject to this Article and consult with professional bodies concerning improving the administration of indigent services;

(8) Conduct training programs for attorneys and others involved in the legal representation of persons subject to this Article;

(8a) Administer the Sentencing Services Program established in Article 61 of this Chapter; and

(9) Perform other duties as the Commission may assign. (2000-144, s. 1; 2002-126, s. 14.7(c).)

Editor's Note. — For effective date and applicability, see the editor's note at G.S. 7A-498.

§ 7A-498.7. Public Defender Offices.

(a) The following counties of the State are organized into the defender districts listed below, and in each of those defender districts an office of public defender is established:

Defender District	Counties
1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans
3A	Pitt
3B	Carteret
5	New Hanover
10	Wake
12	Cumberland
14	Durham
15B	Orange, Chatham
16A	Scotland, Hoke
16B	Robeson
18	Guilford
21	Forsyth
26	Mecklenburg
27A	Gaston
28	Buncombe
29B	Henderson, Polk, Transylvania

After notice to, and consultation with, the affected district bar, senior resident superior court judge, and chief district court judge, the Commission on Indigent Defense Services may recommend to the General Assembly that a district or regional public defender office be established. A legislative act is required in order to establish a new office or to abolish an existing office.

(b) For each new term, and to fill any vacancy, public defenders shall be appointed from a list of not less than two and not more than three names nominated by written ballot of the attorneys resident in the defender district who are licensed to practice law in North Carolina. The balloting shall be conducted pursuant to rules adopted by the Commission on Indigent Defense Services. The appointment shall be made by the senior resident superior court judge of the superior court district or set of districts as defined in G.S. 7A-44.1 that includes the county or counties of the defender district for which the public defender is being appointed.

(c) A public defender shall be an attorney licensed to practice law in North Carolina and shall devote full time to the duties of the office. In lieu of merit and other increment raises paid to regular State employees, a public defender shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, nineteen and two-tenths percent (19.2%) after 20 years of service, and twenty-four percent (24%) after 25 years of service. "Service" means service as a public defender, appellate defender, assistant public or appellate defender, district attorney, assistant district attorney, justice or judge of the General Court of Justice, or clerk of superior court.

(d) Subject to standards adopted by the Commission, the day-to-day operation and administration of public defender offices shall be the responsibility of the public defender in charge of the office. The public defender shall keep appropriate records and make periodic reports, as requested, to the Director of the Office of Indigent Defense Services on matters related to the operation of the office.

(e) The Office of Indigent Defense Services shall procure office equipment and supplies for the public defender, and provide secretarial and library support from State funds appropriated to the public defender's office for this purpose.

(f) Each public defender is entitled to assistant public defenders, investigators, and other staff, full-time or part-time, as may be authorized by the Commission. Assistants, investigators, and other staff are appointed by the public defender and serve at the pleasure of the public defender. Average and minimum compensation of assistants shall be as provided in the biennial Current Operations Appropriations Act. The actual salaries of assistants shall be set by the public defender in charge of the office, subject to approval by the Commission. The Commission shall fix the compensation of investigators. Assistants and investigators shall perform such duties as may be assigned by the public defender.

(g) In lieu of merit and other increment raises paid to regular State employees, an assistant public defender shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, nineteen and two-tenths percent (19.2%) after 20 years of service, and twenty-four percent (24%) after 25 years of service. "Service" means service as a public defender, appellate defender, assistant public or appellate defender, district attorney, assistant district attorney, justice or judge of the General Court of Justice, or clerk of superior court.

(h) The term of office of public defender appointed under this section is four years. A public defender or assistant public defender may be suspended or removed from office, and reinstated, for the same causes and under the same procedures as are applicable to removal of a district attorney.

(i) A public defender may apply to the Director of the Office of Indigent Defense Services to enter into contracts with local governments for the provision by the State of services of temporary assistant public defenders pursuant to G.S. 153A-212.1 or G.S. 160A-289.1.

(j) The Director of the Office of Indigent Defense Services may provide assistance requested pursuant to subsection (i) of this section only upon a showing by the requesting public defender, supported by facts, that the overwhelming public interest warrants the use of additional resources for the speedy disposition of cases involving drug offenses, domestic violence, or other offenses involving a threat to public safety.

(k) The terms of any contract entered into with local governments pursuant to subsection (i) of this section shall be fixed by the Director of the Office of Indigent Defense Services in each case. Nothing in this section shall be construed to obligate the General Assembly to make any appropriation to implement the provisions of this section or to obligate the Office of Indigent Defense Services to provide the administrative costs of establishing or maintaining the positions or services provided for under this section. Further, nothing in this section shall be construed to obligate the Office of Indigent Defense Services to maintain positions or services initially provided for under this section. (2000-144, s. 1; 2001-424, ss. 22.11(a), 22.11(d); 2002-126, s. 14.11(a); 2003-284, ss. 30.19A(c), (d); 2004-124, ss. 14.4(a), (b); 2005-276, s. 14.14(a); 2005-345, s. 50A; 2007-323, ss. 14.4(d), 28.18A(g).)

Editor's Note. — For effective date and applicability, see the editor's note at G.S. 7A-498.

Session Laws 2000-144, s. 48, provides that persons holding the position of public or appellate defender on the date the act becomes law are entitled to serve the remainder of their terms.

Session Laws 2005-345, s. 50A, repealed Session Laws 2005-276, s. 14.14(a), which had proposed to amend subsection (a) of this section by adding an entry for District 5, New Hanover and Pender Counties, to the table.

Session Laws 2007-323, s. 14.4(b), provides: "Notwithstanding the provisions of G.S. 7A-498.7(a), the Indigent Defense Services Commission may establish additional district public defender offices during the 2007-2009 fiscal biennium. Of the funds appropriated in this act to the Office of Indigent Defense Services, the Office may use up to the sum of one million five hundred seventy thousand fifty-seven dollars ($1,570,057) during the 2008-2009 fiscal year to establish these offices. These funds may be used for recurring and nonrecurring personnel and operating costs in the new offices. No more than the sum of two hundred twenty-five thousand dollars ($225,000) may be used for positions in the Office of Indigent Defense Services directly related to facilitating the establishment of these offices.

"The Office of Indigent Defense Services shall report to the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety and to the Fiscal Research Division no later than October 1, 2007, on the location and establishment of the new public defender offices."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, ss. 14.4(d) and 28.18A(g), effective July 1, 2007, in subsection (a), added Defender District 5 and 29B; and, in subsections (c) and (g), inserted "and twenty-four percent (24%) after 25 years of service", and made related changes.

§ 7A-498.8. Appellate Defender.

(a) The appellate defender shall be appointed by the Commission on Indigent Defense Services for a term of four years. A vacancy in the office of appellate defender shall be filled by appointment of the Commission on Indigent Defense Services for the unexpired term. The appellate defender may be suspended or removed from office for cause by two-thirds vote of all the members of the Commission on Indigent Defense Services. The Commission shall provide the appellate defender with timely written notice of the alleged causes and an opportunity for hearing before the Commission prior to taking any final action to remove or suspend the appellate defender, and the appellate defender shall be given written notice of the Commission's decision. The appellate defender may obtain judicial review of suspension or removal by the Commission by filing a petition within 30 days of receiving notice of the decision with the Superior Court of Wake County. Review of the Commission's decision shall be heard on the record and not as a de novo review or trial de novo. The Commission shall adopt rules implementing this section.

(b) The appellate defender shall perform such duties as may be directed by the Office of Indigent Defense Services, including:

(1) Representing indigent persons subsequent to conviction in trial courts. The Office of Indigent Defense Services may, following consultation with the appellate defender and consistent with the resources available to the appellate defender to ensure quality criminal defense services by the appellate defender's office, assign appeals, or authorize the appellate defender to assign appeals, to a local public defender's office or to private assigned counsel.

(2) Maintaining a clearinghouse of materials and a repository of briefs prepared by the appellate defender to be made available to private counsel representing indigents in criminal cases.

(3) Providing continuing legal education training to assistant appellate defenders and to private counsel representing indigents in criminal cases, including capital cases, as resources are available.

(4) Providing consulting services to attorneys representing defendants in capital cases.

(5) Recruiting qualified members of the private bar who are willing to provide representation in State and federal death penalty postconviction proceedings.

(6) In the appellate defender's discretion, serving as counsel of record for indigent defendants in capital cases in State court.

(6a) In the appellate defender's discretion, serving as counsel of record for indigent defendants in the United States Supreme Court pursuant to a petition for writ of certiorari of the decision on direct appeal by a court of the North Carolina Appellate Division.

(7) Undertaking [other] direct representation and consultation in capital cases pending in federal court only to the extent that such work is fully federally funded.

(c) The appellate defender shall appoint assistants and staff, not to exceed the number authorized by the Office of Indigent Defense Services. The assistants and staff shall serve at the pleasure of the appellate defender.

(d) Funds to operate the office of appellate defender, including office space, office equipment, supplies, postage, telephone, library, staff salaries, training, and travel, shall be provided by the Office of Indigent Defense Services from funds authorized by law. Salaries shall be set by the Office of Indigent Defense Services. (2000-144, s. 1; 2007-323, s. 14.19(b).)

Editor's Note. — For effective date and applicability, see the editor's note at G.S. 7A-498.

This section was amended by Session Laws 2007-323, s. 14.19(b), in the coded bill drafting format provided by G.S. 120-20.1. The act failed to use underscoring to indicate the insertion of the word "other." Subdivision (b)(7) has been set out above at the direction of the Revisor of Statutes.

Session Laws 2000-144, s. 48, provides that persons holding the position of public or appellate defender on the date the act becomes law are entitled to serve the remainder of their terms.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 14.19(b), effective July 1, 2007, added subdivision (b)(6a).

§ **7A-499:** Reserved for future codification purposes.

SUBCHAPTER X. NORTH CAROLINA COURTS COMMISSION.

Article 40.

North Carolina Courts Commission.

§§ **7A-500 through 7A-505:** Repealed by Session Laws 1975, c. 956, s. 18.

Cross References. — As to the North Carolina Courts Commission, see G.S. 7A-506 et seq.

Article 40A.

North Carolina Courts Commission.

§ 7A-506. Creation; members; terms; qualifications; vacancies.

(a) The North Carolina Courts Commission is created. Effective July 1, 1993, it shall consist of 28 members, seven to be appointed by the Governor, seven to be appointed by the Speaker of the House of Representatives, seven to be appointed by the President Pro Tempore of the Senate, and seven to be appointed by the Chief Justice of the Supreme Court.

(b) Of the appointees of the Chief Justice of the Supreme Court, one shall be a Justice of the Supreme Court, one shall be a Judge of the Court of Appeals, two shall be judges of superior court, two shall be district court judges, and one shall be a public member who is not an attorney and who is not an officer or employee of the Judicial Department.

(c) Of the seven appointees of the Governor, one shall be a district attorney, one shall be a practicing attorney, one shall be a clerk of superior court, at least three shall be members of the General Assembly, at least two shall not be attorneys, and of the nonattorneys, one shall be a public member who is not an officer or employee of the Judicial Department.

(d) Of the seven appointees of the Speaker of the House, at least three shall be practicing attorneys, at least three shall be members of the General Assembly, at least two shall not be attorneys, and of the non-attorneys, one shall be a public member who is not an officer or employee of the Judicial Department.

(e) Of the seven appointees of the President Pro Tempore of the Senate, at least three shall be practicing attorneys, at least three shall be members of the General Assembly, at least one shall be a magistrate, and one shall be a public member who is not an attorney and who is not an officer or employee of the Judicial Department.

(f) Of the initial appointments of each appointing authority, three shall be appointed for four-year terms to begin July 1, 1993, and three shall be appointed for two-year terms to begin July 1, 1993. The two public members appointed by the Governor and the Speaker of the House of Representatives shall be appointed for four-year terms to begin July 1, 1997. The two public members appointed by the Chief Justice and the President Pro Tempore of the Senate shall be appointed for two-year terms to begin July 1, 1997. Successors shall be appointed for four-year terms.

(g) A vacancy in membership shall be filled for the remainder of the unexpired term by the appointing authority who made the original appointment. A member whose term expires may be reappointed. (1979, c. 1077, s. 1; 1981, c. 847; 1981 (Reg. Sess., 1982), c. 1253, s. 4; 1983, c. 181, ss. 1, 2; c. 774, s. 2; 1991, c. 739, s. 7; 1993, c. 438, s. 1; 1997-82, s. 1.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 7A-507. Ex officio members.

The following additional members shall serve ex officio: the Administrative Officer of the Courts; a representative of the N. C. State Bar appointed by the Council thereof; and a representative of the N. C. Bar Association appointed by the Board of Governors thereof. The Administrative Officer of the Courts has no vote. (1979, c. 1077, s. 1; 1997-82, s. 2.)

CASE NOTES

Cited in State v. Puckett, 43 N.C. App. 596, 259 S.E.2d 310 (1979).

§ 7A-508. Duties.

It shall be the duty of the Commission to make continuing studies of the structure, organization, jurisdiction, procedures and personnel of the Judicial Department and of the General Court of Justice and to make recommendations to the General Assembly for such changes therein as will facilitate the administration of justice. (1979, c. 1077, s. 1.)

§ 7A-509. Chair; meetings; compensation of members.

The Governor, after consultation with the Chief Justice of the Supreme Court, shall appoint a chair from the legislative members of the Commission. The term of the chair is two years, and the chair may be reappointed. The Commission shall meet at such times and places as the chair shall designate. The facilities of the State Legislative Building shall be available to the Commission, subject to approval of the Legislative Services Commission. The members of the Commission shall receive the same per diem and reimbursement for travel expenses as members of State boards and commissions generally. (1979, c. 1077, s. 1; 1993, c. 438, s. 2.)

§ 7A-510. Supporting services.

The Commission is authorized to contract for such professional and clerical services as are necessary in the proper performance of its duties. (1979, c. 1077, s. 1.)

§§ 7A-511 through 7A-515: Reserved for future codification purposes.

SUBCHAPTER XI. NORTH CAROLINA JUVENILE CODE.

Article 41.

Purpose; Definitions.

§§ 7A-516 through 7A-522: Repealed by Session Laws 1998-202, s. 5.

Cross References. — As to abuse, neglect or dependency under the Juvenile Code, effective July 1, 1999, see now G.S. 7B-100 et seq.

Editor's Note. — Repealed G.S. 7A-518 through 7A-522 had been reserved for future codification purposes.

ARTICLE 42.

Jurisdiction.

§§ 7A-523 through 7A-529: Repealed by Session Laws 1998-202, s. 5.

Cross References. — As to jurisdiction under the Juvenile Code, effective July 1, 1999, see now G.S. 7B-200 et seq.

Editor's Note. — Repealed G.S. 7A-525 through 7A-529 had been reserved for future codification purposes.

ARTICLE 43.

Screening of Delinquency and Undisciplined Petitions.

§§ 7A-530 through 7A-541: Repealed by Session Laws 1998-202, s. 5.

Cross References. — For screening of delinquency and undisciplined complaints under the Juvenile Code, effective July 1, 1999, see now G.S. 7B-1700 et seq.

Editor's Note. — Repealed G.S. 7A-537 through 7A-541 had been reserved for future codification purposes.

ARTICLE 44.

Screening of Abuse and Neglect Complaints.

§§ 7A-542 through 7A-557: Repealed by Session Laws 1998-202, s. 5.

Cross References. — For screening of abuse and neglect complaints under the Juvenile Code, effective July 1, 1999, see now G.S. 7B-300 et seq.

Editor's Note. — Repealed G.S. 7A-553 through 7A-557 had been reserved for future codification purposes.

ARTICLE 45.

Venue; Petition; Summons.

§§ 7A-558 through 7A-570: Repealed by Session Laws 1998-202, s. 5.

Cross References. — For venue and petitions under the Juvenile Code, effective July 1, 1999, see now G.S. 7B-400 et seq.

Editor's Note. — Repealed G.S. 7A-566 through 7A-570 had been reserved for future codification purposes.

Article 46.

Temporary Custody; Secure and Nonsecure Custody; Custody Hearings.

§§ 7A-571 through 7A-577: Repealed by Session Laws 1998-202, s. 5.

Cross References. — For temporary custody, nonsecure custody, and custody hearings under the Juvenile Code, effective July 1, 1999, see now G.S. 7B-500 et seq.

§ 7A-577.1: Recodified as § 7B-507.

Editor's Note. — Session Laws 1998-229, s. 4.1 enacted this section after Session Laws 1998-202, s. 5 repealed this Article effective July 1, 1999; thus, this section is not set out as repealed effective July 1, 1999 at the direction of the Revisor of Statutes.

Session Laws 1998-229, s. 21.1 amended this section and provided that it be recodified as 7B-506.1 (recodified as 7B-507 at the direction of the Revisor of Statutes).

§§ 7A-578 through 7A-583: Repealed by Session Laws 1998-202, s. 5.

Editor's Note. — Repealed G.S. 7A-579 through 7A-583 had been reserved for future codification purposes.

Article 47.

Basic Rights.

§§ 7A-584 through 7A-593: Repealed by Session Laws 1998-202, s. 5.

Cross References. — For basic rights under the Juvenile Code, effective July 1, 1999, see now G.S. 7B-600 et seq.

Editor's Note. — Repealed G.S. 7A-589 through 7A-593 had been reserved for future codification purposes.

Article 48.

Law-Enforcement Procedures in Delinquency Proceedings.

§§ 7A-594 through 7A-607: Repealed by Session Laws 1998-202, s. 5.

Cross References. — For law enforcement procedures in delinquency proceedings under the Juvenile Code, effective July 1, 1999, see now G.S. 7B-2100 et seq.

Editor's Note. — Repealed G.S. 7A-603 through 7A-607 had been reserved for future codification purposes.

ARTICLE 49.

Transfer to Superior Court.

§§ 7A-608 through 7A-617: Repealed by Session Laws 1998-202, s. 5.

Cross References. — For probable cause hearings and transfer hearings under the Juvenile Code, effective July 1, 1999, see now G.S. 7B-2200 et seq.

Editor's Note. — Repealed G.S. 7A-613 through 7A-617 had been reserved for future codification purposes.

ARTICLE 50.

Discovery.

§§ 7A-618 through 7A-626: Repealed by Session Laws 1998-202, s. 5.

Cross References. — For discovery under the Juvenile Code, effective July 1, 1999, see now G.S. 7B-700 et seq.

Editor's Note. — Repealed G.S. 7A-622 through 7A-626 had been reserved for future codification purposes.

ARTICLE 51.

Hearing Procedures.

§§ 7A-627 through 7A-645: Repealed by Session Laws 1998-202, s. 5.

Cross References. — For hearing procedures under the Juvenile Code, effective July 1, 1999, see now G.S. 7B-800 et seq.

Editor's Note. — Repealed G.S. 7A-642 through 7A-645 had been reserved for future codification purposes.

ARTICLE 52.

Dispositions.

§§ 7A-646 through 7A-657: Repealed by Session Laws 1998-202, s. 5.

Cross References. — For dispositions under the Juvenile Code, effective July 1, 1999, see now G.S. 7B-900 et seq.

§ 7A-657.1: Recodified as § 7B-907.

Editor's Note. — Session Laws 1998-229, s. 8.1 enacted this section after Session Laws 1998-202, s. 5 repealed this Article effective July 1, 1999; thus, this section is not set out as repealed effective July 1, 1999 at the direction of the Revisor of Statutes.

Session Laws 1998-229, s. 25.1, effective July 1, 1999, amended this section and provided it be recodified as 7B-906.1 (recodified as 7B-907 at the direction of the Revisor of Statutes).

§§ 7A-658 through 7A-663: Repealed by Session Laws 1998-202, s. 5.

Editor's Note. — Repealed G.S. 7A-662 and G.S. 7A-663 had been reserved for future codification purposes.

ARTICLE 53.

Modification and Enforcement of Dispositional Orders; Appeals.

§§ 7A-664 through 7A-674: Repealed by Session Laws 1998-202, s. 5.

Cross References. — For modification and enforcement of dispositional orders and appeals under the Juvenile Code, effective July 1, 1999, see now G.S. 7B-1000 et seq.

Editor's Note. — Repealed G.S. 7A-670 through 7A-674 had been reserved for future codification purposes.

ARTICLE 54.

Juvenile Records and Social Reports.

§§ 7A-675 through 7A-683: Repealed by Session Laws 1998-202, s. 5.

Cross References. — As to juvenile records and social reports of delinquency and undisciplined cases under the Juvenile Code, effective July 1, 1999, see now G.S. 7B-3000 et seq.

Editor's Note. — Repealed G.S. 7A-679 through 7A-683 had been reserved for future codification purposes.

ARTICLE 55.

Interstate Compact on Juveniles.

§§ 7A-684 through 7A-716: Repealed by Session Laws 1998-202, s. 5.

Cross References. — For the Interstate Compact on Juveniles under the Juvenile Code, see now G.S. 7B-2800 et seq.

Editor's Note. — Repealed G.S. 7A-712 through 7A-716 had been reserved for future codification purposes.

ARTICLE 56.

Emancipation.

§§ 7A-717 through 7A-731: Repealed by Session Laws 1998-202, s. 5.

Cross References. — For emancipation under the Juvenile Code, see now G.S. 7B-3500 et seq.

Editor's Note. — Repealed G.S. 7A-727 through 7A-731 had been reserved for future codification purposes.

Article 57.

Judicial Consent for Emergency Surgical or Medical Treatment.

§§ 7A-732 through 7A-739: Repealed by Session Laws 1998-202, s. 5.

Cross References. — For judicial consent for emergency surgical or medical treatment under the Juvenile Code see now G.S. 7B-3600 et seq.

Editor's Note. — Repealed G.S. 7A-733 through 7A-739 had been reserved for future codification purposes.

Article 58.

Juvenile Law Study Commission.

§§ 7A-740 through 7A-744: Repealed by Session Laws 1998-202, s. 5.

Editor's Note. — Repealed G.S. 7A-743 had been reserved for future codification purposes.

Article 59.

§§ 7A-745 through 7A-749: Repealed by Session Laws 1998-202, s. 5.

Editor's Note. — Repealed G.S. 7A-745 through 7A-749 had been reserved for future codification purposes.

SUBCHAPTER XII. ADMINISTRATIVE HEARINGS.

Article 60.

Office of Administrative Hearings.

§ 7A-750. Creation; status; purpose.

There is created an Office of Administrative Hearings. The Office of Administrative Hearings is an independent, quasi-judicial agency under Article III, Sec. 11 of the Constitution and, in accordance with Article IV, Sec. 3 of the Constitution, has such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which it is created. The Office of Administrative Hearings is established to ensure that administrative decisions are made in a fair and impartial manner to protect the due process rights of citizens who challenge administrative action and to provide a source of independent administrative law judges to conduct administrative hearings in contested cases in accordance with Chapter 150B of the General Statutes and thereby prevent the commingling of legislative, executive, and judicial functions in the administrative process. It shall also maintain dockets and records of contested cases and shall codify and publish all administrative rules. (1985, c. 746, s. 2; 1991, c. 103, s. 1; 2000-190, s. 2.)

Editor's Note. — Session Laws 2004-124, s. 22A.1(a), provides: "All personnel and equipment presently assigned to the Rules Review Commission for the purpose of carrying out

Article 2A of Chapter 150B of the General Statutes, are transferred to the Office of Administrative Hearings by a Type I transfer as defined by G.S. 143A-6(a). The Chief Administrative Law Judge shall be responsible for the hiring of the Director and other staff of the Rules Review Commission."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Section 19 of Session Laws 1985, c. 746, which enacted G.S. 7A-750 to 7A-758, provided that c. 746 would expire January 1, 1992. However, Session Laws 1991, c. 103 deleted the sunset provision. Therefore, G.S. 7A-750 through 7A-758 remain in effect.

CASE NOTES

Office of Administrative Hearings Not a Court. — Because the Office of Administrative Hearings was established as a part of the executive branch pursuant to N.C. Const. Art. III, § 11, it is not a court and does not function as such when making final agency decisions on charges deferred from EEOC. Employment Sec. Comm'n v. Peace, 128 N.C. App. 1, 493 S.E.2d 466 (1997), aff'd, 349 N.C. 315, 507 S.E.2d 272 (1998).

Cited in Ford v. North Carolina Dep't of Env't, Health, & Natural Resources, 107 N.C. App. 192, 419 S.E.2d 204 (1992).

§ 7A-751. Agency head; powers and duties; salaries of Chief Administrative Law Judge and other administrative law judges.

(a) The head of the Office of Administrative Hearings is the Chief Administrative Law Judge, who shall serve as Director of the Office. The Chief Administrative Law Judge has the powers and duties conferred on that position by this Chapter and the Constitution and laws of this State and may adopt rules to implement the conferred powers and duties.

The salary of the Chief Administrative Law Judge shall be the same as that fixed from time to time for district court judges. The salary of a Senior Administrative Law Judge shall be ninety-five percent (95%) of the salary of the Chief Administrative Law Judge.

In lieu of merit and other increment raises, the Chief Administrative Law Judge and any Senior Administrative Law Judge shall receive longevity pay on the same basis as is provided to employees of the State who are subject to the State Personnel Act.

(b) The salary of other administrative law judges shall be ninety percent (90%) of the salary of the Chief Administrative Law Judge.

In lieu of merit and other increment raises, an administrative law judge shall receive longevity pay on the same basis as is provided to employees who are subject to the State Personnel Act. (1985, c. 746, s. 2; 1987, c. 774, s. 1; c. 827, s. 1; 1987 (Reg. Sess., 1988), c. 1100, s. 16(b); c. 1111, s. 14(b); 1989, c. 500, s. 45; 1991, c. 103, s. 1; 1997-34, s. 11; 1997-443, s. 33.8; 2000-140, s. 38.)

CASE NOTES

Cited in Ford v. North Carolina Dep't of Env't, Health, & Natural Resources, 107 N.C. App. 192, 419 S.E.2d 204 (1992).

§ 7A-752. Chief Administrative Law Judge; appointments; vacancy.

The Chief Administrative Law Judge of the Office of Administrative Hearings shall be appointed by the Chief Justice for a term of office of four years. The first Chief Administrative Law Judge shall be appointed as soon as practicable for a term to begin on the day of his appointment and to end on June 30, 1989. Successors to the first Chief Administrative Law Judge shall be appointed for a term to begin on July 1 of the year the preceding term ends and to end on June 30 four years later. A Chief Administrative Law Judge may continue to serve beyond his term until his successor is duly appointed and sworn, but any holdover shall not affect the expiration date of the succeeding term.

The Chief Administrative Law Judge shall designate one administrative law judge as senior administrative law judge. The senior administrative law judge may perform the duties of Chief Administrative Law Judge if the Chief Administrative Law Judge is absent or unable to serve temporarily for any reason. (1985, c. 746, s. 2; 1985 (Reg. Sess., 1986), c. 1022, ss. 3, 6(2), 6(3); 1987 (Reg. Sess., 1988), c. 1111, ss. 15, 25; 1991, c. 103, s. 1.)

Editor's Note. — Session Laws 1985, c. 746, s. 18.1 directed the substitution of "Attorney General" for "Chief Justice" in the first sentence of the first paragraph, but s. 19 of c. 746 made this amendment effective only if the Supreme Court issued an advisory opinion that the appointment of the chief hearing officer by the Chief Justice was unconstitutional.

Section 18.2 of Session Laws 1985, c. 746, provided: "The President of the Senate and the Speaker of the House of Representatives shall request the Supreme Court to issue an advisory opinion on the constitutionality of Sections 5 and 6 of this act and the appointment of the chief hearing officer by the Chief Justice as provided in G.S. 7A-752 in Section 2 of this act."

By letter of October 28, 1985, addressed to the President of the Senate and the Speaker of the House, the Supreme Court declined to issue an advisory opinion as contemplated by Session Laws 1985, c. 746, on the grounds that to issue such an opinion would be to place the Court directly in the stream of the legislative process, and in view of the prerogative of the General Assembly to first address and determine the constitutionality of its own legislation. See In re Advisory Opinion, — N.C. —, 335 S.E.2d 890 (1985).

At the direction of the Revisor of Statutes, the amendment by Session Laws 1985, c. 746, s. 18.1 has not been effectuated.

Legal Periodicals. — For note on the separation of powers and the power to appoint, see 66 N.C.L. Rev. 1109 (1988).

CASE NOTES

Cited in Ford v. North Carolina Dep't of Env't, Health, & Natural Resources, 107 N.C. App. 192, 419 S.E.2d 204 (1992).

§ 7A-753. Additional administrative law judges; appointment; specialization.

The Chief Administrative Law Judge shall appoint additional administrative law judges to serve in the Office of Administrative Hearings in such numbers as the General Assembly provides. No person shall be appointed or designated an administrative law judge except as provided in this Article.

The Chief Administrative Law Judge may designate certain administrative law judges as having the experience and expertise to preside at specific types of contested cases and assign only these designated administrative law judges to preside at those cases. (1985, c. 746, s. 2; 1985 (Reg. Sess., 1986), c. 1022, ss. 4, 6(2); 1987 (Reg. Sess., 1988), c. 1111, ss. 24, 25; 1991, c. 103, s. 1.)

CASE NOTES

Cited in Ford v. North Carolina Dep't of Env't, Health, & Natural Resources, 107 N.C. App. 192, 419 S.E.2d 204 (1992).

§ 7A-754. Qualifications; standards of conduct; removal.

Only persons duly authorized to practice law in the General Court of Justice shall be eligible for appointment as the Director and chief administrative law judge or as an administrative law judge in the Office of Administrative Hearings. The Chief Administrative Law Judge and the administrative law judges shall comply with the Model Code of Judicial Conduct for State Administrative Law Judges, as adopted by the National Conference of Administrative Law Judges, Judicial Division, American Bar Association, (revised August 1998), as amended from time to time, except that the provisions of this section shall control as to the private practice of law in lieu of Canon 4G, and G.S. 126-13 shall control as to political activity in lieu of Canon 5. Failure to comply with the applicable provisions of the Model Code may constitute just cause for disciplinary action under Chapter 126 of the General Statutes and grounds for removal from office. Neither the chief administrative law judge nor any administrative law judge may engage in the private practice of law as defined in G.S. 84-2.1 while in office; violation of this provision shall constitute just cause for disciplinary action under Chapter 126 of the General Statutes and shall be grounds for removal from office. Each administrative law judge shall take the oaths required by Chapter 11 of the General Statutes. An administrative law judge may be removed from office by the Director of the Office of Administrative Hearings for just cause, as that term is used in G.S. 126-35 and this section. (1985, c. 746, s. 2; 1985 (Reg. Sess., 1986), c. 1022, s. 6(1), 6(3); 1991, c. 103, s. 1; 2000-190, s. 3.)

CASE NOTES

Cited in Ford v. North Carolina Dep't of Env't, Health, & Natural Resources, 107 N.C. App. 192, 419 S.E.2d 204 (1992).

§ 7A-755. Expenses reimbursed.

The Chief Administrative Law Judge of the Office of Administrative Hearings and all administrative law judges shall be reimbursed for travel and subsistence expenses at the rates allowed to State officers and employees by G.S. 138-6(a). (1985, c. 746, s. 2; 1985 (Reg. Sess., 1986), c. 1022, s. 6(2); 1987 (Reg. Sess., 1988), c. 1111, s. 25; 1991, c. 103, s. 1.)

§ 7A-756. Power to administer oaths and issue subpoenas.

The chief administrative law judge and all administrative law judges in the Office of Administrative Hearings may, in connection with any pending or potential contested case under Chapter 150B:

(1) Administer oaths and affirmations;
(2) Sign and issue subpoenas in the name of the Office of Administrative Hearings requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence; and
(3) Apply to the General Court of Justice, Superior Court Division, for any order necessary to enforce the powers conferred in this Article. (1985,

c. 746, s. 2; 1985 (Reg. Sess., 1986), c. 1022, s. 6(1), 6(2); 1987, c. 827, s. 1; 1991, c. 103, s. 1.)

§ 7A-757. Temporary administrative law judges; appointments; powers and standards; fees.

When regularly appointed administrative law judges are unavailable, the Chief Administrative Law Judge of the Office of Administrative Hearings may contract with qualified individuals to serve as administrative law judges for specific assignments. A temporary administrative law judge shall have the same powers and adhere to the same standards as a regular administrative law judge in the conduct of a hearing. A temporary administrative law judge shall not be considered a State employee by virtue of this assignment, and shall be remunerated for his service at a rate not to exceed three hundred dollars ($300.00) per day and shall be reimbursed for travel and subsistence expenses at the rate allowed to State officers and employees by G.S. 138-6(a). The Chief Administrative Law Judge may also designate a full-time State employee to serve as a temporary administrative law judge with the consent of the employee and his supervisor; however, the employee is not entitled to any additional pay for this service. (1985, c. 746, s. 2; 1985 (Reg. Sess., 1986), c. 1022, s. 5; 1987, c. 878, s. 14; 1987 (Reg. Sess., 1988), c. 1111, s. 25; 1991, c. 103, s. 1.)

§ 7A-758. Availability of administrative law judge to exempt agencies.

The Chief Administrative Law Judge of the Office of Administrative Hearings may, upon request of the head of the agency, provide an administrative law judge to preside at hearings of public bodies not otherwise authorized or required by statute to utilize an administrative law judge from the Office of Administrative Hearings including, but not limited to, State agencies exempt from the provisions of Chapter 150B, municipal corporations or other subdivisions of the State, and agencies of such subdivisions. (1985, c. 746, s. 2; 1987, c. 827, s. 1; c. 878, s. 15; 1987 (Reg. Sess., 1988), c. 1111, s. 25; 1991, c. 103, s. 1.)

§ 7A-759. Role as deferral agency.

(a) The Office of Administrative Hearings is designated to serve as the State's deferral agency for cases deferred by the Equal Employment Opportunity Commission to the Office of Administrative Hearings as provided in Section 706 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., and the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. for charges filed by State or local government employees covered under Chapter 126 of the General Statutes and shall have all of the powers and authority necessary to function as a deferral agency.

(b) The Chief Administrative Law Judge is authorized and directed to contract with the Equal Employment Opportunity Commission for the Office of Administrative Hearings to serve as a deferral agency and to establish and maintain a Civil Rights Division in the Office of Administrative Hearings to carry out the functions of a deferral agency.

(b1) As provided in the contract between the Office of Administrative Hearings and the Equal Employment Opportunity Commission, a deferred charge for purposes of 42 U.S.C. § 2000e-5(c) or (d) is a charge that is filed by a State or local government employee covered under Chapter 126 of the

General Statutes and alleges an unlawful employment practice prohibited under that Chapter or any other State law. A deferred charge may be filed with either agency.

The date a deferred charge is filed with either agency is considered to be a commencement of proceedings under State law for purposes of 42 U.S.C. § 2000e-5(c) or (d). The filing of a deferred charge automatically tolls the time limit under G.S. 126-7.2, 126-35, 126-38, and 150B-23(f) and any other State law that sets a time limit for filing a contested case under Article 3 of Chapter 150B of the General Statutes alleging an unlawful employment practice. These time limits are tolled until the completion of the investigation and of any informal methods of resolution pursued pursuant to subsection (d) of this section.

(c) In investigating charges an employee of the Civil Rights Division of the Office of Administrative Hearings specifically designated by an order of the Chief Administrative Law Judge filed in the pending case may administer oaths and affirmations.

(c1) In investigating charges, an employee of the Civil Rights Division shall have access at reasonable times to State premises, records, and documents relevant to the charge and shall have the right to examine, photograph, and copy evidence. Any challenge to the Civil Rights Division to investigate the deferred charge shall not constitute grounds for denial or refusal to produce or allow access to the investigative evidence.

(d) Any charge not resolved by informal methods of conference, conciliation or persuasion may be heard as a contested case as provided in Article 3 of Chapter 150B of the General Statutes.

(e) Notwithstanding G.S. 150B-34 and G.S. 150B-36, an order entered by an administrative law judge after a contested case hearing on the merits of a deferred charge is a final agency decision and is binding on the parties. The administrative law judge may order whatever remedial action is appropriate to give full relief consistent with the requirements of federal statutes or regulations or State statutes or rules.

(f) In addition to the authority vested in G.S. 7A-756 and G.S. 150B-33, an administrative law judge may monitor compliance with any negotiated settlement, conciliation agreement or order entered in a deferred case.

(g) The standards of confidentiality established by federal statute or regulation for discrimination charges shall apply to deferred cases investigated or heard by the Office of Administrative Hearings.

(h) Nothing in this section shall be construed as limiting the authority or right of any federal agency to act under any federal statute or regulation.

(i) This section shall be broadly construed to further the general purposes stated in this section and the specific purposes of the particular provisions involved. (1987 (Reg. Sess., 1988), c. 1111, s. 14(c); 1993, c. 234, s. 1; 1997-513, s. 1; 1998-212, s. 22.)

Editor's Note. — Session Laws 1997-513, s. 4 states that this act shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act. Each State agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated to that State agency.

CASE NOTES

Construction with Federal Provision. — Where a complainant steadfastly maintained that he had brought only a Title VII (of the Civil Rights Act of 1964) claim and the state referral agency unequivocally addressed only that claim, proceedings under state law had not commenced for purposes of 42 U.S.C.S. § 2000e-5(c). Davis v. North Carolina Dep't of Cors., 48 F.3d 134 (4th Cir. 1995).

Where state law protects persons against the kind of discrimination alleged under federal law, complainants are required to resort to state and local remedies before they may proceed to the EEOC, and then to federal court. Metts v. North Carolina Dep't of Revenue, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 2567 (E.D.N.C. Jan. 9, 2000), aff'd, 230 F.3d 1353 (4th Cir. 2000).

Because the employee's action was commenced under state law when the employee filed with the EEOC, the employee did not need to file a discrimination claim with the state agency and no tolling was necessary; thus the employer's motion to reconsider was denied. Westry v. N.C. A&T State Univ., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 23868 (M.D.N.C. Sept. 9, 2002).

Administrative Law Judge's Decision an Agency Decision. — An Administrative Law Judge's decision with respect to a deferred charge is not a judicial decision, but rather a final agency decision. Employment Sec. Comm'n v. Peace, 128 N.C. App. 1, 493 S.E.2d 466 (1997), aff'd, 349 N.C. 315, 507 S.E.2d 272 (1998).

Cited in Employment Sec. Comm'n v. Peace, 122 N.C. App. 313, 470 S.E.2d 63 (1996), review granted, 345 N.C. 640, 483 S.E.2d 706 (1997); Peace v. Employment Sec. Comm'n, 349 N.C. 315, 507 S.E.2d 272 (1998); Greene v. Swain County P'ship for Health, 342 F. Supp. 2d 442, 2004 U.S. Dist. LEXIS 20193 (W.D.N.C. 2004).

§ 7A-760. Number and status of employees; staff assignments; role of State Personnel Commission.

(a) The number of administrative law judges and employees of the Office of Administrative Hearings shall be established by the General Assembly. The Chief Administrative Law Judge is exempt from provisions of the State Personnel Act as provided by G.S. 126-5(c1)(26). All other employees of the Office of Administrative Hearings are subject to the State Personnel Act.

(b) The Chief Administrative Law Judge shall designate, from among the employees of the Office of Administrative Hearings, the Director and staff of the Rules Review Commission. (2006-66, s. 18.2(d); 2006-221, s. 20.)

Editor's Note. — Session Laws 2006-66, s. 28.7, made this section effective July 1, 2006.

Session Laws 2006-66, s. 18.2(c), as added by Session Laws 2006-221, s. 20, provides: "The number of administrative law judges and employees in the Office of Administrative Hearings are established as follows:

"Position	Number
"Administrative Law Judge	10
"Rules Review Commission	4
"Other Employees	31."

§§ 7A-761 through 7A-769: Reserved for future codification purposes.

SUBCHAPTER XIII. SENTENCING SERVICES PROGRAM.

Article 61.

Sentencing Services Program.

§ 7A-770. Purpose.

This Article shall be known and may be cited as the "Sentencing Services Act." The purpose of this Article is to establish a statewide sentencing services program that will provide the judicial system with information that will assist that system in imposing sentences that make the most effective use of available resources. In furtherance of this purpose, this Article provides for the following:

(1) Establishment of local programs that can provide judges and other court officials with information about local correctional programs that are appropriate for offenders who require a comprehensive sentencing plan that combines punishment, control, and rehabilitation services.

(2) Increased opportunities for certain felons to make restitution to victims of crime through financial reimbursement or community service.
(3) Local involvement in the development of sentencing services to assure that they are specifically designed to meet local needs.
(4) Effective use of available community corrections programs by advising judges and other court officials of the offenders most suited for a particular program. (1983, c. 909, s. 1; 1991, c. 566, ss. 2, 3; 1999-306, s. 1.)

Local Modification. — (As to former Part 6 of Article 11; now this article, see note) Buncombe: 1987, c. 862.

Editor's Note. — This Subchapter is former Part 6 of Article 11 of Chapter 143B as rewritten by Session Laws 1991, c. 566, s. 2, and recodified. Where appropriate, the historical citations to the section in the former part have been added to the corresponding sections in the subchapter as rewritten and recodified. References to "this Part" have been changed to "this Article".

Session Laws 2002-126, s. 14.7(a), provides: "The statutory authority, powers, duties, and functions, records, personnel, property, unexpended balances of appropriations, allocations or other funds, including the functions of budgeting and purchasing, of the Administrative Office of the Courts to conduct the Sentencing Services Program, as provided by Article 61 of Chapter 7A of the General Statutes, are transferred to the Office of Indigent Defense Services. However, pursuant to the provisions of G.S. 7A-498.2(c), the Administrative Office of the Courts shall continue to have the responsibility of providing general administrative support to the Sentencing Services Program."

Session Laws 2002-126, s. 14.7(f), provides: "Each Sentencing Services Program shall review its procedures and implement methods of (i) minimizing the frequency with which plans are prepared but not presented to the court, and (ii) ensuring the efficient management of probation revocation cases when they are referred by a judge."

Session Laws 2002-126, s. 14.7(g), provides: "As of July 1, 2002, the number of State positions assigned as administrative staff is reduced from 11 to four. Notwithstanding the provisions of G.S. 7A-772(b), the number of State positions shall not exceed 26. The Office of Indigent Defense Services may reallocate State employee positions in order to provide sentencing services in any of the districts formerly served by non-State agencies. The Office of Indigent Defense Services shall renegotiate contractual arrangements with some of the highest performing nonprofits that have administered sentencing services programs to date. Within existing funding, the Office of Indigent Defense Services may also contract with individuals or organizations to provide additional sentencing services."

Session Laws 2002-126, s. 14.7(h), provides: "The Office of Indigent Defense Services shall report by January 1, 2003, to the Chairs of the Senate and House of Representatives Appropriations Committees and the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety on the reorganization of the Sentencing Services Program pursuant to this section. The report shall include the specific assignments for the State positions, the districts in which sentencing services will be available, the means by which those services will be provided, and an estimated number of plans and cost per plan for the 2002-2003 fiscal year."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

§ 7A-771. Definitions.

As used in this Article:
(1) Recodified as subdivision (3b) by Session Laws 1999-306, s. 1, effective January 1, 2000.
(2) Recodified as subdivision (3a) by Session Laws 1999-306, s. 1, effective January 1, 2000.

(2a) "Director" means the Director of Indigent Defense Services.
(3) Repealed by Session Laws 1999-306, s. 1, effective January 1, 2000.
(3a) "Sentencing plan" means a plan presented in writing to the sentencing judge which provides a detailed assessment and description of the offender's background, including available information about past criminal activity, a matching of the specific offender's needs with available resources, and, if appropriate, the program's recommendations regarding an intermediate sentence.
(3b) "Sentencing services program" means an agency or State-run office within the superior court district which shall (i) prepare sentencing plans; (ii) arrange or contract with public and private agencies for necessary services for offenders; and (iii) assist offenders in initially obtaining services ordered as part of a sentence entered pursuant to a sentencing plan, if the assistance is not available otherwise.
(4) Repealed by Session Laws 1991, c. 566, s. 4.
(4a) "Superior court district" means a superior court district established by G.S. 7A-41 for those districts consisting of one or more entire counties, and otherwise means the applicable set of districts as that term is defined in G.S. 7A-41.1.
(5) Repealed by Session Laws 1999-306, s. 1, effective January 1, 2000. (1983, c. 909, s. 1; 1989, c. 770, s. 58; 1991, c. 566, ss. 2, 4; 1993 (Reg. Sess., 1994), c. 767, s. 14; 1995, c. 324, s. 21.9(c); 1997-57, s. 5; 1999-306, s. 1; 2002-126, s. 14.7(d).)

Editor's Note. — Former subdivisions (1) and (2) were renumbered as subdivisions (3b) and (3a) at the direction of the Revisor of Statutes. Subdivision (2b) as added by Session Laws 1999-306, s. 1, was renumbered as subdivision (4a), also at the direction of the Revisor.

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6, contains a severability clause.

CASE NOTES

Intermediate Sentence. — Court rejected defendant's claim of ineffective assistance of counsel due to his counsel's alleged request that the court impose consecutive sentences on defendant, because the record indicated that defense counsel did not, in fact, request consecutive sentences, but rather asked that defendant's four convictions for Class F felonies be consolidated into a single mitigated sentence, to be followed by one consolidated "intermediate sentence" pursuant to G.S. 7A-771 (3a) which would include anger management treatment, but no active jail time. State v. McCoy, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005).

§ 7A-772. Allocation of funds.

(a) The Director may award grants in accordance with the policies established by this Article and in accordance with any laws made for that purpose, including appropriations acts and provisions in appropriations acts, and adopt regulations for the implementation, operation, and monitoring of sentencing services programs. Sentencing services programs that are grantees shall use the funds exclusively to develop a sentencing services program that provides sentencing information to judges and other court officials. Grants shall be awarded by the Director to agencies whose comprehensive program plans promise best to meet the goals set forth herein. The Director shall consider the plan required by G.S. 7A-774 in making funding decisions. If a senior resident superior court judge has not formally endorsed the plan, the Director shall consider that fact in making grant decisions, but the Director may, if appropriate, award grants to a program in which the judge has not endorsed the plan as submitted.

(b) The Director may establish local sentencing services programs and appoint those staff as the Director deems necessary. These personnel may serve as full-time or part-time State employees or may be hired on a contractual basis when determined appropriate by the director. Contracts entered under the authority of this subsection shall be exempt from the competitive bidding procedures under Chapter 143 of the General Statutes. The Office of Indigent Defense Services shall adopt rules necessary and appropriate for the administration of the program. Funds appropriated by the General Assembly for the establishment and maintenance of sentencing services programs under this Article shall be administered by the Office of Indigent Defense Services. (1983, c. 909, s. 1; 1991, c. 566, ss. 2, 5; 1995, c. 324, s. 21.9(d); 1999-306, s. 1; 2002-126, s. 14.7(e).)

Editor's Note. — Session Laws 2002-126, s. 14.7(g), provides: "As of July 1, 2002, the number of State positions assigned as administrative staff is reduced from 11 to four. Notwithstanding the provisions of G.S. 7A-772(b), the number of State positions shall not exceed 26. The Office of Indigent Defense Services may reallocate State employee positions in order to provide sentencing services in any of the districts formerly served by non-State agencies. The Office of Indigent Defense Services shall renegotiate contractual arrangements with some of the highest performing nonprofits that have administered sentencing services programs to date. Within existing funding, the Office of Indigent Defense Services may also contract with individuals or organizations to provide additional sentencing services."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6, contains a severability clause.

§ 7A-773. Responsibilities of a sentencing services program.

A sentencing services program shall be responsible for:

(1) Identifying offenders who:
  a. Are charged with or have been offered a plea by the State for a felony offense for which the class of offense and prior record level authorize the court to impose an active punishment, but do not require that it do so;
  b. Have a high risk of committing future crimes without appropriate sanctions and interventions; and
  c. Would benefit from the preparation of an intensive and comprehensive sentencing plan of the type prepared by sentencing services programs.

(2) Preparing detailed sentencing services plans requested pursuant to G.S. 7A-773.1 for presentation to the sentencing judge.

(3) Contracting or arranging with public or private agencies for services described in the sentencing plan.

(4) Repealed by Session Laws 1999-306, s. 1, effective January 1, 2000. (1983, c. 909, s. 1; 1991, c. 566, s. 2; 1993 (Reg. Sess., 1994), c. 767, s. 15; 1995, c. 324, s. 21.9(e); 1999-306, s. 1.)

Editor's Note. — Session Laws 1999-306, s. 4 provides in part that the amendment to this section by s. 1 becomes effective January 1, 2000, except that community penalties plans requested for offenders prior to that date shall be governed by the law in effect at the time the plan was requested.

§ 7A-773.1. Who may request plans; disposition of plans; contents of plans.

(a) A judge presiding over a case in which the offender meets the criteria set forth in G.S. 7A-773(1) may request, at any time prior to the imposition of sentence, that the sentencing services program provide a sentencing plan. The court may also request, at any time prior to the imposition of sentence, that the program provide a sentencing plan in misdemeanor cases in which the class of offense is Class A1 or Class 1 and the prior conviction level is Level III, if the court determines that the preparation of such a plan is in the interest of justice. In addition, in cases in which the offender meets the criteria set forth in G.S. 7A-773, the defendant or a prosecutor, at any time before the court has accepted a guilty plea or received a guilty verdict, may request that the program provide a plan. However, prior to an adjudication of guilt, a defendant may decline to participate in the preparation of a plan within a reasonable time after the request is made. In that case, no plan shall be prepared or presented to the court by the sentencing services program prior to an adjudication of guilt. A defendant's decision not to participate shall be made in writing and filed with the court. The comprehensive sentencing services program plan prepared pursuant to G.S. 7A-774 shall define what constitutes a reasonable time within the meaning of this subsection.

(b) Any sentencing plan prepared by a sentencing services program shall be presented to the court, the defendant, and the State in an appropriate manner.

(c) Sentencing plans prepared by sentencing services programs may include recommendations for use of any treatment or correctional resources available, unless the sentencing court instructs otherwise. Sentencing plans that identify an offender's needs for education, treatment, control, or other services shall, to the extent feasible, also identify resources to meet those needs. Plans may report that no intermediate punishment is appropriate under the circumstances of the case.

(d) To the extent allowed by law, the sentencing services program shall develop procedures to ensure that the program staff may work with offenders before a plea is entered. To that end, information obtained in the course of preparing a sentencing plan may not be used by the State for any purpose at trial and is subject to the provisions of G.S. 15A-1333. (1999-306, s. 1; 2000-67, s. 15.9(b).)

Editor's Note. — Session Laws 1999-306, s. 4, made the section effective January 1, 2000, except that community penalties plans requested for offenders prior to that date shall be governed by the law in effect at the time the plan was requested.

§ 7A-774. Requirements for a comprehensive sentencing services program plan.

Agencies applying for grants shall prepare a comprehensive sentencing services program plan for the development, implementation, operation, and improvement of a sentencing services program for the superior court district, as prescribed by the Director. The plan shall be updated annually and shall be submitted to the senior resident superior court judge for the superior court district for the judge's advice and written endorsement. The plan shall then be forwarded to the Director for approval. The plan shall include:

(1) Goals and objectives of the sentencing services program.

(2) Specification of the kinds or categories of offenders for whom the programs will provide sentencing information to the courts.
(3) Proposed procedures for the identification of appropriate offenders to comply with the plan and the criteria in G.S. 7A-773(1).
(4) Procedures for preparing and presenting plans to the court.
(4a) Strategies for ensuring that judges and court officials who are possible referral sources use the program's services in appropriate cases.
(5) Procedures for obtaining services from existing public or private agencies, and a detailed budget for staff, contracted services, and all other costs.
(6) to (8). Repealed by Session Laws 1999-306, s. 1, effective January 1, 2000. (1983, c. 909, s. 1; 1991, c. 566, ss. 2, 7; 1999-306, s. 1.)

Editor's Note. — Session Laws 1999-306, s. 4 provides in part that the amendment to this section by s. 1 becomes effective January 1, 2000, except that community penalties plans requested for offenders prior to that date shall be governed by the law in effect at the time the plan was requested.

§ 7A-775. Sentencing services board.

(a) Each sentencing services program shall establish a sentencing services board to provide direction and assistance to the sentencing services program in the implementation and evaluation of the plan. Sentencing services boards may be organized as nonprofit corporations under Chapter 55A of the General Statutes. The sentencing services board shall consist of not less than 12 members, and shall include, insofar as possible, judges, district attorneys, attorneys, social workers, law-enforcement officers, probation officers, and other interested persons. The sentencing services board shall meet on a regular basis, and its duties include, but are not limited to, the following:
(1) Preparation and submission of the sentencing services program plan to the senior resident superior court judge and the Director annually, as provided in G.S. 7A-772(a);
(1a) Development of an annual budget for the program;
(2) Hiring, firing, and evaluation of program personnel;
(3) Selection of board members;
(4) Arranging for an annual financial audit.
(5) Development of procedures for contracting for services.

(b) If the board serves as an advisory board to a sentencing services program located in a local or State agency, the board's duties do not include budgeting and personnel decisions. (1983, c. 909, s. 1; 1991, c. 566, ss. 2, 6; 1999-306, s. 1; 2006-203, s. 11; 2006-264, s. 1(a).)

Editor's Note. — Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2006-264, s. 1(a), which amended subdivision (a)(4) by substituting "143-6.2" for "143-6.1" was repealed by Session Laws 2006-264, s. 1(c), which provided that the section was repealed if House Bill 914, 2005 Regular Session [2006-203] becomes law.

Effect of Amendments. — Session Laws 2006-203, s. 11, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "financial audit." for "audit, in accordance with G.S. 143-6.1;" in subdivision (a)(4).

§ 7A-776. Limitation on use of funds.

Funds provided for use under the provisions of this Article shall not be used for the operating costs, construction, or any other costs associated with local jail confinement, or for any purpose other than the operation of a sentencing services program that complies with this Article. (1983, c. 909, s. 1; 1991, c. 566, s. 2; 1999-306, s. 1.)

§ 7A-777. Evaluation.

The Director shall evaluate each sentencing services program on an annual basis to determine the degree to which the program effectively meets the needs of the courts in its judicial district by providing them with sentencing information. In conducting the evaluation, the Director shall consider the goals and objectives established in the program's plan, as well as the extent to which the program is able to ensure that the offenders served by the plan meet the criteria established in G.S. 7A-773(1). (1983, c. 909, s. 1; 1991, c. 566, ss. 2, 7; 1999-306, s. 1.)

§§ 7A-778 through 7A-789: Reserved for future codification purposes.

SUBCHAPTER XIV. DRUG TREATMENT COURTS.

Article 62.

North Carolina Drug Treatment Court Act.

§ 7A-790. Short title.

This Article shall be known and may be cited as the "North Carolina Drug Treatment Court Act of 1995". (1995, c. 507, s. 21.6(a); 1998-23, s. 9; 1998-212, s. 16.15(a).)

Drug Treatment Court Program — Session Laws 2002-126, s. 14.8(a), provides: "The Drug Treatment Court Program shall maintain the existing State-funded programs in Districts 5, 9, 9A, 10, 14, 21, and 26 during the 2002-2003 fiscal year."

Session Laws 2002-126, s. 14.8(b), provides: "It is the intent of the General Assembly that State Drug Treatment Court funds not be used to fund case manager positions when those services can be reasonably provided by the Treatment Alternatives to Street Crime (TASC) program in the Department of Health and Human Services or by other existing resources. The Drug Treatment Court Program shall identify areas of potential cost savings in the local programs that would result from reducing the number of case manager positions. The Program shall also identify areas in which federal funding might absorb administrative costs.

"The Drug Treatment Court Program shall report by February 1, 2003, to the Chairs of the Senate and House of Representatives Appropriations Committees and the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety on the savings identified."

Session Laws 2002-126, s. 14.8(c), provides: "Prior to the establishment of any new local drug treatment court programs, the local drug treatment court management committee shall consult with the TASC program as to the availability of case management services in that community."

Session Laws 2003-284, s. 13.4(a) and (b), provides: "(a) It is the intent of the General Assembly that, allowing for established local differences in implementation, State Drug Treatment Court funds not be used to fund case manager positions when the services provided by those positions can be reasonably provided by the Treatment Alternatives to Street Crime (TASC) program in the Department of Health and Human Services or by other existing resources. The Drug Treatment Court Program shall identify areas of potential cost savings in the local programs that would result from reducing the number of case manager positions.

The Program shall also identify areas in which federal funding might absorb administrative costs.

"The Drug Treatment Court Program shall report by February 1, 2004, to the Chairs of the Senate and House of Representatives Appropriations Committees and the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety on the savings identified. The report shall include a transition plan for sustaining any local program that is currently receiving federal grant funding.

"(b) Prior to the establishment of any new local drug treatment court programs, the local drug treatment court management committee shall consult with the TASC program as to the availability of case management services in that community."

Session Laws 2004-124, s. 14.2B provides: "The Administrative Office of the Courts shall develop a plan to continue providing drug treatment court services in districts currently offering those services through time-limited non-State funding. This plan shall include a long-range plan for provision of drug treatment court services in any district where feasible and needed. The Administrative Office of the Courts shall report on this plan to the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety by March 1, 2005."

Plan to Continue Drug Court Services — Session Laws 2004-124, s. 14.2B, provides: "The Administrative Office of the Courts shall develop a plan to continue providing drug treatment court services in districts currently offering those services through time-limited non-State funding. This plan shall include a long-range plan for provision of drug treatment court services in any district where feasible and needed. The Administrative Office of the Courts shall report on this plan to the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety by March 1, 2005."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5 contains a severability clause.

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2006-32, s. 4, as amended by 2006-187, s. 8, as amended by 2006-259, s. 44(a), provides: "The Legislative Research Commission shall study drug treatment courts in North Carolina. The study shall include the following issues in relation to drug treatment courts:

"(1) Funding mechanisms;

"(2) Target populations;

"(3) Interagency collaboration at the State and local levels; and

"(4) Any other matter that the Commissions deem appropriate or necessary to provide proper information to the General Assembly on the subject of the study.

"The Commission may report its findings and recommendations to the 2007 Regular Session of the 2007 General Assembly."

§ 7A-791. Purpose.

The General Assembly recognizes that a critical need exists in this State for judicial programs that will reduce the incidence of alcohol and other drug abuse or dependence and crimes, delinquent acts, and child abuse and neglect committed as a result of alcohol and other drug abuse or dependence, and child abuse and neglect where alcohol and other drug abuse or dependence are significant factors in the child abuse and neglect. It is the intent of the General

Assembly by this Article to create a program to facilitate the creation of local drug treatment court programs. (1995, c. 507, s. 21.6(a); 1998-23, s. 9; 1998-212, s. 16.15(a), (b); 2001-424, s. 22.8(a).)

Editor's Note. — Session Laws 2001-424, s. 22.8(i), provides: "This section shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this section."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5, contains a severability clause.

§ 7A-792. Goals.

The goals of the drug treatment court programs funded under this Article include the following:

(1) To reduce alcoholism and other drug dependencies among adult and juvenile offenders and defendants and among respondents in juvenile petitions for abuse, neglect, or both;

(2) To reduce criminal and delinquent recidivism and the incidence of child abuse and neglect;

(3) To reduce the alcohol-related and other drug-related court workload;

(4) To increase the personal, familial, and societal accountability of adult and juvenile offenders and defendants and respondents in juvenile petitions for abuse, neglect, or both; and

(5) To promote effective interaction and use of resources among criminal and juvenile justice personnel, child protective services personnel, and community agencies. (1995, c. 507, s. 21.6(a); 1998-23, s. 9; 1998-212, s. 16.15(a); 2001-424, s. 22.8(b).)

Editor's Note. — Session Laws 2001-424, s. 22.8(i), provides: "This section shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this section."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5, contains a severability clause.

§ 7A-793. Establishment of Program.

The North Carolina Drug Treatment Court Program is established in the Administrative Office of the Courts to facilitate the creation and funding of local drug treatment court programs. The Director of the Administrative Office of the Courts shall provide any necessary staff for planning, organizing, and administering the program. Local drug treatment court programs funded pursuant to this Article shall be operated consistently with the guidelines adopted pursuant to G.S. 7A-795. Local drug treatment court programs established and funded pursuant to this Article may consist of adult drug treatment court programs, juvenile drug treatment court programs, family drug treatment court programs, or any combination of these programs. (1995, c. 507, s. 21.6(a); 1998-23, s. 9; 1998-212, s. 16.15(a), (c); 2001-424, s. 22.8(c).)

Editor's Note. — Session Laws 2001-424, s. 22.8(i), provides: "This section shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this section."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5, contains a severability clause.

§ 7A-794. Fund administration.

The Drug Treatment Court Program Fund is created in the Administrative Office of the Courts and is administered by the Director of the Administrative Office of the Courts in consultation with the State Drug Treatment Court Advisory Committee. (1995, c. 507, s. 21.6(a); 1998-23, s. 9; 1998-212, s. 16.15(a), (d); 2007-393, s. 12.)

Editor's Note. — Session Laws 2007-323, s. 14.12, provides: "Notwithstanding the provisions of G.S. 7A-794 and G.S. 7A-798 [repealed], funds appropriated to the Judicial Department for the 2007-2009 fiscal biennium for drug treatment courts need not be granted but may be budgeted to support existing and new drug treatment courts in a manner similar to other specialty courts operating within the Judicial Department."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-393, s. 12, effective October 1, 2007, deleted the former last two sentences of the section which read: "The Director of the Administrative Office of the Courts shall award grants from this Fund and implement local drug treatment court programs. Grants shall be awarded based upon the general guidelines set forth by the Director of the Administrative Office of the Courts and the State Drug Treatment Court Advisory Committee."

§ 7A-795. State Drug Treatment Court Advisory Committee.

The State Drug Treatment Court Advisory Committee is established to develop and recommend to the Director of the Administrative Office of the Courts guidelines for the drug treatment court program and to monitor local programs wherever they are implemented. The Committee shall be chaired by the Director or the Director's designee and shall consist of not less than seven members appointed by the Director and broadly representative of the courts, law enforcement, corrections, juvenile justice, child protective services, and substance abuse treatment communities. In developing guidelines, the Advisory Committee shall consider the Substance Abuse and the Courts Action Plan and other recommendations of the Substance Abuse and the Courts State Task Force. (1995, c. 507, s. 21.6(a); 1998-23, s. 9; 1998-212, s. 16.15(a), (e); 2001-424, s. 22.8(d).)

Editor's Note. — Session Laws 2001-424, s. 22.8(i), provides: "This section shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this section."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to

funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5, contains a severability clause.

§ 7A-796. Local drug treatment court management committee.

Each judicial district choosing to establish a drug treatment court shall form a local drug treatment court management committee, which shall be comprised to assure representation appropriate to the type or types of drug treatment court operations to be conducted in the district and shall consist of persons appointed by the senior resident superior court judge with the concurrence of the chief district court judge and the district attorney for that district, chosen from the following list:

(1) A judge of the superior court;
(2) A judge of the district court;
(3) A district attorney or assistant district attorney;
(4) A public defender or assistant public defender in judicial districts served by a public defender;
(5) An attorney representing a county department of social services within the district;
(6) A representative of the guardian ad litem;
(7) A member of the private criminal defense bar;
(8) A member of the private bar who represents respondents in department of social services juvenile matters;
(9) A clerk of superior court;
(10) The trial court administrator in judicial districts served by a trial court administrator;
(11) The director or member of the child welfare services division of a county department of social services within the district;
(12) The chief juvenile court counselor for the district;
(13) A probation officer;
(14) A local law enforcement officer;
(15) A representative of the local school administrative unit;
(16) A representative of the local community college;
(17) A representative of the treatment providers;
(18) A representative of the area mental health program;
(19) The local program director provided for in G.S. 7A-798; and
(20) Any other persons selected by the local management committee.

The local drug treatment court management committee shall develop local guidelines and procedures, not inconsistent with the State guidelines, that are necessary for the operation and evaluation of the local drug treatment court. (1995, c. 507, s. 21.6(a); 1998-23, s. 9; 1998-212, s. 16.15(a), (f); 2001-424, s. 22.8(e).)

Editor's Note. — G.S. 7A-798, as referred to in subdivision (19) above, was repealed by Session Laws 2007-393, s. 13, effective October 1, 2007.

Session Laws 2001-424, s. 22.8(i), provides: "This section shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this section."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5, contains a severability clause.

§ 7A-797. Eligible population; drug treatment court procedures.

The Director of the Administrative Office of the Courts, in conjunction with the State Drug Treatment Court Advisory Committee, shall develop criteria for eligibility and other procedural and substantive guidelines for drug treatment court operation. (1995, c. 507, s. 21.6(a); 1998-23, s. 9; 1998-212, s. 16.15(a).)

§ 7A-798: Repealed by Session Laws 2007-393, s. 13, effective October 1, 2007.

Editor's Note. — Session Laws 2007-323, s. 14.12, provides: "Notwithstanding the provisions of G.S. 7A-794 and G.S. 7A-798 [repealed], funds appropriated to the Judicial Department for the 2007-2009 fiscal biennium for drug treatment courts need not be granted but may be budgeted to support existing and new drug treatment courts in a manner similar to other specialty courts operating within the Judicial Department."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 7A-799. Treatment not guaranteed.

Nothing contained in this Article shall confer a right or an expectation of a right to treatment for a defendant or offender within the criminal or juvenile justice system or a respondent in a juvenile petition for abuse, neglect, or both. (1995, c. 507, s. 21.6(a); 1998-23, s. 9; 1998-212, s. 16.15(a); 2001-424, s. 22.8(f).)

Editor's Note. — Session Laws 2001-424, s. 22.8(i), provides: "This section shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this section."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5, contains a severability clause.

§ 7A-800. Payment of costs of treatment program.

Each defendant, offender, or respondent in a juvenile petition for abuse, neglect, or both, who receives treatment under a local drug treatment court program shall contribute to the cost of the alcohol and other drug abuse or dependency treatment received in the drug treatment court program, based upon guidelines developed by the local drug treatment court management committee. (1995, c. 507, s. 21.6(a); 1998-23, s. 9; 1998-212, s. 16.15(a), (h); 2001-424, s. 22.8(g).)

Editor's Note. — Session Laws 2001-424, s. 22.8(i), provides: "This section shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this section."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5, contains a severability clause.

§ 7A-801. Monitoring and annual report.

The Administrative Office of the Courts shall monitor all State-recognized and funded local drug treatment courts, prepare an annual report on the implementation, operation, and effectiveness of the statewide drug treatment court program, and submit the report to the General Assembly by March 1 of each year. Each local drug treatment court program shall submit evaluation reports to the Administrative Office of the Courts as requested. (1995, c. 507, s. 21.6(a); 1998-23, s. 9; 1998-212, s. 16.15(a), (i); 2007-393, s. 14.)

Effect of Amendments. — Session Laws 2007-393, s. 14, effective October 1, 2007, rewrote the section.

§§ 7A-802 through 7A-804: Reserved for future codification purposes.

SUBCHAPTER XV. CONFERENCE OF CLERKS OF SUPERIOR COURT.

Article 63.

Conference of Clerks of Superior Court.

§ 7A-805. Establishment and purpose.

There is created the Conference of Clerks of Superior Court of North Carolina, of which each clerk of superior court is a member. The purpose of the Conference is to assist in improving the administration of justice in North Carolina by coordinating the efforts of the various clerks of superior court, by assisting them in the administration of their offices, and by exercising the powers and performing the duties provided for in this Article. (2005-100, s. 1.)

Editor's Note. — Session Laws 2005-100, s. 3, made this Subchapter effective July 1, 2005.

Session Laws 2005-100, s. 2, provides: "The organizational meeting of the Conference of Clerks of Superior Court shall be convened by the Director of the Administrative Office of the Courts as soon as feasible. Officers elected at that organizational meeting shall serve until their successors take office July 1, 2006."

§ 7A-806. Annual meetings; organization; election of officers.

(a) Annual Meetings. — The Conference shall meet each summer and winter at a time and place selected by the President of the Conference.

(b) Election of Officers. — Officers of the Conference are a President, two Vice Presidents, a Secretary, a Treasurer, and other officers from among its membership that the Conference may designate in its bylaws. Officers are elected for one-year terms at the annual summer conference and take office immediately following their election.

(c) Executive Committee. — The Executive Committee of the Conference consists of the President, the two Vice Presidents, the Secretary, the Treasurer, and seven other members of the Conference. One of these seven members shall be the immediate past president if there is one and that past president continues to be a member.

(d) Organization and Functioning; Bylaws. — The bylaws may provide for the organization and functioning of the Conference, including the powers and duties of its officers and committees. The bylaws shall state the number of members required to constitute a quorum at any meeting of the Conference or the Executive Committee. The bylaws shall set out the procedure for amending the bylaws.

(e) Calling Meetings; Duty to Attend. — The President or the Executive Committee may call a meeting of the Conference upon 10 days' notice to the members, except upon written waiver of notice signed by at least three-fourths of the members. A member should attend each meeting of the Conference and the Executive Committee of which he is given notice. Members are entitled to reimbursement for travel and subsistence expenses at the rate applicable to State employees. (2005-100, s. 1; 2006-66, s. 14.20(a); 2006-221, s. 15.)

Effect of Amendments. — Session Laws 2006-66, s. 14.20(a), as added by Session Laws 2006-221, s. 15, effective July 1, 2006, deleted "on July 1" following "take office" in the second sentence of subsection (b).

§ 7A-807. Powers of Conference.

(a) The Conference may:
- (1) Cooperate with citizens and other public and private agencies to promote the effective administration of justice.
- (2) Develop advisory manuals to assist in the organization and administration of their offices, case management, calendaring, case tracking, filing, and office procedures.
- (3) Work with the cooperation of the Administrative Office of the Courts and the Institute of Government of the School of Government at UNC-Chapel Hill to provide education and training programs for the clerks of superior court and their staff.

(b) The Conference may not adopt rules pursuant to Chapter 150B of the General Statutes. (2005-100, s. 1.)

CASE NOTES

Evidentiary Standard. — Trial court's conclusion sufficiently stated the evidentiary standard for terminating the mother's parental rights where it stated "Clear, cogent and convincing evidence exists." In re J.T.W., 178 N.C. App. 678, 632 S.E.2d 237, 2006 N.C. App. LEXIS 1677 (2006), rev'd on other grounds, 361 N.C. 341, 643 S.E.2d 579 (2007).

§ 7A-808. Executive secretary; clerical support.

The Conference may employ an executive secretary and any necessary supporting staff to assist it in carrying out its duties. (2005-100, s. 1.)

Chapter 7B.

Juvenile Code.

SUBCHAPTER I. ABUSE, NEGLECT, DEPENDENCY.

Article 1.

Purposes; Definitions.

Sec.
7B-100. Purpose.
7B-101. Definitions.

Article 2.

Jurisdiction.

7B-200. Jurisdiction.
7B-201. Retention and termination of jurisdiction.
7B-202. Permanency mediation.
7B-203 through 7B-299. [Reserved.]

Article 3.

Screening of Abuse and Neglect Complaints.

7B-300. Protective services.
7B-301. Duty to report abuse, neglect, dependency, or death due to maltreatment.
7B-302. Assessment by director; access to confidential information; notification of person making the report.
7B-303. Interference with assessment.
7B-304. [Repealed.]
7B-305. Request for review by prosecutor.
7B-306. Review by prosecutor.
7B-307. Duty of director to report evidence of abuse, neglect; investigation by local law enforcement; notification of Department of Health and Human Services and State Bureau of Investigation.
7B-308. Authority of medical professionals in abuse cases.
7B-309. Immunity of persons reporting and cooperating in an assessment.
7B-310. Privileges not grounds for failing to report or for excluding evidence.
7B-311. Central registry; responsible individuals list.
7B-312 through 7B-319. [Reserved.]

Article 3A.

Expunction; Responsible Individuals List.

7B-320. Notification to individual responsible for abuse or substantial neglect.
7B-321. Requests for expunction; director review.

Sec.
7B-322. District attorney review expunction request.
7B-323. Petition for expunction; district court.
7B-324. Persons ineligible to request expunction; stay of expunction proceeding pending juvenile court case.
7B-325 through 7B-399. [Reserved.]

Article 4.

Venue; Petitions.

7B-400. Venue; pleading.
7B-401. Pleading and process.
7B-402. Petition.
7B-403. Receipt of reports; filing of petition.
7B-404. Immediate need for petition when clerk's office is closed.
7B-405. Commencement of action.
7B-406. Issuance of summons.
7B-407. Service of summons.
7B-408. Copy of petition and notices to guardian ad litem.
7B-409 through 7B-413. [Reserved.]

Article 5.

Temporary Custody; Nonsecure Custody; Custody Hearings.

7B-500. Taking a juvenile into temporary custody; civil and criminal immunity.
7B-501. Duties of person taking juvenile into temporary custody.
7B-502. Authority to issue custody orders; delegation.
7B-503. Criteria for nonsecure custody.
7B-504. Order for nonsecure custody.
7B-505. Place of nonsecure custody.
7B-506. Hearing to determine need for continued nonsecure custody.
7B-507. Reasonable efforts.
7B-508. Telephonic communication authorized.

Article 6.

Basic Rights.

7B-600. Appointment of guardian.
7B-601. Appointment and duties of guardian ad litem.
7B-602. Parent's right to counsel; guardian ad litem.
7B-603. Payment of court-appointed attorney or guardian ad litem.

Article 7.

Discovery.

7B-700. Regulation of discovery; protective orders.

Article 8.

Hearing Procedures.

Sec.
7B-800. Amendment of petition.
7B-801. Hearing.
7B-802. Conduct of hearing.
7B-803. Continuances.
7B-804. Rules of evidence.
7B-805. Quantum of proof in adjudicatory hearing.
7B-806. Record of proceedings.
7B-807. Adjudication.
7B-808. Predisposition report.

Article 9.

Dispositions.

7B-900. Purpose.
7B-901. Dispositional hearing.
7B-902. Consent judgment in abuse, neglect, or dependency proceeding.
7B-903. Dispositional alternatives for abused, neglected, or dependent juvenile.
7B-904. Authority over parents of juvenile adjudicated as abused, neglected, or dependent.
7B-905. Dispositional order.
7B-906. Review of custody order.
7B-907. Permanency planning hearing.
7B-908. Post termination of parental rights' placement court review.
7B-909. Review of agency's plan for placement.
7B-910. Review of voluntary foster care placements.
7B-911. Civil child-custody order.

Article 10.

Modification and Enforcement of Dispositional Orders; Appeals.

7B-1000. Authority to modify or vacate.
7B-1001. Right to appeal.
7B-1002. Proper parties for appeal.
7B-1003. Disposition pending appeal.
7B-1004. Disposition after appeal.

Article 11.

Termination of Parental Rights.

7B-1100. Legislative intent; construction of Article.
7B-1101. Jurisdiction.
7B-1101.1. Parent's right to counsel; guardian ad litem.
7B-1102. Pending child abuse, neglect, or dependency proceedings.
7B-1103. Who may file a petition or motion.
7B-1104. Petition or motion.
7B-1105. Preliminary hearing; unknown parent.
7B-1106. Issuance of summons.
Sec.
7B-1106.1. Notice in pending child abuse, neglect, or dependency cases.
7B-1107. Failure of parent to answer or respond.
7B-1108. Answer or response of parent.
7B-1109. Adjudicatory hearing on termination.
7B-1110. Determination of best interests of the juvenile.
7B-1111. Grounds for terminating parental rights.
7B-1112. Effects of termination order.
7B-1113. [Repealed.]

Article 12.

Guardian Ad Litem Program.

7B-1200. Office of Guardian ad Litem Services established.
7B-1201. Implementation and administration.
7B-1202. Conflict of interest or impracticality of implementation.
7B-1203. Alternative plans.
7B-1204. Civil liability of volunteers.

Article 13.

Prevention of Abuse and Neglect.

7B-1300. Purpose.
7B-1301. Program on Prevention of Abuse and Neglect.
7B-1302. Children's Trust Fund.

Article 14.

North Carolina Child Fatality Prevention System.

7B-1400. Declaration of public policy.
7B-1401. Definitions.
7B-1402. Task Force — creation; membership; vacancies.
7B-1403. Task Force — duties.
7B-1404. State Team — creation; membership; vacancies.
7B-1405. State Team — duties.
7B-1406. Community Child Protection Teams; Child Fatality Prevention Teams; creation and duties.
7B-1407. Local Teams; composition.
7B-1408. Child Fatality Prevention Team Coordinator; duties.
7B-1409. Community Child Protection Teams; duties of the director of the county department of social services.
7B-1410. Local Teams; duties of the director of the local department of health.
7B-1411. Community Child Protection Teams; responsibility for training of team members.
7B-1412. Task Force — reports.
7B-1413. Access to records.
7B-1414. Administration; funding.

SUBCHAPTER II. UNDISCIPLINED AND DELINQUENT JUVENILES.

Article 15.

Purposes; Definitions.

Sec.
7B-1500. Purpose.
7B-1501. Definitions.

Article 16.

Jurisdiction.

7B-1600. Jurisdiction over undisciplined juveniles.
7B-1601. Jurisdiction over delinquent juveniles.
7B-1602. Extended jurisdiction over a delinquent juvenile under certain circumstances.
7B-1603. Jurisdiction in certain circumstances.
7B-1604. Limitations on juvenile court jurisdiction.

Article 17.

Screening of Delinquency and Undisciplined Complaints.

7B-1700. Intake services.
7B-1701. Preliminary inquiry.
7B-1702. Evaluation.
7B-1703. Evaluation decision.
7B-1704. Request for review by prosecutor.
7B-1705. Review of determination that petition should not be filed.
7B-1706. Diversion plans and referral.
7B-1707. Direct contempt by juvenile.

Article 18.

Venue; Petition; Summons.

7B-1800. Venue.
7B-1801. Pleading and process.
7B-1802. Petition.
7B-1803. Receipt of complaints; filing of petition.
7B-1804. Commencement of action.
7B-1805. Issuance of summons.
7B-1806. Service of summons.
7B-1807. Notice to parent and juvenile of scheduled hearings.
7B-1808. First appearance for felony cases.

Article 19.

Temporary Custody; Secure and Nonsecure Custody; Custody Hearings.

7B-1900. Taking a juvenile into temporary custody.
7B-1901. Duties of person taking juvenile into temporary custody.
7B-1902. Authority to issue custody orders; delegation.
Sec.
7B-1903. Criteria for secure or nonsecure custody.
7B-1904. Order for secure or nonsecure custody.
7B-1905. Place of secure or nonsecure custody.
7B-1906. Secure or nonsecure custody hearings.
7B-1907. Telephonic communication authorized.

Article 20.

Basic Rights.

7B-2000. Juvenile's right to counsel; presumption of indigence.
7B-2001. Appointment of guardian.
7B-2002. Payment of court-appointed attorney.

Article 21.

Law Enforcement Procedures in Delinquency Proceedings.

7B-2100. Role of the law enforcement officer.
7B-2101. Interrogation procedures.
7B-2102. Fingerprinting and photographing juveniles.
7B-2103. Authority to issue nontestimonial identification order where juvenile alleged to be delinquent.
7B-2104. Time of application for nontestimonial identification order.
7B-2105. Grounds for nontestimonial identification order.
7B-2106. Issuance of order.
7B-2107. Nontestimonial identification order at request of juvenile.
7B-2108. Destruction of records resulting from nontestimonial identification procedures.
7B-2109. Penalty for willful violation.

Article 22.

Probable Cause Hearing and Transfer Hearing.

7B-2200. Transfer of jurisdiction of juvenile to superior court.
7B-2201. Fingerprinting juvenile transferred to superior court.
7B-2202. Probable cause hearing.
7B-2203. Transfer hearing.
7B-2204. Right to pretrial release; detention.

Article 23.

Discovery.

7B-2300. Disclosure of evidence by petitioner.
7B-2301. Disclosure of evidence by juvenile.
7B-2302. Regulation of discovery; protective orders.
7B-2303. Continuing duty to disclose.

Article 24.

Hearing Procedures.

Sec.
7B-2400. Amendment of petition.
7B-2401. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.
7B-2402. Open hearings.
7B-2402.1. Restraint of juveniles in courtroom.
7B-2403. Adjudicatory hearing.
7B-2404. Participation of the prosecutor.
7B-2405. Conduct of the adjudicatory hearing.
7B-2406. Continuances.
7B-2407. When admissions by juvenile may be accepted.
7B-2408. Rules of evidence.
7B-2409. Quantum of proof in adjudicatory hearing.
7B-2410. Record of proceedings.
7B-2411. Adjudication.
7B-2412. Legal effect of adjudication of delinquency.
7B-2413. Predisposition investigation and report.
7B-2414. When jeopardy attaches.

Article 25.

Dispositions.

7B-2500. Purpose.
7B-2501. Dispositional hearing.
7B-2502. Evaluation and treatment of undisciplined and delinquent juveniles.
7B-2503. Dispositional alternatives for undisciplined juveniles.
7B-2504. Conditions of protective supervision for undisciplined juveniles.
7B-2505. Contempt of court for undisciplined juveniles.
7B-2506. Dispositional alternatives for delinquent juveniles.
7B-2507. Delinquency history levels.
7B-2508. Dispositional limits for each class of offense and delinquency history level.
7B-2509. Registration of certain delinquent juveniles.
7B-2510. Conditions of probation; violation of probation.
7B-2511. Termination of probation.
7B-2512. Dispositional order.
7B-2513. Commitment of delinquent juvenile to Department.
7B-2514. Post-release supervision planning; release.
7B-2515. Notification of extended commitment; plan of treatment.
7B-2516. Revocation of post-release supervision.
7B-2517. Transfer authority of Governor.

Article 26.

Modification and Enforcement of Dispositional Orders; Appeals.

Sec.
7B-2600. Authority to modify or vacate.
7B-2601. Request for modification for lack of suitable services.
7B-2602. Right to appeal.
7B-2603. Right to appeal transfer decision.
7B-2604. Proper parties for appeal.
7B-2605. Disposition pending appeal.
7B-2606. Disposition after appeal.

Article 27.

Authority over Parents of Juveniles Adjudicated Delinquent or Undisciplined.

7B-2700. Appearance in court.
7B-2701. Parental responsibility classes.
7B-2702. Medical, surgical, psychiatric, or psychological evaluation or treatment of juvenile or parent.
7B-2703. Compliance with orders of court.
7B-2704. Payment of support or other expenses; assignment of insurance coverage.
7B-2705. Employment discrimination unlawful.
7B-2706. Contempt for failure to comply.

Article 28.

Interstate Compact on Juveniles.

7B-2800. (For contingent repeal — see note) Execution of Compact.
7B-2801. (For contingent repeal — see note) Findings and purposes.
7B-2802. (For contingent repeal — see note) Existing rights and remedies.
7B-2803. (For contingent repeal — see note) Definitions.
7B-2804. (For contingent repeal — see note) Return of runaways.
7B-2805. (For contingent repeal — see note) Return of escapees and absconders.
7B-2806. (For contingent repeal — see note) Voluntary return procedure.
7B-2807. (For contingent repeal — see note) Cooperative supervision of probationers and parolees.
7B-2808. (For contingent repeal — see note) Responsibility for costs.
7B-2809. (For contingent repeal — see note) Detention practices.
7B-2810. (For contingent repeal — see note) Supplementary agreements.
7B-2811. (For contingent repeal — see note) Acceptance of federal and other aid.

Sec.
7B-2812. (For contingent repeal — see note) Compact administrators.
7B-2813. (For contingent repeal — see note) Execution of Compact.
7B-2814. (For contingent repeal — see note) Renunciation.
7B-2815. (For contingent repeal — see note) Severability.
7B-2816. (For contingent repeal — see note) Authority of Governor to designate Compact Administrator.
7B-2817. (For contingent repeal — see note) Authority of Compact Administrator to enter into supplementary agreements.
7B-2818. (For contingent repeal — see note) Discharging financial obligations imposed by Compact or agreement.
7B-2819. (For contingent repeal — see note) Enforcement of Compact.
7B-2820. (For contingent repeal — see note) Additional procedure for returning runaways not precluded.
7B-2821. (For contingent repeal — see note) Proceedings for return of runaways under G.S. 7B-2804 of Compact; "juvenile" construed.
7B-2822. (For contingent repeal — see note) Interstate parole and probation hearing procedures for juveniles.
7B-2823. (For contingent repeal — see note) Hearing officers.
7B-2824. (For contingent repeal — see note) Due process at parole or probation violation hearing.
7B-2825. (For contingent repeal — see note) Effect of parole or probation violation hearing outside State.
7B-2826. (For contingent repeal — see note) Amendment to Interstate Compact on Juveniles concerning interstate rendition of juveniles alleged to be delinquent.
7B-2827. (For contingent repeal — see note) Out-of-State Confinement Amendment.
7B-2828 through 7B-2899 [Reserved.]

SUBCHAPTER III. JUVENILE RECORDS.

Article 29.

Records and Social Reports of Cases of Abuse, Neglect, and Dependency.

7B-2900. Definitions.
7B-2901. Confidentiality of records.
7B-2902. Disclosure in child fatality or near fatality cases.

Article 30.

Juvenile Records and Social Reports of Delinquency and Undisciplined Cases.

Sec.
7B-3000. Juvenile court records.
7B-3001. Other records relating to juveniles.

Article 31.

Disclosure of Juvenile Information.

7B-3100. Disclosure of information about juveniles.
7B-3101. Notification of schools when juveniles are alleged or found to be delinquent.
7B-3102. Disclosure of information about juveniles who escape.

Article 32.

Expunction of Juvenile Records.

7B-3200. Expunction of records of juveniles alleged or adjudicated delinquent and undisciplined.
7B-3201. Effect of expunction.
7B-3202. Notice of expunction.

Article 33.

Computation of Recidivism Rates [Repealed.]

7B-3300. [Repealed.]

SUBCHAPTER IV. PARENTAL AUTHORITY; EMANCIPATION.

Article 34.

Parental Authority over Juveniles.

7B-3400. Juvenile under 18 subject to parents' control.
7B-3401. Definitions.
7B-3402. Exceptions.
7B-3403. No criminal liability created.
7B-3404. Enforcement.

Article 35.

Emancipation.

7B-3500. Who may petition.
7B-3501. Petition.
7B-3502. Summons.
7B-3503. Hearing.
7B-3504. Considerations for emancipation.
7B-3505. Final decree of emancipation.
7B-3506. Costs of court.
7B-3507. Legal effect of final decree.
7B-3508. Appeals.
7B-3509. Application of common law.

Article 36.

Judicial Consent for Emergency Surgical or Medical Treatment.

7B-3600. Judicial authorization of emergency treatment; procedure.

SUBCHAPTER V. PLACEMENT OF JUVENILES.

Article 37.

Placing or Adoption of Juvenile Delinquents or Dependents.

Sec.
7B-3700. Consent required for bringing child into State for placement or adoption.
7B-3701. Bond required.
7B-3702. Consent required for removing child from State.
7B-3703. Violation of Article a misdemeanor.
7B-3704. Definitions.
7B-3705. Application of Article.

Article 38.

Interstate Compact on the Placement of Children.

7B-3800. Adoption of Compact.
7B-3801. Financial responsibility under Compact.
7B-3802. Agreements under Compact.
7B-3803. Visitation, inspection or supervision.
Sec.
7B-3804. Compact to govern between party states.
7B-3805. Placement of delinquents.
7B-3806. Compact Administrator.

Article 39.

Interstate Compact on Adoption and Medical Assistance.

7B-3900. Legislative findings and purposes.
7B-3901. Definitions.
7B-3902. Compacts authorized.
7B-3903. Content of compacts.
7B-3904. Medical assistance.
7B-3905. Federal participation.
7B-3906. Compact Administrator.

Article 40.

Interstate Compact for Juveniles.

7B-4000. (Contingent effective date — see notes) Short title.
7B-4001. (Contingent effective date — see notes) Governor to execute Compact; form of Compact.
7B-4002. (Contingent effective date — see notes) Implementation of the Compact.

SUBCHAPTER I. ABUSE, NEGLECT, DEPENDENCY.

ARTICLE 1.

Purposes; Definitions.

§ 7B-100. Purpose.

This Subchapter shall be interpreted and construed so as to implement the following purposes and policies:

(1) To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents;

(2) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family.

(3) To provide for services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence; and

(4) To provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents.

(5) To provide standards, consistent with the Adoption and Safe Families Act of 1997, P.L. 105-89, for ensuring that the best interests of the juvenile are of paramount consideration by the court and that when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a safe, permanent home within a reasonable amount of time. (1979, c. 815, s. 1; 1987 (Reg. Sess., 1988), c. 1090, s. 1; 1998-202, s. 6; 1999-456, s. 60; 2003-140, s. 5.)

Cross References. — As to legislation regarding pilot programs for holding family court within district court districts, see the editor's note under G.S. 7A-244. As to legislation regarding a study of programs for screening for and identification of delinquency risk factors, see the editor's note under G.S. 7B-1500. As to legislation regarding a study by the Office of Juvenile Justice (now the Department of Juvenile Justice and Delinquency Prevention) in cooperation with the Department of Public Instruction to study ways to coordinate case management, provide services to juveniles in need of treatment, and provide public protection, see the editor's note under G.S. 7B-1500. As to a study by the Office of Juvenile Justice (now the Department of Juvenile Justice and Delinquency Prevention) of blended sentencing and direct filing in certain juvenile cases, see the notes to G.S. 7B-2500. As to legislation regarding development of a cost-effective plan to establish statewide community-based dispositional alternatives for juveniles adjudicated delinquent, see the editor's note under G.S. 7B-2506. As to legislation regarding a phased-in 10-county pilot On Track program as an additional probation option for certain juvenile delinquents, see the editor's note under G.S. 7B-2508. As to legislation regarding pilot Guard Response Alternative Sentencing Programs as an additional probation option for certain first-time juvenile delinquents, see the editor's note under G.S. 7B-2508.

Child Welfare System Pilot System. — Session Laws 2003-284, s. 10.56(a)-(d), provides:

"(a) The Department of Health and Human Services, Division of Social Services, shall continue working with local departments of social services to implement an alternative response system of child protection in no fewer than 10 and no more than 33 demonstration areas in this State. The Division of Social Services may exceed the maximum number of demonstration areas if a county specifically requests inclusion and the Division determines that resources are available. The demonstration projects in place in the 2003-2004 fiscal year shall continue. The alternative response system shall provide for a family-centered approach to child protective services which local departments of social services utilize family assessment tools and family support principles when responding to selected reports of suspected child neglect and dependency.

"(b) The Department of Health and Human Services shall evaluate the original pilot demonstration areas to determine the impact the alternative response system to child protective services has had in the following areas:

"(1) Child safety.

"(2) Timeliness of response.

"(3) Timeliness of service.

"(4) Coordination of local human services.

"(c) The Department of Health and Human Services shall proceed to expand this demonstration project if non-State funds are identified for this purpose.

"(d) The Department of Health and Human Services shall report on the outcome of the evaluation of the original pilot demonstration areas pursuant to subsection (b) of this section and the expansion of the demonstration areas. The Department shall make recommendations for statewide implementation of an alternative response system to child protective services. The report shall include any statutory changes required for full implementation. Any recommendations for statutory changes contained in the report shall be eligible for consideration by the 2003 General Assembly in the 2004 Regular Session. The report shall be submitted to the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division not later than April 1, 2004."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Editor's Note. — Articles 1-11 of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

Section 5 of Session Laws 1998-202, also effective July 1, 1999, repealed the former North Carolina Juvenile Code, Articles 41 through 59 of Chapter 7A, along with additional related provisions.

Where applicable, historical citations and case annotations to former sections have been added to the corresponding sections in new Chapter 7B.

At the end of new Chapter 7B are tables showing comparable sections and their disposition of new Chapter 7B.

Legal Periodicals. — For article, "Leandro v. State and the Constitutional Limitation on School Suspensions and Expulsions in North Carolina" see 83 N.C. L. Rev. 1507 (2005).

CASE NOTES

Editor's Note. *— Many of the following cases were decided prior to the enactment of this Chapter.*

The common thread running throughout the Juvenile Code (G.S. 7A-516, et seq. [see now G.S. 7B-100 et seq.]) is that the court must consider the child's best interests in making all placements whether at the dispositional hearing or the review hearing. In re Shue, 63 N.C. App. 76, 303 S.E.2d 636 (1983), modified, 311 N.C. 586, 319 S.E.2d 567 (1984).

Legislative Intent. — When, in a dependency proceeding, a trial court's order transferring a child's custody from a department of social services to foster parents was entered eight months late, this resulted in protracted custody proceedings that left the legal relationship between parent and child unresolved and left the child in legal limbo, thwarting the legislature's wish that children be placed in safe, permanent homes within a reasonable amount of time, as stated in G.S. 7B-100(5). In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

In dependency proceedings, to hold that the failure of a department of social services to list the address of an allegedly dependent child in a petition under G.S. 7B-402, or that the department's failure to file an affidavit required by G.S. 50A-209(a) could prevent a trial court from acquiring subject matter jurisdiction over the juvenile action, would be to elevate form over substance; such a holding would additionally impose jurisdictional limitations that the general assembly clearly never intended in G.S. 7B-100(3) when it sought to balance the interests of children with the rights of parents in juvenile actions. In re A.R.G., 361 N.C. 392, 646 S.E.2d 349, 2007 N.C. LEXIS 597 (2007).

Best interest of the child is paramount. — The common thread running throughout the Juvenile Code, G.S. 7B-100 et seq., is that the court's primary concern must be the child's best interest; a child's interest in being protected from abuse and neglect is paramount to his parents' constitutional interest in the custody of their child. In re Pittman, 149 N.C. App. 756, 561 S.E.2d 560, 2002 N.C. App. LEXIS 303 (2002), cert. denied, 538 U.S. 982, 123 S. Ct. 1799, 155 L. Ed. 2d 673 (2003).

While one of the essential aims of the Juvenile Code is to reunite a parent with a child after the child is taken from the parent's custody, reunification may not always be a viable option. A trial court did not fail to consider the purpose and legislative intent of G.S. 7B-100(4) when it terminated a mother's parental rights after finding clear, cogent, and convincing evidence that supported neglect as a ground for termination. In re Dhermy, 161 N.C. App. 424, 588 S.E.2d 555, 2003 N.C. App. LEXIS 2181 (2003).

Goal of G.S. 7B-100(5) is to place children in safe, permanent houses within a reasonable time, and allowing parents to delay termination proceedings by appealing custody review orders would have thwarted G.S. 7B-100(5); G.S. 7B-1003 did not deprive the trial court of jurisdiction to terminate the mother's parental rights during the pendency of the custody review order appeal as G.S. 7B-1003 applied only to dependency proceedings, not to termination proceedings. In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

The purpose of former § 7A-277 was to give to delinquent children the control and environment which might lead to their reformation and enable them to become law abiding and useful citizens, a support and not a hindrance to the State. In re Whichard, 8 N.C. App. 154, 174 S.E.2d 281 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971).

Juvenile Hearing. — Former Subchapter XI of Chapter 7A, which contained the former North Carolina Juvenile Code, did not classify a juvenile hearing as civil or criminal. State v. Smith, 328 N.C. 161, 400 S.E.2d 405, cert. denied, 502 U.S. 956, 112 S. Ct. 414, 116 L. Ed. 2d 435 (1991).

Constitutional Rights at Juvenile Hearing. — There are certain constitutional rights which a juvenile has at a juvenile hearing which are not required in civil trials, such as the right to counsel if there is a possibility of commitment and the privilege against self incrimination. This would suggest a juvenile hearing is not a civil case. State v. Smith, 328 N.C. 161, 400 S.E.2d 405, cert. denied, 502 U.S. 956, 112 S. Ct. 414, 116 L. Ed. 2d 435 (1991).

The court must consider the welfare of the delinquent child as well as the best interest of the State. In re Hardy, 39 N.C. App. 610, 251 S.E.2d 643 (1979).

State's Interest in Juvenile Proceeding. — The fact that the proceeding is not an ordinary criminal prosecution, but is a juvenile proceeding, does not lessen, but should actually increase, the burden upon the State to see that the child's rights are protected. In re Meyers, 25 N.C. App. 555, 214 S.E.2d 268 (1975).

The county was not entitled to appeal an order to pay for the mental health evaluation of a juvenile although it had to be given notice and the opportunity to be heard at the juvenile hearing. In re Voight, 138 N.C. App. 542, 530 S.E.2d 76, 2000 N.C. App. LEXIS 624 (2000).

The district court's authority in juvenile dispositions is limited to utilization of currently existing programs or those for which the funding and machinery for implementation is in place. In re Jackson, 84 N.C. App. 167, 352 S.E.2d 449 (1987).

The former North Carolina Juvenile Code (former G.S. 7A-516 et seq.) did not grant the district courts the authority to order the State, through the Division of Youth Services, to develop and implement specific treatment programs and facilities for juveniles. In re Swindell, 326 N.C. 473, 390 S.E.2d 134 (1990).

Court Order May Not Exceed Court's Authority. — When a student has been lawfully suspended or expelled pursuant to G.S. 115C-391 and the school has not provided a suitable alternative educational forum, court-ordered public school attendance is not a dispositional alternative available to the juvenile court judge, absent a voluntary reconsideration of or restructuring of the suspension by the school board to allow the student's restoration to an educational program within its system. In re Jackson, 84 N.C. App. 167, 352 S.E.2d 449 (1987).

Delinquency Proceedings May Result in Commitment. — Juvenile proceedings to determine delinquency, though not the same as criminal prosecutions of an adult, may nevertheless result in commitment to an institution in which the juvenile's freedom is curtailed. In re Meyers, 25 N.C. App. 555, 214 S.E.2d 268 (1975).

Dismissal of Petitions Against Juveniles Treated Unequally. — The trial court erred in not dismissing petitions against six juveniles who received unequal treatment relative to other juveniles who were alleged to have committed the same or similar offenses by design, in that each respondent was prosecuted because he or she, or his or her parents, was unwilling or unable to pay $1,000 compensation to the victim, while the other juveniles, who were similarly situated, were not prosecuted because they, or their parents, were able or willing to pay $1,000 thereto. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

Lack of Jurisdiction Found. — Because a district court never exercised jurisdiction over defendant for the charge of conspiracy to commit armed robbery, the superior court that convicted him never obtained jurisdiction via transfer of the charge; because the trial court lacked jurisdiction over defendant for the conspiracy charge, his conviction was vacated. State v. Jackson, 165 N.C. App. 763, 600 S.E.2d 16, 2004 N.C. App. LEXIS 1509 (2004).

Applied in In re Schrimpsher, 143 N.C. App. 461, 546 S.E.2d 407 (2001).

Cited in In re Wright, 137 N.C. App. 104, 527 S.E.2d 70, 2000 N.C. App. LEXIS 265 (2000); Dobson v. Harris, 352 N.C. 77, 530 S.E.2d 829, 2000 N.C. LEXIS 433 (2000); In re Allison, 143 N.C. App. 586, 547 S.E.2d 169, 2001 N.C. App. LEXIS 329 (2001); In re Eckard, 144 N.C. App. 187, 547 S.E.2d 835, 2001 N.C. App. LEXIS 449 (2001); In re Hartsock, 158 N.C. App. 287, 580 S.E.2d 395 (2003); In re McKinney, 158 N.C. App. 441, 581 S.E.2d 793, 2003 N.C. App. LEXIS 1191 (2003); In re Stumbo, 357 N.C. 279, 582 S.E.2d 255, 2003 N.C. LEXIS 747 (2003); In re As.L.G., 173 N.C. App. 551, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005); In re N.B., — N.C. App. —, 644 S.E.2d 22, 2007 N.C. App. LEXIS 831 (2007).

OPINIONS OF ATTORNEY GENERAL

Abuse Occurring in County Operated Secure Detention Facility. — The Department of Social Services has the authority to investigate an abuse complaint (involving a juvenile) which allegedly occurred in a county operated secure detention facility which is licensed by the North Carolina Office of Juvenile Justice. See Opinion of Attorney General to Mr. Lowell L. Siler, Esq., Deputy County Attorney, County of Durham, 2000 N.C. AG LEXIS 17 (9/11/2000).

§ 7B-101. Definitions.

As used in this Subchapter, unless the context clearly requires otherwise, the following words have the listed meanings:

(1) Abused juveniles. — Any juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:
  a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;
  b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;
  c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior;

d. Commits, permits, or encourages the commission of a violation of the following laws by, with, or upon the juvenile: first-degree rape, as provided in G.S. 14-27.2; second degree rape as provided in G.S. 14-27.3; first-degree sexual offense, as provided in G.S. 14-27.4; second degree sexual offense, as provided in G.S. 14-27.5; sexual act by a custodian, as provided in G.S. 14-27.7; crime against nature, as provided in G.S. 14-177; incest, as provided in G.S. 14-178; preparation of obscene photographs, slides, or motion pictures of the juvenile, as provided in G.S. 14-190.5; employing or permitting the juvenile to assist in a violation of the obscenity laws as provided in G.S. 14-190.6; dissemination of obscene material to the juvenile as provided in G.S. 14-190.7 and G.S. 14-190.8; displaying or disseminating material harmful to the juvenile as provided in G.S. 14-190.14 and G.S. 14-190.15; first and second degree sexual exploitation of the juvenile as provided in G.S. 14-190.16 and G.S. 14-190.17; promoting the prostitution of the juvenile as provided in G.S. 14-190.18; and taking indecent liberties with the juvenile, as provided in G.S. 14-202.1;

e. Creates or allows to be created serious emotional damage to the juvenile; serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others; or

f. Encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile.

(2) Aggravated circumstances. — Any circumstance attending to the commission of an act of abuse or neglect which increases its enormity or adds to its injurious consequences, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse.

(3) Caretaker. — Any person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a stepparent, foster parent, an adult member of the juvenile's household, an adult relative entrusted with the juvenile's care, any person such as a house parent or cottage parent who has primary responsibility for supervising a juvenile's health and welfare in a residential child care facility or residential educational facility, or any employee or volunteer of a division, institution, or school operated by the Department of Health and Human Services. "Caretaker" also means any person who has the responsibility for the care of a juvenile in a child care facility as defined in Article 7 of Chapter 110 of the General Statutes and includes any person who has the approval of the care provider to assume responsibility for the juveniles under the care of the care provider. Nothing in this subdivision shall be construed to impose a legal duty of support under Chapter 50 or Chapter 110 of the General Statutes. The duty imposed upon a caretaker as defined in this subdivision shall be for the purpose of this Subchapter only.

(4) Clerk. — Any clerk of superior court, acting clerk, or assistant or deputy clerk.

(5) Community-based program. — A program providing nonresidential or residential treatment to a juvenile in the community where the juvenile's family lives. A community-based program may include specialized foster care, family counseling, shelter care, and other appropriate treatment.

(6) Court. — The district court division of the General Court of Justice.

(7) Court of competent jurisdiction. — A court having the power and authority of law to act at the time of acting over the subject matter of the cause.

(7a) Criminal history. — A local, State, or federal criminal history of conviction or pending indictment of a crime, whether a misdemeanor or a felony, involving violence against a person.

(8) Custodian. — The person or agency that has been awarded legal custody of a juvenile by a court or a person, other than parents or legal guardian, who has assumed the status and obligation of a parent without being awarded the legal custody of a juvenile by a court.

(9) Dependent juvenile. — A juvenile in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement.

(10) Director. — The director of the county department of social services in the county in which the juvenile resides or is found, or the director's representative as authorized in G.S. 108A-14.

(11) District. — Any district court district as established by G.S. 7A-133.

(11a) Family assessment response. — A response to selected reports of child neglect and dependency as determined by the Director using a family-centered approach that is protection and prevention oriented and that evaluates the strengths and needs of the juvenile's family, as well as the condition of the juvenile.

(11b) Investigative assessment response. — A response to reports of child abuse and selected reports of child neglect and dependency as determined by the Director using a formal information gathering process to determine whether a juvenile is abused, neglected, or dependent.

(12) Judge. — Any district court judge.

(13) Judicial district. — Any district court district as established by G.S. 7A-133.

(14) Juvenile. — A person who has not reached the person's eighteenth birthday and is not married, emancipated, or a member of the armed forces of the United States.

(15) Neglected juvenile. — A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

(16) Petitioner. — The individual who initiates court action, whether by the filing of a petition or of a motion for review alleging the matter for adjudication.

(17) Prosecutor. — The district attorney or assistant district attorney assigned by the district attorney to juvenile proceedings.

(18) Reasonable efforts. — The diligent use of preventive or reunification services by a department of social services when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time. If a court of competent jurisdiction determines that the juvenile is not to be returned home, then reasonable efforts means the diligent and timely use of permanency planning services by a department of social services to develop and implement a permanent plan for the juvenile.

(18a) Responsible individual. — An individual identified by the director as the person who is responsible for rendering a juvenile abused or seriously neglected.

(19) Safe home. — A home in which the juvenile is not at substantial risk of physical or emotional abuse or neglect.

(20) Shelter care. — The temporary care of a juvenile in a physically unrestricting facility pending court disposition.

(21) Substantial evidence. — Relevant evidence a reasonable mind would accept as adequate to support a conclusion.

(22) Working day. — Any day other than a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions.

The singular includes the plural, the masculine singular includes the feminine singular and masculine and feminine plural unless otherwise specified. (1979, c. 815, s. 1; 1981, c. 336; c. 359, s. 2; c. 469, ss. 1-3; c. 716, s. 1; 1985, c. 648; c. 757, s. 156(q); 1985 (Reg. Sess., 1986), c. 852, s. 16; 1987, c. 162; c. 695; 1987 (Reg. Sess., 1988), c. 1037, ss. 36, 37; 1989 (Reg. Sess., 1990), c. 815, s. 1; 1991, c. 258, s. 3; c. 273, s. 11; 1991 (Reg. Sess., 1992), c. 1030, s. 3; 1993, c. 324, s. 1; c. 516, ss. 1-3; 1997-113, s. 1; 1997-390, s. 3; 1997-390, s. 3.2; 1997-443, s. 11A.118(a); 1997-506, s. 30; 1998-202, s. 6; 1998-229, ss. 1, 18; 1999-190, s. 1; 1999-318, s. 1; 1999-456, s. 60; 2005-55, s. 1; 2005-399, s. 1.)

Editor's Note. — Subdivisions (2) and (7) were originally enacted by Session Laws 1998-229, s. 18 as subdivisions (1a) and (5a). The subdivisions have been renumbered at the direction of the Revisor of Statutes.

Session Laws 2005, c. 55, s. 13, provides: "The Department of Health and Human Services shall continue to assess the alternative response system of child protection as to the impact the system has in child safety, timeliness of response, timeliness of service, and coordination of local human services. The Department shall report the status of its evaluation to the Legislative Study Commission on Children and Youth, the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division before the convening of the 2006 Regular Session of the 2005 General Assembly."

Subsections (18a), (21) and (22), added by Session Laws 2005-399, s. 1, effective October 1, 2005, are applicable to investigative assessment responses initiated by county departments of social services on or after that date.

Legal Periodicals. — For legislative survey on family and juvenile law, see 22 Campbell L. Rev. 253 (2000).

CASE NOTES

Editor's Note. — *Most of the following cases were decided prior to the enactment of this Chapter.*

Constitutionality. — Former G.S. 7A-278 did not violate the equal protection clause of the United States Constitution by classifying and treating children differently from adults. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

Allowing a child to be adjudged undisciplined and placed on probation without benefit of counsel, while at the same time requiring counsel before a child may be adjudged delinquent, did not deny equal protection of the laws to the undisciplined child. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

Former G.S. 7A-289.32(2) and former G.S. 7A-517(21) (see now G.S. 7B-101(15)) did not violate constitutional standards of equal protection or definiteness. Department of Social Servs. v. Johnson, 70 N.C. App. 383, 320 S.E.2d 301 (1984).

"Community-Based Program". — Although the term "community-based program" is a term of art, its usage by the General Assembly reflects its concern that responses to the problems of the juveniles coming before the courts be fashioned in a flexible manner so as to address the best interests of the child in ways other than probation and commitment to training schools (now youth development centers). In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

The term community ought to be interpreted in a broad manner, connoting an interrelationship among persons who live in the same general area, but who also share the same laws, rights, and interests. In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

"Custodian". — Definition of "custodian" in 7A-517(11) was, see now 7B-101(8), was much narrower than the previous definition. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 699, 349 S.E.2d 589 (1986).

"Dependent". — Trial court erred in adjudicating a mother's three-month-old son as dependent, pursuant to G.S. 7B-101(9), as the trial court's finding of fact that the mother was not willing to investigate the needs of her son in a safe environment, after the infant suffered a severe head trauma while in the father's sole care, was not supported by clear and convincing evidence; as the mother did not neglect her son, nor was he deemed abused, he was not dependent because he had a parent capable of providing care and supervision. In re J.A.G., 172 N.C. App. 708, 617 S.E.2d 325, 2005 N.C. App. LEXIS 1785 (2005).

Children were dependent where the parents were neither able to care for them nor did they suggest appropriate alternate replacements; the father's proposed replacement was insufficient because there was no evidence that his aunt was willing or able to care for the children. In re D.J.D., 171 N.C. App. 230, 615 S.E.2d 26, 2005 N.C. App. LEXIS 1268 (2005).

Trial court's findings supported its conclusion that the children were dependent under G.S. 7B-101(9) because it found that the mother could not care for her children without constant assistance, and that such assistance was not available to her. In re J.J., — N.C. App. —, 637 S.E.2d 258, 2006 N.C. App. LEXIS 2412 (2006).

"Juvenile." — The rights afforded under former G.S. 7A-595 to be informed of Miranda rights, as well as to have a parent, guardian, or custodian present during questioning apply only to persons defined to be a juvenile under G.S. 7A-517 (see now this section). State v. Brantley, 129 N.C. App. 725, 501 S.E.2d 676 (1998).

"Dependent juvenile." — Trial court's finding of fact that the child's mother had not appropriately cared for him was not supported by clear and convincing evidence; similarly, the finding of fact that the mother was not willing to investigate the needs of the child in a safe environment was not supported by clear and convincing evidence. Further, the child was not neglected as to his mother; therefore, pursuant to G.S. 7B-101(9), the child was not dependent as to his mother because she was capable of providing care for and supervision of the child. In re J.A.G., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 1091 (June 7, 2005).

Nature of Proceedings. — As the district court division has exclusive original jurisdiction of Juvenile Code matters, actions under the former Juvenile Code (formerly G.S. 7A-516 et seq.) are not special proceedings. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Jurisdiction. — The issuance and service of process is the means by which the court obtains jurisdiction; thus, where no summons was issued, the court acquired jurisdiction over neither the persons nor the subject matter of the action, and was without authority to enter order adjudicating a juvenile as neglected. In re Mitchell, 126 N.C. App. 432, 485 S.E.2d 623 (1997).

In dependency proceedings brought under G.S. 7B-101, the failure of a petition to list an allegedly dependent juvenile's address pursuant to G.S. 7B-402 did not deprive the trial court of jurisdiction because this was "routine clerical information," and the trial court could easily determine from information provided in the petition whether the court had subject matter jurisdiction over the case. In re A.R.G., 361 N.C. 392, 646 S.E.2d 349, 2007 N.C. LEXIS 597 (2007).

Applicability To Termination Proceedings. — Although G.S. 7B-101(9), G.S. 7B-1111(a)(6) concerned dependency, those provisions are applicable to termination of parental rights proceedings where neglect is pursued. In re L.W., 175 N.C. App. 387, 623 S.E.2d 626, 2006 N.C. App. LEXIS 55 (2006), review denied, appeal dismissed, 360 N.C. 534, 633 S.E.2d 818 (2006).

Findings of Fact Required. — Trial court erred in concluding that a child was dependent because the trial court made no findings of fact concerning the mother's ability to provide care or supervision for the child or that the mother lacked an alternative child care arrangement to support the court's conclusion that the child was dependent. In re E.C., 174 N.C. App. 517, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

Subsequent Custody Denied. — Plaintiff did not have standing to seek custody of his biological children as an "other" person under G.S. 50-13.1(a) where his parental rights were previously terminated for neglect. Krauss v. Wayne County Dep't of Social Servs., 347 N.C. 371, 493 S.E.2d 428 (1997).

Definition of "Neglected Juvenile" Not Unconstitutional. — The statutory definition of a "neglected juvenile" in former G.S. 7A-517 was not unconstitutional by reason of vagueness, nor does it violate constitutional safeguards as to equal protection. In re Huber, 57 N.C. App. 453, 291 S.E.2d 916, appeal dismissed and cert. denied, 306 N.C. 557, 294 S.E.2d 223 (1982).

Former G.S. 7A-517(21) (see now G.S. 7B-101(15)) of this section is not unconstitutionally vague. In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), appeal dismissed, 459 U.S. 1139, 103 S. Ct. 776, 74 L. Ed. 2d 987 (1983).

The determination of neglect requires the application of the legal principles set forth in former § 7A-517(21) (see now § 7B-101(15)) and is therefore a conclusion of law; appellate review of a trial court's conclusions of law is limited to whether they are supported by findings of fact. In re Helms, 127 N.C. App. 505, 491 S.E.2d 672 (1997).

Classification of Neglected Children Is Reasonable. — The classification of neglected children by former G.S. 7A-517 is founded upon reasonable distinctions, affects all persons similarly situated without discrimination, and has a reasonable relation to the public peace, welfare and safety. In re Huber, 57 N.C. App. 453, 291 S.E.2d 916, appeal dismissed and cert. denied, 306 N.C. 557, 294 S.E.2d 223 (1982).

"Abandonment" Defined. — Abandonment imports any willful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. Abandonment has also been defined as willful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child. In re APA, 59 N.C. App. 332, 296 S.E.2d 811 (1982).

Neglect Based on Abandonment. — Mother neglected child by way of abandonment where the mother had wilfully refused to perform her obligations as a parent, had withheld her presence, love, care, and opportunity to display filial affection from the child, and failed to financially contribute to the support of the child for a significant period of time. In re Humphrey, 156 N.C. App. 533, 577 S.E.2d 421, 2003 N.C. App. LEXIS 236 (2003).

Definitions Not Mutually Exclusive. — A child may be both "dependent" and "neglected" within the definitions of former G.S. 7A-517(13) and (21) (see now G.S. 7B-101(9) and (15)). Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

Lack of Parental Concern. — An individual's lack of parental concern for his child is simply an alternate way of stating that the individual has failed to exercise proper care, supervision, and discipline as to that child. Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

Any child whose physical, mental or emotional condition has been impaired or is in danger of becoming impaired as a result of the failure of his or her parent to exercise that degree of care consistent with the normative standards imposed upon parents by society may be considered neglected. In re Thompson, 64 N.C. App. 95, 306 S.E.2d 792 (1983).

A child who is found to have been disciplined so severely that bruises and internal abrasions result is a "neglected" juvenile. In re Thompson, 64 N.C. App. 95, 306 S.E.2d 792 (1983).

To deprive a child of the opportunity for normal growth and development is perhaps the greatest neglect a parent can impose upon a child. In re Huber, 57 N.C. App. 453, 291 S.E.2d 916, appeal dismissed & cert. denied, 306 N.C. 557, 294 S.E.2d 223 (1982).

Refusal to Educate as Neglect. — It is fundamental that a child who receives proper care and supervision in modern times is provided a basic education. A child does not receive "proper care" and lives in an "environment injurious to his welfare" when he is deliberately refused this education, and he is "neglected". In re McMillan, 30 N.C. App. 235, 226 S.E.2d 693 (1976); In re Devone, 86 N.C. App. 57, 356 S.E.2d 389 (1987).

Failure to Provide Medical Care or Remedial Care Constitutes Neglect. — This section provides that if a child is not provided necessary medical care, it is neglected. In re Huber, 57 N.C. App. 453, 291 S.E.2d 916, appeal dismissed & cert. denied, 306 N.C. 557, 294 S.E.2d 223 (1982).

Child with a severe speech defect which could be treated by medical or other remedial care, as well as a hearing defect, which problems could be overcome with proper treatment and therapy which were available to child without expense to her mother, was "neglected" where her mother refused to permit her to receive this opportunity to progress toward her full development. In re Huber, 57 N.C. App. 453, 291 S.E.2d 916, appeal dismissed & cert. denied, 306 N.C. 557, 294 S.E.2d 223 (1982).

A finding of neglect by clear and convincing evidence was proper where the children were kept at home, and they did not receive proper medical care, supervision, or adequate nutrition. In re Bell, 107 N.C. App. 566, 421 S.E.2d 590, appeal withdrawn, 333 N.C. 168, 426 S.E.2d 699 (1992).

Clear, cogent, and convincing evidence supported a conclusion that a child did not receive proper care and supervision, and that the neglect was likely to result in physical, mental, or emotional impairment, or a substantial risk of such impairment under G.S. 7B-101(15) as: (1) a mother had over two years to work on a case plan with a department of social services and had ample time to follow through with the services designed to assist her in learning to parent; (2) the mother had attended only one mental health appointment and had not participated in vocational rehabilitation; (3) a father missed a psychological evaluation despite a social worker's efforts to provide transportation; (4) the service providers were unable to make contact with the parents; and (5) the parents delayed seeking medical attention for the child after a social worker telephoned the father and told him about the need to take the child to a pediatrician. In re C.M., — N.C. App. —, 644 S.E.2d 588, 2007 N.C. App. LEXIS 1043 (2007).

Failure to Provide Clean Home and Child Care. — Failure of parents, during the three months additional time allowed to them to make improvements, to provide a clean and suitable home for their children and to provide for appropriate child care when they were absent, was strong supporting evidence for the conclusion that the children were genuinely neglected within the terms of subdivision (21) of this section. In re Black, 76 N.C. App. 106, 332 S.E.2d 85 (1985).

The inability to maintain secure living arrangements is relevant to a determination of whether there is a substantial risk of injury to the juvenile. In re Helms, 127 N.C. App. 505, 491 S.E.2d 672 (1997).

Neglect may be manifested in ways less tangible than failure to provide physical necessities. Therefore, on the question of neglect, the trial judge may consider, in addition, a parent's complete failure to provide the personal contact, love, and affection that inheres in the parental relationship. In re APA, 59 N.C. App. 322, 296 S.E.2d 811 (1982).

Findings that the child's home is clean and that she is well fed and clothed are not dispositive on the issue of neglect. In re Thompson, 64 N.C. App. 95, 306 S.E.2d 792 (1983).

Determination of Child's Residence. — Child was living in the home of respondent mother even though the child resided in the hospital until the Department of Social Services intervened. In re A.B., 179 N.C. App. 605, 635 S.E.2d 11, 2006 N.C. App. LEXIS 2027 (2006).

Evidence of abuse of another child in the home is relevant in determining whether a child is a neglected juvenile; however, the removal of all other children from the home once a child has either died or been subjected to sexual or severe physical abuse is not required. In re Nicholson, 114 N.C. App. 91, 440 S.E.2d 852 (1994).

One communication in a two-year period does not evidence the personal contact, love, and affection that inheres in the parental relationship. In re Graham, 63 N.C. App. 146, 303 S.E.2d 624, cert. denied, 309 N.C. 320, 307 S.E.2d 170 (1983).

A parent's insistence on attempting to teach a mentally retarded child himself constitutes neglect, if it denies that child the right to attend special education classes critical to the child's development and welfare. In re Devone, 86 N.C. App. 57, 356 S.E.2d 389 (1987).

Trial court did not err in finding that 15 year old with an IQ of 41, who had been taken out of public school and was being taught at home by his father, was neglected, in granting legal custody to the Department of Social Services, and in ordering the child to be returned to public school. In re Devone, 86 N.C. App. 57, 356 S.E.2d 389 (1987).

Evidence of Neglect Sufficient to Withstand Motion to Dismiss. — The petitioner offered substantial evidence sufficient to withstand a motion to dismiss where the evidence presented, taken in the light most favorable to petitioner, amounted to the following: (1) that respondent's eight year-old daughter had been left alone for approximately three and a half hours by respondent as a form of discipline; (2) that she was found to have a cut on her lip and bruising on her face; (3) that respondent's boyfriend had spanked her at church when she misbehaved, and had grabbed her face and hit her face when they arrived home; (4) that respondent's boyfriend had punched holes in the walls, and that he had once cracked the car windshield with his fist while the children were in the vehicle; (5) that respondent was completely uncooperative with petitioner; (6) that respondent's son had a wound on his upper lip which respondent insisted was a cold sore but was later determined to be an infected cut; and (7) that respondent had a blackened eye. In re Gleisner, 141 N.C. App. 475, 539 S.E.2d 362, 2000 N.C. App. LEXIS 1308 (2000).

Although G.S. 7B-101(15) was silent on whether a juvenile to be adjudicated as neglected had to sustain some injury as a result of neglect, there had to be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline; and where there was no finding that the juvenile had been impaired or was at substantial risk of impairment, there was no error if all the evidence supported such a finding. In re Padgett, 156 N.C. App. 644, 577 S.E.2d 337, 2003 N.C. App. LEXIS 324 (2003).

Evidence of Abuse and Neglect Sufficient to Withstand Motion to Dismiss. — Trial court did not err in denying the mother and father's motions to dismiss filed at the close of the county welfare agency's case and the close of all of the evidence, as the evidence that the older daughter was abused and the younger daughter was neglected was supported by evidence sufficient to withstand their motions to dismiss. In re Morales, 159 N.C. App. 429, 583 S.E.2d 692, 2003 N.C. App. LEXIS 1518 (2003).

Evidence Held Sufficient to Show Neglect. — There was ample clear, cogent and convincing evidence that a juvenile's injuries were the result of nonaccidental means, that her injuries were "intentionally" inflicted upon her and that, therefore, she was neglected, despite mother's alleged love and devotion. In re Hughes, 74 N.C. App. 751, 330 S.E.2d 213 (1985).

Facts that father had little if any contact with his daughter in the year before he murdered his daughter's mother; that since the murder, father had been incarcerated; that father had twice given his consent for the child's adoption by his sister and her husband; that father had known that the child was in petitioners' custody and had nevertheless made no effort to contact petitioners, to send support for daughter to petitioners, or to establish any verbal or written communication with the child, supported the trial court's conclusion that father "acted in such a way as to evince a lack of parental concern for the child" and were sufficient to constitute neglect pursuant to G.S. 7A-289.32(2) [see now G.S. 7B-1111(a)(1)] and 7A-517(21) [see now G.S. 7B-101(15)]. Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

The evidence before the trial court was sufficient to support its findings of abuse and neglect where: (1) Child, while in respondent's sole care, suffered multiple burns over a wide portion of her body; (2) no accidental cause was established, and the child in fact stated that respondent burned her; (3) the burns were serious, requiring prompt medical attention; (4) respondent did not seek treatment for the child's injuries and refused to permit social worker to do so; and (5) the child was taken for treatment only upon the intervention of the sheriff's department, over respondent's opposition. In re Hayden, 96 N.C. App. 77, 384 S.E.2d 558 (1989).

Child held to be a neglected juvenile where the child was substantially at risk due to the instability of her living arrangements, the mother and child moved at least six times during the four months the mother retained custody, the child was substantially at risk through repeated exposure to violent individuals, one of whom used cocaine, and where the environment in which the mother and child lived was injurious in that it involved drugs, violence, and attempted sexual assault. In re Helms, 127 N.C. App. 505, 491 S.E.2d 672 (1997).

Where mother had a severe alcohol problem, had driven while under the influence with her minor children as passengers, became intoxicated at home to the point of falling down and becoming unable to care for her younger children, and her drinking contributed to her children's emotional problems evidence was sufficient to show neglect. Powers v. Powers, 130 N.C. App. 37, 502 S.E.2d 398 (1998).

Evidence supported a trial court's finding that father abused, neglected, or negligently provided care for his three-month old child where it showed that: (1) the father lived with the child; (2) the father knew his son had a medical condition; (3) the father took the child to the hospital; (4) the father left the hospital on a second occasion without the child being seen; (5) the father did not obtain subsequent medical treatment for his son; and (6) the child's injuries were serious and had been inflicted over a period of time. In re Pittman, 149 N.C. App. 756, 561 S.E.2d 560, 2002 N.C. App. LEXIS 303 (2002), cert. denied, 538 U.S. 982, 123 S. Ct. 1799, 155 L. Ed. 2d 673 (2003).

Evidence was sufficient to support a finding that the parents of a three-month old child abused, neglected, or negligently cared for the child where it showed that: (1) the parents could not reconstruct who cared for the child for days, or even weeks; (2) the parents failed to furnish a detailed account or proper medical history to explain the child's injuries; (3) both parents knew that the child had a medical condition; (4) the second time the child was taken to the hospital the parents left the hospital without the child being seen because they were tired of waiting; (5) the child's injuries were serious; and (6) the child's injuries were inflicted over a period of time. In re Pittman, 149 N.C. App. 756, 561 S.E.2d 560, 2002 N.C. App. LEXIS 303 (2002), cert. denied, 538 U.S. 982, 123 S. Ct. 1799, 155 L. Ed. 2d 673 (2003).

Trial court properly terminated the father's parental rights on the ground that the father neglected the children, because the father expressed some interest in visitation rights, but only if a paternity test showed that the father was one child's biological father. In re Mills, 152 N.C. App. 1, 567 S.E.2d 168, 2002 N.C. App. LEXIS 905 (2002), cert. denied, 356 N.C. 672, 577 S.E.2d 627 (2003).

Where (1) a mother did not keep medical appointments for a child, resulting in the child's uncontrollable behavior; (2) children were unattended; (3) the children's school could not contact the mother; (4) a child was sleep-deprived and hungry; and (5) while the mother was incarcerated, the children were padlocked in their rooms without bathroom access and the refrigerator was padlocked, the evidence was sufficient to support the trial court's adjudication of the children as neglected, under G.S. 7B-101(15). In re Padgett, 156 N.C. App. 644, 577 S.E.2d 337, 2003 N.C. App. LEXIS 324 (2003).

Trial court's determination that that mother neglected the child was supported by evidence that the mother failed to provide any parental guidance, personal contact, love or custodial/spiritual support for at least six months prior to the filing of the grandmother's petition. Lechuga v. Ore (In re Ore), 160 N.C. App. 586, 586 S.E.2d 486, 2003 N.C. App. LEXIS 1816 (2003).

Evidence that a father, who had been incarcerated since his child's birth, had not provided any financial support for the child from his compensation for his prison employment, had not sought personal contact with the child or attempted to convey love or affection to the child, and did not inquire about the child in his infrequent correspondence with the child's mother, showed the father neglected the child, as defined in G.S. 7B-101(15), allowing termination of his parental rights, under G.S. 7B-1111(a)(1). In re Bradshaw, 160 N.C. App. 677, 587 S.E.2d 83, 2003 N.C. App. LEXIS 1910 (2003).

Testimony of a pediatrician and a mental health professional was sufficient evidence of child abuse to support the trial court's finding that two minor children were abused and neglected children, and that the children's placement and care was the responsibility of the county department of social services. In re Mashburn, 162 N.C. App. 386, 591 S.E.2d 584, 2004 N.C. App. LEXIS 175 (2004), appeal dismissed, — N.C. —, 603 S.E.2d 884 (2004).

Noting that the neglect statute, G.S. 7B-101(15), afforded a trial court some discretion in determining the weight to be given evidence of a past adjudication of neglect and the likelihood of its continuation in the future, an appeals court held that the trial court's findings of fact, which included a 16 year old mother's prior adjudication of neglect, marijuana use, and her demonstrated inability to care for an infant, supported the conclusion that the child was a neglected child. In re E.N.S., 164 N.C. App. 146, 595 S.E.2d 167, 2004 N.C. App. LEXIS 706 (2004), cert. denied, 359 N.C. 189, 606 S.E.2d 903 (2004).

Despite an appellate court's determination that several of the trial court's findings of fact were not supported by clear, cogent, and convincing evidence in a neglect and abuse case, it also found that several findings of fact were so supported and provided sufficient evidence to uphold the neglect and abuse adjudication of a mother's infant child based on the mother's (1) whereabouts to have been unknown upon the baby's discharge from the hospital, (2) testing positive for marijuana since the adjudication hearing, (3) refusal to attend several substance abuse assessments, (4) failure to make progress on her psychological problems, and (5) abuse and neglect adjudication regarding an older daughter. In re M.J.G., 168 N.C. App. 638, 608 S.E.2d 813, 2005 N.C. App. LEXIS 435 (2005).

Where the evidence showed that a child resided in the same home where four other children had been neglected, this fact was sufficient to support a finding that the child was being neglected under G.S. 7B-101(15); although the father was in jail, the mother was accused of the previous neglect. In re P.M., 169 N.C. App. 423, 610 S.E.2d 403, 2005 N.C. App. LEXIS 678 (2005).

Trial court did not abuse its discretion in terminating a mother's parental rights based on neglect where: (1) the mother failed to maintain stable housing and was unemployed, (2) the mother failed to comply with a child support order, (3) the mother had left the child with others, including an incident initiating the child's removal from her custody, (4) the mother failed to provide proper medication for the child, (5) the mother had attempted suicide, had not cooperated with social workers, did not follow through with mental health counseling, and did not complete parenting classes, and (6) the mother only sporadically visited and contacted the child for over five years. In re E.T.S., 175 N.C. App. 32, 623 S.E.2d 300, 2005 N.C. App. LEXIS 2724 (2005).

When it was alleged that a mother's parental rights to two children should be terminated because she (1) neglected them while they were in an agency's care within the meaning of G.S. 7B-101, under G.S. 7B-1111(a)(1), (2) willfully left the children in foster care for more than 12 months without showing reasonable progress to correct the conditions that led to their removal, under G.S. 7B-1111(a)(2), and (3) willfully failed to pay a reasonable portion of the cost of the children's care while in an agency's custody, under G.S. 7B-1111(a)(3), and the petition was sustained on all three grounds, when the mother objected to findings as to only one ground on appeal, the other findings were binding, under N.C. R. App. P. 10, and, as only one ground had to be found to terminate parental rights, it was unnecessary to consider the mother's appellate argument as to the ground she challenged. In re J.A.A., 175 N.C. App. 66, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

Social services department presented clear, cogent, and convincing evidence from which the trial court could find and conclude that child was at risk of some physical, mental, or emotional impairment where the mother kept the child at her cousin's home in a filthy room with clothes and dirty diapers strewn about, she would leave the home for several days at a time and, upon her return, she would sleep for long periods of time with the child in the bed and would not awaken when the child cried, the mother came home drunk or under the influence of drugs on one occasion and attempted to remove the child from the home in the middle of the night, and the mother was unable to complete a substance abuse treatment program because of frequent altercations with other residents. In re E.C., 174 N.C. App. 517, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

In a termination of parental rights hearing, clear, cogent and convincing evidence showed a mother's children were neglected, as defined in G.S. 7B-101(15), for purposes of termination, as the mother did not (1) complete classes in parenting, budgeting, and homemaking, (2) obtain mental health counseling, (3) have a phone, or (4) keep a clean home, all as required by her case plan, and she offered no specific plan for the children's care while she worked, if they were returned to her, and her residential instability was shown. In re J.W., 173 N.C. App. 450, 619 S.E.2d 534, 2005 N.C. App. LEXIS 2109 (2005), aff'd, — N.C. —, 625 S.E.2d 780 (2006).

Admittedly, there was not testimonial evidence that a mother failed to provide consistent financial support to the minor child. However, when compared to the overwhelming, substantive evidence supporting findings of fact four and five, that the mother physically harmed the minor child by hitting her with a belt and failed to consistently attend assigned mental health sessions as she only attended five of 10 sessions, and finding of fact six, that the mother failed to regularly visit the minor child, the substantive evidence supported the trial court's conclusion that the minor child was neglected pursuant to G.S. 7B-101(15). In re A.J.M., 177 N.C. App. 745, 630 S.E.2d 33, 2006 N.C. App. LEXIS 1220 (2006).

Trial court's order concluding that a mother's children were neglected and ordering the continued legal custody of the children with a state agency was affirmed because the trial court's findings supported its conclusion of law that the children were neglected juveniles under G.S. 7B-101(15); the findings included instances of drug abuse and domestic violence by the mother and the father of one of her children. In re T.S., 178 N.C. App. 110, 631 S.E.2d 19, 2006 N.C. App. LEXIS 1299 (2006).

Trial court's conclusion that the father neglected both children because the minor children did not receive proper care or supervision and they lived in an environment injurious to their welfare was proper where the father admitted that he had been required to call the police because the mother had been throwing things. In re A.S., — N.C. App. —, 640 S.E.2d 817, 2007 N.C. App. LEXIS 378 (2007).

Evidence sufficiently supported the trial court's finding that the mother's children were neglected, including that the mother delayed taking the one child for medical treatment for the one child's bruises because of the mother's fear that the county social services agency would take custody of the children and that the other two children had disciplinary and developmental problems while in the mother's care. In re C.P., — N.C. App. —, 641 S.E.2d 13, 2007 N.C. App. LEXIS 377 (2007).

Trial court did not err in concluding that the minor child was a neglected juvenile, as the allegation in the petition that the minor child was neglected because the minor child lived in an environment injurious to the minor child's welfare was proven by clear and convincing evidence; indeed, the evidence showed that the minor child's older sibling was adjudicated abused and neglected because the mother's boyfriend, who was cohabitating with the mother at the time of the abuse, pled guilty to several felony sex offenses. In re D.S.A., — N.C. App. —, 641 S.E.2d 18, 2007 N.C. App. LEXIS 375 (2007).

Adjudication of neglect was supported by evidence that the mother admitted to "thumping" the five-year-old daughter in the face hard enough with a finger to leave a bruise shaped like the mother's finger, the bruising of the four-year-old child's upper leg was from a severe blow delivered by his stepfather with a brush, respondents' effort to convince the younger child to lie about what happened to cause the bruise on his leg, the fact that the older child told the social worker that the bruise on her face came from falling in the bathtub, the same lie respondents tried to exact from the younger child, and the mother's admission that she left the younger alone in the bathtub every night for 20 to 30 minutes. In re L.T.R., — N.C. App. —, 639 S.E.2d 122, 2007 N.C. App. LEXIS 157 (2007).

Trial court properly adjudicated a child to be a neglected juvenile where the testimony showed that the mother had left the child alone in a motel room when she was only 16 months old. In re D.C., — N.C. App. —, 644 S.E.2d 640, 2007 N.C. App. LEXIS 1168 (2007).

Fact that the mother admitted to using cocaine for at least two months prior to the child's birth, the mother and the child tested positive for cocaine at the time of the child's birth, that there were incidents of domestic violence between respondents, and that the mother refused to sign a safety assessment plan, provided clear and convincing evidence supporting a finding of neglect. In re B.M., — N.C. App. —, 643 S.E.2d 644, 2007 N.C. App. LEXIS 833 (2007).

Mother's parental rights were properly terminated because the district court's findings that the mother changed employment every couple of months and had transportation problems that contributed to the mother's employment issues and the mother's difficulties in visitation with all of her children supported a determination that the child at issue was neglected under G.S. 7B-101. In re J.T.W., 361 N.C. 341, 643 S.E.2d 579, 2007 N.C. LEXIS 413 (2007).

Sufficient evidence supported the conclusion that a mother neglected the mother's child under G.S. 7B-101(15) and G.S. 7B-1111(a)(1) because the mother failed to stop substance abuse after the children were removed from the home and failed to meet their basic needs during a trial period. In re C.T., — N.C. App. —, 643 S.E.2d 23, 2007 N.C. App. LEXIS 683 (2007).

Findings relating to the prior adjudication of neglect and subsequent termination of parental rights as to the parents' first child and the parents' failure to comply with their case plan, when combined with the parents' failure to acknowledge culpability for their first child's injuries, supported the conclusion that the child was a neglected juvenile based on the high risk of future abuse or neglect. In re N.G., — N.C. App. —, 650 S.E.2d 45, 2007 N.C. App. LEXIS 1970 (2007).

Evidence supported a finding of neglect under former § 7A-517(21) where the trial court found that the respondent parents intended to live with their new infant in the home of the maternal grandparents where their previous child died; where the child's father had been convicted of causing the infant's death; where the mother had been advised regarding the cause of this non-accidental death but continued to support the father's version of events; where the parents had neither expressed nor exhibited any concern for the future safety of their newborn in their home; and where the father "extended most of the care for the juvenile" during the visits of the parents with the child. In re McLean, 135 N.C. App. 387, 521 S.E.2d 121, 1999 N.C. App. LEXIS 1150 (1999).

Evidence Insufficient to Show Neglect. — Where at the time of termination proceedings, father was employed in a steady job for the first time in a number of years, had been alcohol free for over two years, had reduced his child support arrearage from $15,200 to $2,200, and had been paying $750 a month in child support ($500 in arrears and $250 to keep current), insufficient evidence existed to support a finding of neglect. Bost v. Van Nortwick, 117 N.C. App. 1, 449 S.E.2d 911 (1994).

The trial court's findings of fact did not support its conclusion that a child was neglected, where the trial court's finding that the mother did not provide the child with proper care, supervision, or discipline was more properly denominated a conclusion of law, and the court did not find that the child was impaired or at substantial risk of impairment. In re Everette, 133 N.C. App. 84, 514 S.E.2d 523 (1999).

Anonymous call, reporting a naked child two years of age, unsupervised in a driveway, did not, standing alone, constitute a report of abuse, neglect, or dependency, so the statutory investigative mandate was not properly invoked against the parents of the child that refused to let a caseworker privately interview the child or the child's siblings; the determination of neglect required the application of the legal principles set forth in G.S. 7B-101(15), and was therefore a conclusion of law. In re Stumbo, 357 N.C. 279, 582 S.E.2d 255, 2003 N.C. LEXIS 747 (2003).

While the findings of fact and conclusions of law showed, by clear and convincing evidence pursuant to G.S. 7B-805, that a father neglected his three-month-old infant under G.S. 7B-101(15), based on an incident where the infant suffered a severe head injury while in his father's sole care, which could not have been attributed to rolling off the couch as the father contended happened when he went to get a bottle for the infant, the proof was insufficient to show that the mother had neglected the infant; she was not at home when the incident occurred and there were no other incidents involving the infant. In re J.A.G., 172 N.C. App. 708, 617 S.E.2d 325, 2005 N.C. App. LEXIS 1785 (2005).

Trial court erred in finding that the mother neglected the child, because: (1) the trial court's finding of fact that the mother had failed to appropriately care for the child was not supported by clear and convincing evidence; (2) the trial court's findings of fact indicated that the mother was not at the home when the child suffered his injuries; (3) the child was developing appropriately and had never missed any doctor's appointments; (4) there were no allegations, evidence, or findings of fact related to any of the other bases for a finding of neglect as defined in G.S. 7B-101(15); and (5) there was no evidence presented indicating that the mother knew or reasonably should have known that the father would harm the child. In re J.A.G., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 1091 (June 7, 2005).

Because a finding of neglect against the father of three children under G.S. 7B-101(15) was based on the trial court's conclusion of abuse as to another child living in the same residence and that finding of abuse had been reversed, the finding was insufficient to establish a basis for neglect. In re C.B., — N.C. App. —, 636 S.E.2d 336, 2006 N.C. App. LEXIS 2237 (2006).

County department of social services did not satisfy its burden of proving the allegations in its juvenile petitions by clear, cogent, and convincing evidence under G.S. 7B-1109 because the subject children were not neglected juveniles under G.S. 7B-101(15), nor dependant juveniles under G.S. 7B-101(9); the trial court in its ruling properly entered uncontested findings of fact that: (1) the father possessed a gun, but did not point it at the mother or the children during a domestic disturbance; (2) the parents' three oldest children left their residence with the father, but no kidnapping was reported, and an Amber Alert was not issued; (3) the district attorney's office dismissed the charges against the father for communicating threats to and assault by pointing a gun at the mother; and (4) the father was not in possession of a gun when he was arrested. In re H.M., — N.C. App. —, 641 S.E.2d 715, 2007 N.C. App. LEXIS 594 (2007).

Department of social services failed to present evidence that the children were neglected, as defined in G.S. 7B-101(9), and dependent, as defined in G.S. 7B-101(15); although the record showed that the parents abused alcohol, the record contained no evidence that the children suffered any harm or were in anyway neglected as a result. In re E.P, — N.C. App. —, 645 S.E.2d 772, 2007 N.C. App. LEXIS 1163 (2007).

Evidence Insufficient to Show Neglect Under Former § 7A-517. — The trial court correctly held that there was insufficient evidence to support a finding that the siblings of a child who died under mysterious circumstances were abused or neglected. Norris v. Zambito, 135 N.C. App. 288, 520 S.E.2d 113 (1999).

Spanking by Father Did Not Rise to Level of Serious Injury for Abuse. — Finding of child abuse under G.S. 7B-101(1) was improper because the only evidence of record was a spanking by the father with a belt, resulting in a bruise on the child's buttocks, which did not rise to the level of "serious injury" to constitute abuse by clear and convincing evidence, as required by G.S. 7B-805. In re C.B., — N.C. App. —, 636 S.E.2d 336, 2006 N.C. App. LEXIS 2237 (2006).

Evidence Held Sufficient to Show Abuse. — The evidence before the trial court was sufficient to support its findings of abuse and neglect where: (1) Child, while in respondent's sole care, suffered multiple burns over a wide portion of her body; (2) no accidental cause was established, and the child in fact stated that respondent burned her; (3) the burns were serious, requiring prompt medical attention; (4) respondent did not seek treatment for the child's injuries and refused to permit social worker to do so; and (5) the child was taken for treatment only upon the intervention of the sheriff's department, over respondent's opposition. In re Hayden, 96 N.C. App. 77, 384 S.E.2d 558 (1989).

Children were held to be abused juveniles, where the court found that the children had suffered serious emotional damage as the result of their parents' acrimonious marital dispute as the older daughter exhibited symptoms of depression and had entertained suicidal thoughts, and the younger daughter testified about the severe anxiety her parents' actions caused her. Powers v. Powers, 130 N.C. App. 37, 502 S.E.2d 398 (1998).

The trial court's findings of fact regarding child's status as an abused juvenile were supported by clear and convincing evidence where the child testified that her father had shown her a picture of a woman wearing a see-through dress, the child's friend drew a picture in court of what she had seen, i.e. the father's anatomy, a social worker testified that the child had told her that her father had "asked her to touch his penis," and a doctor testified that the child had told her that her father had asked her to look at a "dirty book." In re Cogdill, 137 N.C. App. 504, 528 S.E.2d 600 (2000), 2000 N.C. App. LEXIS 425.

Father's children were found abused by his wife under G.S. 7B-101(1)(a), (b) based upon G.S. 7B-101(15) clear and convincing evidence that wife regularly abused the children, inter alia, by choking, hitting with her hands and a cookie jar, pulling out their hair, and fighting with them, and by drinking alcohol and using crack cocaine in front of the children; furthermore evidence showed that the father did not protect the children from such behavior. Rholetter v. Rholetter, 162 N.C. App. 653, 592 S.E.2d 237, 2004 N.C. App. LEXIS 251 (2004).

Parental rights were properly terminated under G.S. 7B-1111 because the trial court found that the children were abused under G.S. 7B-101(1) and that they exhibited symptoms of that abuse; further, the Department of Social Services met its burden of proving that termination was in the best interests of the children under G.S. 7B-1110(a). In re L.C., — N.C. App. —, 638 S.E.2d 638, 2007 N.C. App. LEXIS 83 (2007).

Evidence before the trial court was sufficient to support its findings of abuse and neglect where three physicians, two of whom were experts in the area of child abuse, testified that the juvenile was the victim of Munchausen syndrome by proxy, a form of child abuse with a substantial risk of morbidity and even mortality, possibly induced by the mother either smothering the juvenile or administering a toxin. In re McCabe, 157 N.C. App. 673, 580 S.E.2d 69, 2003 N.C. App. LEXIS 949 (2003).

Abuse and neglect determination was supported by evidence that the child's skull fracture was a depression fracture caused by nonaccidental means, the mother's explanations were inconsistent with the injuries observed, the injuries occurred while the child was in the physical custody of the mother, the injuries were severe, and the mother failed to obtain medical attention for the child. In re T.H.T., — N.C. App. —, 648 S.E.2d 519, 2007 N.C. App. LEXIS 1812 (2007).

Parental Rights Properly Terminated. — The following findings supported the court's conclusion that a mother's parental rights should be terminated for neglect: (1) The child was in the bottom 5% of children in her age group in weight; (2) the mother failed to supervise her properly; (3) the child was allowed to remain in dirty diapers and to drink out of discarded bottles; (4) the child lived in an environment injurious to her health and welfare; and (5) the mother suffered mental problems resulting in inability to care for herself and her child. In re Caldwell, 75 N.C. App. 299, 330 S.E.2d 513 (1985).

Even if there is no evidence of neglect at the time of the termination proceeding, parental rights may still be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to her parent or parents. In re Reyes, 136 N.C. App. 812, 526 S.E.2d 499, 2000 N.C. App. LEXIS 160 (2000).

The trial court's decision adjudicating a mother's son as a neglected and dependant juvenile was not supported by clear, cogent, and convincing evidence because the trial court's order (1) did not distinguish between findings of fact and conclusions of law, (2) did not reference any of the several statutory grounds for determining neglect, and (3) was based on an order adjudicating the son's siblings neglected in another case, which had been remanded for adequate findings of fact and conclusions of law. In re T.M.M., 167 N.C. App. 801, 606 S.E.2d 416, 2005 N.C. App. LEXIS 17 (2005).

Trial court's ordering of neglected juvenile into the custody of the Department of Social Services was not error, even though it was unable, at the time, to provide adequate living and educational facilities for the juvenile. In re Kennedy, 103 N.C. App. 632, 406 S.E.2d 307 (1991).

Absence of parent. — The respondent/mother's failure to be present at the adjudicatory hearing did not relieve the trial court of its duty to find, based on competent evidence, that the allegations of neglect contained in the petition were supported by clear and convincing evidence; nor was the father's purported consent sufficient to support a finding of neglect. Thrift v. Buncombe County Dep't of Soc. Servs., 137 N.C. App. 559, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000).

District court had no right to assume custody jurisdiction of minor children upon its finding that they were "neglected" children to the exclusion of the district court which had previously acquired custody jurisdiction in a divorce and custody proceeding of the children's parents. In re Greer, 26 N.C. App. 106, 215 S.E.2d 404, cert. denied, 287 N.C. 664, 216 S.E.2d 910 (1975).

Parents have the duty to take every step reasonably possible under the circumstances to prevent harm to their children. Failure to perform this duty is negligence. Coleman v. Cooper, 89 N.C. App. 188, 366 S.E.2d 2, cert. denied, 322 N.C. 834, 371 S.E.2d 275 (1988).

Permanent Nature of Disfigurement. — By using the word "disfigurement" instead of words of transient import such as bruise, abrasion, contusion, discoloration, marks, or stripes in context with other words clearly indicating permanency ("death," "impairment of physical health," "loss or impairment of function of any bodily organ") the General Assembly obviously intended to limit the application of subdivision (1)a of this section to injuries permanent in their effect. In re Mickle, 84 N.C. App. 559, 353 S.E.2d 232 (1987).

A temporary bruising is not a "disfigurement" under subdivision (1)a of this section. In re Mickle, 84 N.C. App. 559, 353 S.E.2d 232 (1987).

Procedure upon Finding Juvenile in Contempt. — The trial court was not authorized to summarily commit a child under 16 to state custody upon finding her in contempt of an order entered for engaging in undisciplined and non-criminal behavior, but was required to follow specific statutory provisions applicable to children of that age. Taylor v. Robinson, 131 N.C. App. 337, 508 S.E.2d 289 (1998).

Department of Social Service's reunification efforts were reasonable under G.S. 7B-101 to prevent a father's kids' removal from his home where the department completed two family services case plans with custodial father outlining what needed to be accomplished, provided supervised visits between him and his kids, and provided family counseling to the parties involved in addition to other services provided by the department. Rholetter v. Rholetter, 162 N.C. App. 653, 592 S.E.2d 237, 2004 N.C. App. LEXIS 251 (2004).

"Reasonable Effort." — "Reasonable effort" has been defined to mean the diligent and timely implementation of a plan of action; in the context of G.S. 15A-1344(f) that would mean those actions a reasonable person would pursue in seeking to notify defendant of his probation violation and conduct a hearing on the matter. State v. Burns, 171 N.C. App. 759, 615 S.E.2d 347, 2005 N.C. App. LEXIS 1273 (2005).

Allegations of G.S. 7B-602 Parental Condition Triggers Required Appointment of Guardian Ad Litem. — Department of social services "alleged" that the mother's dependency and mental illness were the cause of her child's problems so, even without allegations of specific facts, it was error under G.S. 7B-602 for the lower court not to appoint a guardian ad litem for her before it adjudicated whether her child was dependent and neglected under G.S. 7B-101(9), (15). In re C.B., 171 N.C. App. 341, 614 S.E.2d 579, 2005 N.C. App. LEXIS 1205 (2005).

Dependency Finding Reversed. — Decision that a child was dependent under G.S. 7B-101(9) was reversed because a trial court failed to conduct the two-part analysis; the court did not consider the availability of alternative child care arrangements where the evidence showed that a relative was willing to take the child in question. In re P.M., 169 N.C. App. 423, 610 S.E.2d 403, 2005 N.C. App. LEXIS 678 (2005).

Fact that the father could have been criminally liable for statutory rape pursuant to G.S. 14-27.7A(a), standing alone, was insufficient to support a conclusion that the father was unable to provide appropriate care for the child and that therefore the child was a dependent child. In re J.L., — N.C. App. —, 643 S.E.2d 604, 2007 N.C. App. LEXIS 840 (2007).

Change of Custody Improper. — Given that the department of social services was prohibited under G.S. 7B-903(a)(2)(c) from returning physical custody of a child, to the parent from whom the child had been taken, without a hearing in which a court found that the child would receive proper care in a safe home, as defined in G.S. 7B-101(19), a trial court erred in changing custody of a child from a father to the mother because the court was required to find, but did not find, that the child would receive from the mother the necessary proper care and supervision in a safe home, particularly in light of prior evidence that domestic violence had occurred in the home. In re H.S.F., 177 N.C. App. 193, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

Return of Child to Parents Did Not Make the Issue of Neglect Moot. — Although a father regained full custody of his child, since there were collateral legal consequences that could arise from a neglect adjudication, such as a determination of whether another child was neglected, the appeal from the adjudication of neglect should not have been dismissed as moot. In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006).

Applied in In re Small, 138 N.C. App. 474, 530 S.E.2d 104, 2000 N.C. App. LEXIS 631 (2000); In re Brim, 139 N.C. App. 733, 535 S.E.2d 367, 2000 N.C. App. LEXIS 1028 (2000); In re Blackburn, 142 N.C. App. 607, 543 S.E.2d 906, 2001 N.C. App. LEXIS 190 (2001); State v. Carrilo, 149 N.C. App. 543, 562 S.E.2d 47, 2002 N.C. App. LEXIS 280 (2002); In re Johnston, 151 N.C. App. 728, 567 S.E.2d 219, 2002 N.C. App. LEXIS 866 (2002); In re Yocum, 158 N.C. App. 198, 580 S.E.2d 399, 2003 N.C. App. LEXIS 1054 (2003); In re Dhermy, 161 N.C. App. 424, 588 S.E.2d 555, 2003 N.C. App. LEXIS 2181 (2003); In re H. W., 163 N.C. App. 438, 594 S.E.2d 211, 2004 N.C. App. LEXIS 414 (2004); In re J.C.S., 164 N.C. App. 96, 595 S.E.2d 155, 2004 N.C. App. LEXIS 746 (2004); In re D.Q.W., 167 N.C. App. 38, 604 S.E.2d 675, 2004 N.C. App. LEXIS 2077 (2004); In re A.P., 165 N.C. App. 841, 600 S.E.2d 9, 2004 N.C. App. LEXIS 1527 (2004); In re B.M., 168 N.C. App. 350, 607 S.E.2d 698, 2005 N.C. App. LEXIS 252 (2005); In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005); In re C.C., 173 N.C. App. 375, 618 S.E.2d 813, 2005 N.C. App. LEXIS 2017 (2005); In re K.D., 178 N.C. App. 322, 631 S.E.2d 150, 2006 N.C. App. LEXIS 1393 (2006).

Cited in In re Pegram, 137 N.C. App. 382, 527 S.E.2d 737, 2000 N.C. App. LEXIS 322 (2000); Dobson v. Harris, 352 N.C. 77, 530 S.E.2d 829, 2000 N.C. LEXIS 433 (2000); In re Dula, 143 N.C. App. 16, 544 S.E.2d 591, 2001 N.C. App. LEXIS 226 (2001), aff'd, 354 N.C. 356, 554 S.E.2d 336 (2001); In re Pope, 144 N.C. App. 32, 547 S.E.2d 153, 2001 N.C. App. LEXIS 320 (2001); State v. Branham, 153 N.C. App. 91, 569 S.E.2d 24, 2002 N.C. App. LEXIS 1078 (2002); In re Faircloth, 153 N.C. App. 565, 571 S.E.2d 65, 2002 N.C. App. LEXIS 1273 (2002); In re Shermer, 156 N.C. App. 281, 576 S.E.2d 403, 2003 N.C. App. LEXIS 112 (2003); In re Estes, 157 N.C. App. 513, 579 S.E.2d 496, 2003 N.C. App. LEXIS 734 (2003), cert. denied, 357 N.C. 459, 585 S.E.2d 390 (2003); In re Stratton, 159 N.C. App. 461, 583 S.E.2d 323, 2003 N.C. App. LEXIS 1503 (2003), appeal dismissed, 357 N.C. 506, 588 S.E.2d 472 (2003); In re Everett, 161 N.C. App. 475, 588 S.E.2d 579, 2003 N.C. App. LEXIS 2201 (2003); In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1, 2004 N.C. App. LEXIS 129 (2004); In re V.L.B., 164 N.C. App. 743, 596 S.E.2d 896, 2004 N.C. App. LEXIS 1143 (2004); In re J.L.K., 165 N.C. App. 311, 598 S.E.2d 387, 2004 N.C. App. LEXIS 1162 (2004), cert. denied, 359 N.C. 68, 604 S.E.2d 314 (2004); In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), aff'd, — N.C. —, 625 S.E.2d 779 (2006); In re As.L.G., 173 N.C. App. 551, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005); In re H.S.F., 177 N.C. App. 193, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006); In re J.G.B., 177 N.C. App. 375, 628 S.E.2d 450, 2006 N.C. App. LEXIS 978 (2006); In re T.M., — N.C. App. —, 638 S.E.2d 236, 2006 N.C. App. LEXIS 2514 (2006); In re H.T., — N.C. App. —, 637 S.E.2d 923, 2006 N.C. App. LEXIS 2497 (2006); In re A.S., — N.C. App. —, 641 S.E.2d 400, 2007 N.C. App. LEXIS 484 (2007); In re C.W., — N.C. App. —, 641 S.E.2d 725, 2007 N.C. App. LEXIS 596 (2007); In re T.M., — N.C. App. —, 643 S.E.2d 471, 2007 N.C. App. LEXIS 802 (2007); In re A.H., — N.C. App. —, 644 S.E.2d 635, 2007 N.C. App. LEXIS 1159 (2007); State v. Oglesby, 361 N.C. 550, 648 S.E.2d 819, 2007 N.C. LEXIS 812 (2007).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The opinion below was rendered under former Chapter 7A.*

The definition of "sexual abuse" as set forth in the recent amendments to the Child Abuse Prevention and Treatment Act (42 U.S.C. § 5101 et seq., as amended by P.L. 95-266) was encompassed within the definition of "abused child" as set forth in former G.S. 110-117 and the definition of "neglected child" as set forth in former G.S. 7A-278(4). See opinion of Attorney General to Mr. Carl H. Harper, Regional Attorney, Region IV, United States Department of Health, Education and Welfare, 48 N.C.A.G. 1 (1978).

Article 2.

Jurisdiction.

§ 7B-200. Jurisdiction.

(a) The court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent. This jurisdiction does not extend to cases involving adult defendants alleged to be guilty of abuse or neglect.

The court also has exclusive original jurisdiction of the following proceedings:

(1) Proceedings under the Interstate Compact on the Placement of Children set forth in Article 38 of this Chapter.

(2) Proceedings involving judicial consent for emergency surgical or medical treatment for a juvenile when the juvenile's parent, guardian, custodian, or other person who has assumed the status and obligation of a parent without being awarded legal custody of the juvenile by a court refuses to consent for treatment to be rendered.

(3) Proceedings to determine whether a juvenile should be emancipated.

(4) Proceedings to terminate parental rights.

(5) Proceedings to review the placement of a juvenile in foster care pursuant to an agreement between the juvenile's parents or guardian and a county department of social services.

(6) Proceedings in which a person is alleged to have obstructed or interfered with an investigation required by G.S. 7B-302.

(7) Proceedings involving consent for an abortion on an unemancipated minor under Article 1A, Part 2 of Chapter 90 of the General Statutes.

(8) Proceedings by an underage party seeking judicial authorization to marry under Article 1 of Chapter 51 of the General Statutes.

(9) Petitions for expunction of an individual's name from the responsible individuals list under Article 3A of this Chapter.

(b) The court shall have jurisdiction over the parent or guardian of a juvenile who has been adjudicated abused, neglected, or dependent, as provided by G.S. 7B-904, provided the parent or guardian has been properly served with summons pursuant to G.S. 7B-406.

(c) When the court obtains jurisdiction over a juvenile as the result of a petition alleging that the juvenile is abused, neglected, or dependent:

(1) Any other civil action in this State in which the custody of the juvenile is an issue is automatically stayed as to that issue, unless the juvenile proceeding and the civil custody action or claim are consolidated pursuant to subsection (d) of this section or the court in the juvenile proceeding enters an order dissolving the stay.

(2) If an order entered in the juvenile proceeding and an order entered in another civil custody action conflict, the order in the juvenile proceeding controls as long as the court continues to exercise jurisdiction in the juvenile proceeding.

(d) Notwithstanding G.S. 50-13.5(f), the court in a juvenile proceeding may order that any civil action or claim for custody filed in the district be consolidated with the juvenile proceeding. If a civil action or claim for custody of the juvenile is filed in another district, the court in the juvenile proceeding, for good cause and after consulting with the court in the other district, may: (i) order that the civil action or claim for custody be transferred to the county in which the juvenile proceeding is filed; or (ii) order a change of venue in the juvenile proceeding and transfer the juvenile proceeding to the county in which the civil action or claim is filed. The court in the juvenile proceeding may also proceed in the juvenile proceeding while the civil action or claim remains stayed or dissolve the stay of the civil action or claim and stay the juvenile proceeding pending a resolution of the civil action or claim. (1979, c. 815, s. 1; 1983, c. 837, s. 1; 1985, c. 459, s. 2; 1987, c. 409, s. 2; 1995, c. 328, s. 3; c. 462, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 23.2(c); 1998-202, s. 6; 1999-456, s. 60; 2001-62, s. 13; 2005-320, s. 1; 2005-399, s. 4.)

Cross References. — As to legislation regarding pilot programs for holding family court within district court districts, see the editor's note under G.S. 7A-244.

Editor's Note. — Articles 1-11, of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

Section 5 of Session Laws 1998-202, also effective July 1, 1999, repealed the former North Carolina Juvenile Code, Articles 41 through 59 of Chapter 7A, along with additional related provisions.

Where applicable, historical citations and case annotations to former sections have been added to the corresponding sections in new Chapter 7B.

At the end of new Chapter 7B are tables showing comparable sections and their disposition of new Chapter 7B.

Session Laws 1998-202, s. 36, contains a severability clause.

Session Laws 2003-381, s. 2(a)-(c), provides: "The Administrative Office of the Courts, in consultation with the Department of Health and Human Services, shall establish a pilot program in the Twelfth Judicial District that addresses the issue of conflicting child custody orders. To the extent that this act or the program established pursuant to it conflicts with any State law, the program supersedes that law. However, the Department of Health and Human Services shall ensure that federal funding is not jeopardized.

"Under this program, when a court obtains jurisdiction over a juvenile as the result of a petition alleging that the juvenile is abused, neglected, or dependent:

"(1) The court in the juvenile proceeding may stay any other civil action in this State in which the custody of the juvenile is an issue.

"(2) If an order entered in the juvenile proceeding and an order entered in another civil custody action conflict, the order in the juvenile proceeding controls as long as the court continues to retain jurisdiction in the juvenile proceeding.

"(3) The court in the juvenile proceeding may order that any civil action or claim for custody filed in the pilot judicial district be consolidated with the juvenile proceeding.

"(4) If a civil action or claim for custody has been filed in a district other than the pilot judicial district, then the court in the juvenile proceeding may, after consulting with the court in the other district, order that the civil action or claim for custody be transferred to the pilot judicial district or may order a change of venue in the juvenile proceeding and transfer the juvenile proceeding to the other district.

"(5) The court may establish a mechanism for determining the legal status of a juvenile after jurisdiction of the juvenile court terminates, including a determination as to who has custody of the juvenile and under what circumstances custody may subsequently be changed."

"The Administrative Office of the Courts shall evaluate the pilot program and report its findings and recommendations to the 2005 General Assembly prior to its convening.

Subsections (c) and (d), added by Session Laws 2005-320, s. 1, effective October 1, 2005, are applicable to juvenile proceedings and civil actions pending or filed on or after that date.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

For article on the efficacy of a probable cause requirement in juvenile proceedings, see 59 N.C.L. Rev. 723 (1981).

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

For article, "Re-Imaging Childhood and Reconstructing the Legal Order: the Case for Abolishing the Juvenile Court," see 69 N.C.L. Rev. 1083 (1991).

CASE NOTES

***Editor's Note.** — Most of the following cases were decided prior to the enactment of this Chapter.*

This Article vests exclusive, original jurisdiction over any case involving a child in the district court judge and provides in detail for procedures in the district court in cases involving children. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972), decided under former §§ 7A-278 and 7A-279.

Nature of Proceedings. — As the district court division has exclusive original jurisdiction of Juvenile Code matters, actions under the former Juvenile Code (formerly G.S. 7A-516 et seq.) are not special proceedings. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Petition of Continuing Jurisdiction. — Juvenile court, which acquired jurisdiction over children as of September 26, 1984, when service of summons was completed on parent, and on September 27, 1984, entered an order allowing Department of Social Services (DSS) to retain temporary and legal custody of the children, retained continuing jurisdiction over the children. In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

Jurisdiction over Juveniles. — Where defendant was twelve or thirteen at the time he committed the felony of crime against nature, but had subsequently become an adult, the district court had exclusive original jurisdiction, because for the purposes of determining subject matter jurisdiction over a juvenile, age at the time of the alleged offense governs. State v. Dellinger, 343 N.C. 93, 468 S.E.2d 218 (1996).

Where juvenile was temporarily living with his uncle in North Carolina he was found to reside in North Carolina, thus permitting disposition of delinquency petitions in the district where the acts allegedly occurred, even though the juvenile's mother, who resided in the District of Columbia, had custody of him. In re Robinson, 132 N.C. App. 122, 510 S.E.2d 190 (1999).

Jurisdiction over Neglect and Dependency Proceedings. — Juvenile court, which acquired jurisdiction over the subject matter when the summons was served upon mother, although it was not served upon father, as required by former G.S. 7A-565, had the authority to decide the issue of neglect and dependency of three children. In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

Trial court had authority pursuant to G.S. 7B-200(a)(6) to issue an ex parte order directing a mother to cease interference with a department's juvenile investigation concerning her children; however, where no request for nonsecure custody was presented and no petition alleging that the children were neglected was filed, the trial court lacked jurisdiction to award custody of the children to their father. In re K.C.G., 171 N.C. App. 488, 615 S.E.2d 76, 2005 N.C. App. LEXIS 1314 (2005).

Trial court lacked subject matter jurisdiction to enter orders finding the mother's four minor children to be abused an neglected after the county social services department of the neighboring county, due to a conflict the county social services department had, conducted an investigation and found that allegations of abuse and neglect by the mother's church and the caretaker of the children were unfounded; once an official finding that no abuse and neglect had occurred, the trial court lost the authority to declare that it had occurred and to determine that the four minor children should be removed from the custody of the caretaker. In re S.D.A., 170 N.C. App. 354, 612 S.E.2d 362, 2005 N.C. App. LEXIS 1012 (2005).

District court, in adjudicating a child neglected, was not limited to considering only those circumstances occurring within its district. To hold otherwise would allow abusive and neglectful parents to avoid court intervention by simply moving from county to county. In re E.C., 174 N.C. App. 517, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

Failure of the director of a county department of social services to sign and verify before a notary, pursuant to G.S. 7B-403(a), a petition for a finding that a minor child was a neglected juvenile rendered the petition fatally deficient and inoperative to invoke the subject matter jurisdiction of the trial court; because there was no evidence in the record suggesting later filings sufficient to invoke subject matter jurisdiction as to the lower court's subsequent order from a review hearing, the trial court erred in proceeding on the matter due to lack of subject matter jurisdiction. In re T.R.P., 173 N.C. App. 541, 619 S.E.2d 525, 2005 N.C. App. LEXIS 2098 (2005).

Trial court had jurisdiction over a child's mother and father where both parents were properly served with the summons and the petition alleged that the child was neglected. In re M.B., 179 N.C. App. 572, 635 S.E.2d 8, 2006 N.C. App. LEXIS 1960 (2006).

Trial Court Had No Authority to Act Where No Request for Relief in Motion. — Trial court lacked subject matter jurisdiction to enter an order on the county Department of Social Services' (DSS) "motion in the cause," which was made at the previous direction of the trial court for DSS to petition for termination of a mother's parental rights, where the motion lacked any request for relief, as required by G.S. 1A-1, Rule 7(b)(1); although the trial court had subject matter jurisdiction over termination proceedings and motions therein, pursuant to subdivision (a)(4) of this section and G.S. 7B-1101, it was bound to follow the Rules of Civil Procedure in such an action, based on G.S. 1A-1, Rule 17(c)(2), and accordingly, the motion was found to be insufficient. In re McKinney, 158 N.C. App. 441, 581 S.E.2d 793, 2003 N.C. App. LEXIS 1191 (2003).

Trial court had authority to assert jurisdiction over child who had relocated to North Carolina from Florida. — Under former G.S. 50A-3(a)(3)(ii), the emergency jurisdiction provision of the UCCJA, where child was present in Durham County at the time the petition was filed alleging that she had been sexually abused; however, the trial court erred by failing to contact the Florida court that had previously exercised jurisdiction over the custody of the child to determine if that court would exercise jurisdiction, prior to attempting to change custody. In re Malone, 129 N.C. App. 338, 498 S.E.2d 836 (1998).

The trial court had jurisdiction to enter a temporary nonsecure custody order. — Placing children who had been visiting noncustodial parent in North Carolina, but whose "home state" under the former UCCJA was Iowa, with DSS where there was a reasonable factual basis to believe that one child had been sexually abused and hospitalized for depression and the other child had been physically abused and was hospitalized for stress disorder, pending application to home state determine if Iowa was willing to exercise jurisdiction. In re Van Kooten, 126 N.C. App. 764, 487 S.E.2d 160 (1997), appeal dismissed, 347 N.C. 576, 502 S.E.2d 618 (1998).

Affidavit Not Required. — Where the court obtained jurisdiction over a juvenile matter pursuant to former G.S. 7A-523, and not Chapter 50A, the Uniform Child Custody Jurisdiction Act, the affidavit referred to in former G.S. 50A-9 was not a prerequisite to its jurisdiction. In re Botsford, 75 N.C. App. 72, 330 S.E.2d 23 (1985).

Even where the juvenile petition filed by the county social services department failed to attach an affidavit as to the status of the minor child, the trial court did not lack subject matter jurisdiction over the minor child's neglect and dependency proceeding; although the better practice was to attach the affidavit, the failure to file the affidavit did not by itself divest the trial court of subject matter jurisdiction. In re D.S.A., — N.C. App. —, 641 S.E.2d 18, 2007 N.C. App. LEXIS 375 (2007).

Power to Order Sex Offender Treatment. — The district court had power to order the Department of Human Resources, Division of Youth Services to give sex offender treatment to an adolescent found delinquent because of sex offenses and subsequently to deny the conditional release of that adolescent because treatment had not been in compliance with that mandate. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

Ordering Division of Youth Services to provide specific treatment for sexual offenders for a delinquent juvenile in its custody, when such treatment was available, was within the scope of the court's statutory authority. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

Procedure upon Finding Juvenile in Contempt. — The trial court was not authorized to summarily commit a child under 16 to state custody upon finding her in contempt of an order entered for engaging in undisciplined and non-criminal behavior, but was required to follow specific statutory provisions applicable to children of that age. Taylor v. Robinson, 131 N.C. App. 337, 508 S.E.2d 289 (1998).

Applied in In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

Cited in In re Poole, 151 N.C. App. 472, 568 S.E.2d 200, 2002 N.C. App. LEXIS 775 (2002).

§ 7B-201. Retention and termination of jurisdiction.

(a) When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first.

(b) When the court's jurisdiction terminates, whether automatically or by court order, the court thereafter shall not modify or enforce any order previously entered in the case, including any juvenile court order relating to the custody, placement, or guardianship of the juvenile. The legal status of the juvenile and the custodial rights of the parties shall revert to the status they were before the juvenile petition was filed, unless applicable law or a valid court order in another civil action provides otherwise. Termination of the court's jurisdiction in an abuse, neglect, or dependency proceeding, however, shall not affect any of the following:

(1) A civil custody order entered pursuant to G.S. 7B-911.
(2) An order terminating parental rights.
(3) A pending action to terminate parental rights, unless the court orders otherwise.
(4) Any proceeding in which the juvenile is alleged to be or has been adjudicated undisciplined or delinquent.
(5) The court's jurisdiction in relation to any new abuse, neglect, or dependency petition that is filed. (1979, c. 815, s. 1; 1981, c. 469, s. 4;

1996, 2nd Ex. Sess., c. 18, s. 23.2(d); 1998-202, s. 6; 1999-456, s. 60; 2005-320, s. 2.)

Editor's Note. — This section, as amended by Session Laws 2005-320, s. 2, effective October 1, 2005, is applicable to juvenile proceedings and civil actions pending or filed on or after that date.

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

Periodic Judicial Review. — Contrary to the mother's assertion, when custody of five children was placed with the father and jurisdiction was terminated by the trial court's dispositional order, the trial court had no further duty or authority to conduct placement reviews. In re Dexter, 147 N.C. App. 110, 553 S.E.2d 922, 2001 N.C. App. LEXIS 1067 (2001).

Jurisdiction over Neglect and Dependency Proceedings. — Juvenile court, which acquired jurisdiction over the subject matter when the summons was served upon mother, although it was not served upon father, as required by former G.S. 7A-565, had the authority to decide the issue of neglect and dependency of three children. In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

Failure of the director of a county department of social services to sign and verify before a notary, pursuant to G.S. 7B-403(a), a petition for a finding that a minor child was a neglected juvenile rendered the petition fatally deficient and inoperative to invoke the subject matter jurisdiction of the trial court; because there was no evidence in the record suggesting later filings sufficient to invoke subject matter jurisdiction as to the lower court's subsequent order from a review hearing, the trial court erred in proceeding on the matter due to lack of subject matter jurisdiction. In re T.R.P., 173 N.C. App. 541, 619 S.E.2d 525, 2005 N.C. App. LEXIS 2098 (2005).

Retention of Continuing Jurisdiction. — Juvenile court, which acquired jurisdiction over children as of September 26, 1984, when service of summons was completed on parent, and on September 27, 1984, entered an order allowing Department of Social Services (DSS) to retain temporary and legal custody of the children, retained continuing jurisdiction over the children. In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

Effect of Voluntary Dismissal of First Termination Petition. — Fact that county department of social services had dismissed a prior petition for termination of a mother's parental rights did not preclude a subsequent petition since the best interests of the children was always the primary focus, with no procedural rule barring the court's continuing jurisdiction over such a matter. In re L.O.K., 174 N.C. App. 426, 621 S.E.2d 236, 2005 N.C. App. LEXIS 2476 (2005).

Jurisdiction Until 18 or Emancipated. — Although a trial court in a custody dispute ended the custody of a county department of social services, the court did not err in retaining jurisdiction to conduct period review hearings, despite a father's claim that the court, under G.S. 7B-906(d), the court was relieved of the duty to conduct such reviews after custody was awarded to the father; in deciding a custody case under G.S. 7A-657, the almost-identical predecessor to G.S. § 7B-906, the state's supreme court had already ruled that the relevant statutory language meant only that a trial court had a right to terminate its jurisdiction, but a trial court was not required to do so. Further, in the context of the Juvenile Code, North Carolina, G.S. 7B-201 provided that once a court obtained jurisdiction over a juvenile, that jurisdiction continued until terminated by a court order or until the juvenile reached the age of 18 years or was otherwise emancipated, and the parties' child was not yet 18 or emancipated. In re H.S.F., 177 N.C. App. 193, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

Applied in In re H.L.A.D., — N.C. App. —, 646 S.E.2d 425, 2007 N.C. App. LEXIS 1482 (2007).

Cited in In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), aff'd, — N.C. —, 625 S.E.2d 779 (2006); In re T.R.P., 360 N.C. 588, 636 S.E.2d 787, 2006 N.C. LEXIS 1193 (2006).

§ 7B-202. Permanency mediation.

(a) The Administrative Office of the Courts shall establish a Permanency Mediation Program to provide statewide and uniform services to resolve issues in cases under this Subchapter in which a juvenile is alleged or has been adjudicated to be abused, neglected, or dependent, or in which a petition or motion to terminate a parent's rights has been filed. Participants in the mediation shall include the parties and their attorneys, including the guardian ad litem and attorney advocate for the child; provided, the court may allow mediation to proceed without the participation of a parent whose identity is unknown, a party who was served and has not made an appearance, or a parent, guardian, or custodian who has not been served despite a diligent attempt to serve the person. Upon a finding of good cause, the court may allow mediation to proceed without the participation of a parent who is unable to participate due to incarceration, illness, or some other cause. Others may participate by agreement of the parties, their attorneys, and the mediator, or by order of the court.

(b) The Administrative Office of the Courts shall establish in phases a statewide Permanency Mediation Program consisting of local district programs to be established in all judicial districts of the State. The Director of the Administrative Office of the Courts is authorized to approve contractual agreements for such services as executed by order of the Chief District Court Judge of a district court district, such contracts to be exempt from competitive bidding procedures under Chapter 143 of the General Statutes. The Administrative Office of the Courts shall promulgate policies and regulations necessary and appropriate for the administration of the program. Any funds appropriated by the General Assembly for the establishment and maintenance of permanency mediation programs under this Article shall be administered by the Administrative Office of the Courts.

(c) Mediation proceedings shall be held in private and shall be confidential. Except as provided otherwise in this section, all verbal or written communications from participants in the mediation to the mediator or between or among the participants in the presence of the mediator are absolutely privileged and inadmissible in court.

(d) Neither the mediator nor any party or other person involved in mediation sessions under this section shall be competent to testify to communications made during or in furtherance of such mediation sessions; provided, there is no confidentiality or privilege as to communications made in furtherance of a crime or fraud. Nothing in this subsection shall be construed as permitting an individual to obtain immunity from prosecution for criminal conduct or as excusing an individual from the reporting requirements of Article 3 of Chapter 7B of the General Statutes or G.S. 108A-102.

(e) Any agreement reached by the parties as a result of the mediation, whether referred to as a "placement agreement," "case plan," or some similar name, shall be reduced to writing, signed by each party, and submitted to the court as soon as practicable. Unless the court finds good reason not to, the court shall incorporate the agreement in a court order, and the agreement shall become enforceable as a court order. If some or all of the issues referred to mediation are not resolved by mediation, the mediator shall report that fact to the court. (2006-187, s. 4(a).)

Editor's Note. — Session Laws 2006-187, s. 13, made this section effective July 1, 2006.

Session Laws 2006-187, s. 4(b), provides: "The Administrative Office of the Courts may use funds available during the 2006-2007 fiscal year to implement the provisions of this section."

§§ 7B-203 through 7B-299: Reserved for future codification purposes.

ARTICLE 3.

Screening of Abuse and Neglect Complaints.

§ 7B-300. Protective services.

The director of the department of social services in each county of the State shall establish protective services for juveniles alleged to be abused, neglected, or dependent.

Protective services shall include the screening of reports, the performance of an assessment using either a family assessment response or an investigative assessment response, casework, or other counseling services to parents, guardians, or other caretakers as provided by the director to help the parents, guardians, or other caretakers and the court to prevent abuse or neglect, to improve the quality of child care, to be more adequate parents, guardians, or caretakers, and to preserve and stabilize family life.

The provisions of this Article shall also apply to child care facilities as defined in G.S. 110-86. (1979, c. 815, s. 1; 1981, c. 359, s. 1; 1991 (Reg. Sess., 1992), c. 923, s. 1; 1997-506, s. 31; 1998-202, s. 6; 1999-456, s. 60; 2005-55, s. 2.)

Cross References. — As to collaboration between Division of Social Services and Commission of Indian Affairs on Indian child welfare issues, see G.S. 143B-139.5A. As to establishment of School-Based Child and Family Team Initiative, see note under G.S. 143B-366.

School-Based Child and Family Team Initiative. — Session Laws 2005-276, s. 6.24, provides for the development and implementation of a School-Based Child and Family Team Initiative. See note at G.S. 115C-105.20.

Editor's Note. — Articles 1-11, of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

Section 5 of Session Laws 1998-202, also effective July 1, 1999, repealed the former North Carolina Juvenile Code, Articles 41 through 59 of Chapter 7A, along with additional related provisions.

Where applicable, historical citations and case annotations to former sections have been added to the corresponding sections in new Chapter 7B.

At the end of new Chapter 7B are tables showing comparable sections and their disposition of new Chapter 7B.

Session Laws 1998-202, s. 36, contains a severability clause.

Session Laws 1999-237, s. 1.1 provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999'."

Session Laws 1999-237, s. 11.27(a) provides that the Department of Health and Human Services, Division of Social Services, shall develop a plan, working with local departments of social services, to implement a dual response system of child protection in no fewer than two and no more than five demonstration areas in this State, where local child protective services and law enforcement work together as coinvestigators in serious abuse cases and where a family assessment and services approach is utilized.

Session Laws 1999-237, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 30.4, contains a severability clause.

Session Laws 2005-55, s. 13, provides: "The Department of Health and Human Services shall continue to assess the alternative response system of child protection as to the impact the system has in child safety, timeliness of response, timeliness of service, and coordination of local human services. The Department shall report the status of its evaluation to the Legislative Study Commission on Children and Youth, the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division before the convening of the 2006 Regular Session of the 2005 General Assembly."

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

Refusal to Permit Evaluation. — Respondent's refusal to permit the Child Mental Health Evaluation of his two sons based, in part, upon his religious beliefs was not constitutionally protected and did not afford him a lawful excuse for his interference with the investigation by the Department of Social Services. In re Browning, 124 N.C. App. 190, 476 S.E.2d 465 (1996).

Family Privacy and Integrity. — State statutes granting authority to the Department of Social Services to prevent the abuse or neglect of children take into account families' fundamental interest in family privacy and integrity. Renn v. Garrison, 100 F.3d 344 (4th Cir. 1996).

Report Did Not Constitute Report of Abuse, Neglect, or Dependency. — Anonymous call, reporting a naked child two years of age, unsupervised in a driveway, did not, standing alone, constitute a report of abuse, neglect, or dependency, so the statutory investigative mandate was not properly invoked against the parents of the child that refused to let a caseworker privately interview the child or the child's siblings; one of the initial responsibilities of any department of social services was to screen a report for an ultimate determination of whether to investigate further, as not all reports constituted abuse, neglect, or dependency. In re Stumbo, 357 N.C. 279, 582 S.E.2d 255, 2003 N.C. LEXIS 747 (2003).

Cited in In re Stumbo, 143 N.C. App. 375, 547 S.E.2d 451, 2001 N.C. App. LEXIS 304 (2001); In re Q.V., 164 N.C. App. 737, 596 S.E.2d 867, 2004 N.C. App. LEXIS 1140 (2004).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — *The opinions below were rendered under former Chapter 7A.*

Investigation of Abuse and Neglect at Day-Care Facilities. — Former G.S. 7A-452 requires county departments of social services to investigate reports of child abuse and child neglect at day-care facilities and day-care plans (now "child day care facilities"). See opinion of Attorney General to Mr. J. Randolph Riley, District Attorney, 51 N.C.A.G. 6 (1981).

Protection of Minor's Rights. — Although a minor cannot obtain legal representation without the consent of the legally responsible person, the rights of the child can be adequately protected. The Department of Social Services can conduct an investigation of the legally responsible person pursuant to former G.S. 7A-542 et seq., the guardian ad litem program can provide additional support for abused, neglected, or dependent juveniles, including legal support and, a minor receives representation for the commitment proceedings by virtue of G.S. 122C-224.1 and 122C-270. See opinion of Attorney General to C. Robin Britt, Sr., Secretary, Department of Human Resources, — N.C.A.G. — (December 20, 1995).

§ 7B-301. Duty to report abuse, neglect, dependency, or death due to maltreatment.

Any person or institution who has cause to suspect that any juvenile is abused, neglected, or dependent, as defined by G.S. 7B-101, or has died as the result of maltreatment, shall report the case of that juvenile to the director of the department of social services in the county where the juvenile resides or is found. The report may be made orally, by telephone, or in writing. The report shall include information as is known to the person making it including the name and address of the juvenile; the name and address of the juvenile's parent, guardian, or caretaker; the age of the juvenile; the names and ages of other juveniles in the home; the present whereabouts of the juvenile if not at the home address; the nature and extent of any injury or condition resulting from abuse, neglect, or dependency; and any other information which the person making the report believes might be helpful in establishing the need for protective services or court intervention. If the report is made orally or by telephone, the person making the report shall give the person's name, address, and telephone number. Refusal of the person making the report to give a name shall not preclude the department's assessment of the alleged abuse, neglect, dependency, or death as a result of maltreatment.

Upon receipt of any report of sexual abuse of the juvenile in a child care facility, the director shall notify the State Bureau of Investigation within 24 hours or on the next workday. If sexual abuse in a child care facility is not alleged in the initial report, but during the course of the assessment there is reason to suspect that sexual abuse has occurred, the director shall immediately notify the State Bureau of Investigation. Upon notification that sexual abuse may have occurred in a child care facility, the State Bureau of Investigation may form a task force to investigate the report. (1979, c. 815, s. 1; 1991 (Reg. Sess., 1992), c. 923, s. 2; 1993, c. 516, s. 4; 1997-506, s. 32; 1998-202, s. 6; 1999-456, s. 60; 2005-55, s. 3.)

Editor's Note. — Session Laws 2005-55, s. 13, provides: "The Department of Health and Human Services shall continue to assess the alternative response system of child protection as to the impact the system has in child safety, timeliness of response, timeliness of service, and coordination of local human services. The Department shall report the status of its evaluation to the Legislative Study Commission on Children and Youth, the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division before the convening of the 2006 Regular Session of the 2005 General Assembly."

CASE NOTES

Editor's Note. — *Most of the following cases were decided prior to the enactment of this Chapter.*

Former § 7A-543 (see now this section) makes no exceptions for extenuating circumstances in reporting suspected child abuse. White v. North Carolina State Bd. of Exmrs. of Practicing Psychologists, 97 N.C. App. 144, 388 S.E.2d 148, cert. denied, 326 N.C. 601, 393 S.E.2d 891 (1990).

The report referred to in former § 7A-550 was clearly an initial report of child abuse, as specified in former G.S. 7A-544 (see now this section), which is to be made to the Director of the Department of Social Services. Coleman v. Cooper, 89 N.C. App. 188, 366 S.E.2d 2, cert. denied, 322 N.C. 834, 371 S.E.2d 275 (1988).

Immunity Under Former § 7A-550. — In an action for malicious prosecution, defamation, intentional infliction of emotional distress, and negligence brought by a substitute teacher against a school system, the school system was held not liable for a principal's reporting student complaints to the Department of Social Services as directed by G.S. 115C-400; evidence established that the principal's reports were an accurate representation of the student's complaints, and the principal clearly acted in good faith. Davis v. Durham City Schools, 91 N.C. App. 520, 372 S.E.2d 318 (1988).

Statutory Good Faith Presumption Shields Reporter from Slander Per Se Action. — Summary judgment for the defendant on the issue of slander per se was appropriate where the plaintiff's description of retaliatory motives for defendant's report failed to rebut the statutory presumption created in favor of the defendant by the child abuse reporting provisions of this section and G.S. 7B-309 which together provide immunity not merely conditional upon proof of good faith, but a "good faith" immunity which endows the reporter with the mandatory presumption that he or she acted in good faith. Dobson v. Harris, 352 N.C. 77, 530 S.E.2d 829, 2000 N.C. LEXIS 433 (2000).

Statement Not Privileged. — Wife's statements to persons alleging that the husband had sexual relations with the family dog were not privileged under G.S. 7B-301 which concerned the abuse or neglect of children. Kroh v. Kroh, 152 N.C. App. 347, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002), cert. denied, 356 N.C. 673, 577 S.E.2d 120 (2003).

Public Duty Doctrine Inapplicable. — A school resource officer, who allegedly knew that a teacher was facilitating sexual liaisons between a 14-year-old girl and an 18-year-old boy, was not required, nor was he permitted, to weigh the safety interests of the public when he decided not to report the boy's possible statutory rape of the girl or the teacher's sexual exploitation of the girl and boy — rather, his duty to report abuse was imposed by statute and involved no deliberation or discretionary consideration; thus, his failure to report known child abuse was outside the scope of conduct generally associated with law enforcement and the public duty doctrine did not bar the claim. Smith v. Jackson County Bd. of Educ., 168 N.C. App. 452, 608 S.E.2d 399, 2005 N.C. App. LEXIS 347 (2005).

Cited in Burgess v. Busby, 142 N.C. App. 393, 544 S.E.2d 4, 2001 N.C. App. LEXIS 146 (2001); In re Stumbo, 143 N.C. App. 375, 547

S.E.2d 451, 2001 N.C. App. LEXIS 304 (2001); In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006); State v. Browning, 177 N.C. App. 487, 629 S.E.2d 299, 2006 N.C. App. LEXIS 1079 (2006).

§ 7B-302. Assessment by director; access to confidential information; notification of person making the report.

(a) When a report of abuse, neglect, or dependency is received, the director of the department of social services shall make a prompt and thorough assessment, using either a family assessment response or an investigative assessment response, in order to ascertain the facts of the case, the extent of the abuse or neglect, and the risk of harm to the juvenile, in order to determine whether protective services should be provided or the complaint filed as a petition. When the report alleges abuse, the director shall immediately, but no later than 24 hours after receipt of the report, initiate the assessment. When the report alleges neglect or dependency, the director shall initiate the assessment within 72 hours following receipt of the report. When the report alleges abandonment, the director shall immediately initiate an assessment, take appropriate steps to assume temporary custody of the juvenile, and take appropriate steps to secure an order for nonsecure custody of the juvenile. The assessment and evaluation shall include a visit to the place where the juvenile resides, except when the report alleges abuse or neglect in a child care facility as defined in Article 7 of Chapter 110 of the General Statutes. When a report alleges abuse or neglect in a child care facility as defined in Article 7 of Chapter 110 of the General Statutes, a visit to the place where the juvenile resides is not required. When the report alleges abandonment, the assessment shall include a request from the director to law enforcement officials to investigate through the North Carolina Center for Missing Persons and other national and State resources whether the juvenile is a missing child. All information received by the department of social services, including the identity of the reporter, shall be held in strictest confidence by the department. However, the department of social services shall disclose confidential information to any federal, State, or local governmental entity or its agent needing confidential information to protect a juvenile from abuse and neglect. Any confidential information disclosed to any federal, State, or local governmental entity, or its agent, under this subsection shall remain confidential with the other governmental entity, or its agent, and shall only be redisclosed by the governmental entity or its agent for purposes directly connected with carrying out the governmental entity's or agent's mandated responsibilities.

(b) When a report of a juvenile's death as a result of suspected maltreatment or a report of suspected abuse, neglect, or dependency of a juvenile in a noninstitutional setting is received, the director of the department of social services shall immediately ascertain if other juveniles live in the home, and, if so, initiate an assessment in order to determine whether they require protective services or whether immediate removal of the juveniles from the home is necessary for their protection. When a report of a juvenile's death as a result of maltreatment or a report of suspected abuse, neglect, or dependency of a juvenile in an institutional setting such as a residential child care facility or residential educational facility is received, the director of the department of social services shall immediately ascertain if other juveniles remain in the facility subject to the alleged perpetrator's care or supervision, and, if so, assess the circumstances of those juveniles in order to determine whether they require protective services or whether immediate removal of those juveniles from the facility is necessary for their protection.

(c) If the assessment indicates that abuse, neglect, or dependency has occurred, the director shall decide whether immediate removal of the juvenile or any other juveniles in the home is necessary for their protection. If immediate removal does not seem necessary, the director shall immediately provide or arrange for protective services. If the parent, guardian, custodian, or caretaker refuses to accept the protective services provided or arranged by the director, the director shall sign a complaint seeking to invoke the jurisdiction of the court for the protection of the juvenile or juveniles.

(d) If immediate removal seems necessary for the protection of the juvenile or other juveniles in the home, the director shall sign a complaint that alleges the applicable facts to invoke the jurisdiction of the court. Where the assessment shows that it is warranted, a protective services worker may assume temporary custody of the juvenile for the juvenile's protection pursuant to Article 5 of this Chapter.

(d1) Whenever a juvenile is removed from the home of a parent, guardian, custodian, stepparent, or adult relative entrusted with the juvenile's care due to physical abuse, the director shall conduct a thorough review of the background of the alleged abuser or abusers. This review shall include a criminal history check and a review of any available mental health records. If the review reveals that the alleged abuser or abusers have a history of violent behavior against people, the director shall petition the court to order the alleged abuser or abusers to submit to a complete mental health evaluation by a licensed psychologist or psychiatrist.

(e) In performing any duties related to the assessment of the report or the provision or arrangement for protective services, the director may consult with any public or private agencies or individuals, including the available State or local law enforcement officers who shall assist in the assessment and evaluation of the seriousness of any report of abuse, neglect, or dependency when requested by the director. The director or the director's representative may make a written demand for any information or reports, whether or not confidential, that may in the director's opinion be relevant to the assessment or provision of protective services. Upon the director's or the director's representative's request and unless protected by the attorney-client privilege, any public or private agency or individual shall provide access to and copies of this confidential information and these records to the extent permitted by federal law and regulations. If a custodian of criminal investigative information or records believes that release of the information will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation, it may seek an order from a court of competent jurisdiction to prevent disclosure of the information. In such an action, the custodian of the records shall have the burden of showing by a preponderance of the evidence that disclosure of the information in question will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation. Actions brought pursuant to this paragraph shall be set down for immediate hearing, and subsequent proceedings in the actions shall be accorded priority by the trial and appellate courts.

(f) Within five working days after receipt of the report of abuse, neglect, or dependency, the director shall give written notice to the person making the report, unless requested by that person not to give notice, as to whether the report was accepted for assessment and whether the report was referred to the appropriate State or local law enforcement agency.

(g) Within five working days after completion of the protective services assessment, the director shall give subsequent written notice to the person making the report, unless requested by that person not to give notice, as to whether there is a finding of abuse, neglect, or dependency, whether the county department of social services is taking action to protect the juvenile, and what action it is taking, including whether or not a petition was filed. The person making the report shall be informed of procedures necessary to request a review by the prosecutor of the director's decision not to file a petition. A request for review by the prosecutor shall be made within five working days of receipt of the second notification. The second notification shall include notice that, if the person making the report is not satisfied with the director's decision, the person may request review of the decision by the prosecutor within five working days of receipt. The person making the report may waive the person's right to this notification, and no notification is required if the person making the report does not identify himself to the director.

(h) The director or the director's representative may not enter a private residence for assessment purposes without at least one of the following:

(1) The reasonable belief that a juvenile is in imminent danger of death or serious physical injury.

(2) The permission of the parent or person responsible for the juvenile's care.

(3) The accompaniment of a law enforcement officer who has legal authority to enter the residence.

(4) An order from a court of competent jurisdiction. (1979, c. 815, s. 1; 1985, c. 205; 1991, c. 593, s. 1; 1991 (Reg. Sess., 1992), c. 923, s. 3; 1993, c. 516, s. 5; 1995, c. 411, s. 1; 1997-390, s. 3.1; 1998-202, s. 6; 1998-229, ss. 2, 19; 1999-190, s. 2; 1999-318, s. 2; 1999-456, s. 60; 2001-291, s. 1; 2003-304, s. 4.1; 2005-55, s. 4; 2006-205, s. 1.)

Editor's Note. — The paragraphs in this section were designated as subsections (a) through (g) at the direction of the Revisor of Statutes.

Session Laws 2001-291, s. 6, provides: "The Department of Health and Human Services, Division of Public Health, shall develop recommendations for a plan to inform the public as to the provisions of this act [Session Laws 2001-291, the Infant Homicide Prevention Act, which decriminalized abandonment of an infant under seven days of age when that infant is voluntarily delivered to certain health care providers, law enforcement officials, social services personnel, or emergency medical service personnel]. The plan shall contain information on responsible parenting in addition to information about the provisions of the act. The plans shall be targeted at adolescents and young adults, and shall be developed in consultation with law enforcement officials, medical professionals, and representatives of the Department of Public Instruction. Not later than April 1, 2002, the Department of Health and Human Services shall report its recommendations, and the projected cost for implementing its recommendations, to the chairpersons of the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, the Senate Appropriations Committee on Justice and Public Safety, and the House Appropriations Subcommittee on Justice and Public Safety."

In addition to the plan developed pursuant to Session Laws 2001-291, s. 6, Session Laws 2003-284, s. 10.8B(a) and (b), effective July 1, 2003, provides: "(a) The Department of Health and Human Services, Division of Public Health and the Division of Social Services, shall incorporate education and awareness of the Infant Homicide Prevention Act pursuant to S.L. 2001-291, into other State-funded programs at the local level.

"(b) The Department shall report on its activities to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, and the Fiscal Research Division not later than April 1, 2004."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5, contains a severability clause.

Session Laws 2005-55, s. 13, provides: "The Department of Health and Human Services shall continue to assess the alternative response system of child protection as to the impact the system has in child safety, timeliness of response, timeliness of service, and coordination of local human services. The Department shall report the status of its evaluation to the Legislative Study Commission on Children and Youth, the Senate Appropriations Committee on Health and Human Services, the

House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division before the convening of the 2006 Regular Session of the 2005 General Assembly."

Effect of Amendments. — Session Laws 2006-205, s. 1, effective August 8, 2006, added the last two sentences in subsection (a).

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For comment, "The Child Abuse Amendments of 1984: Congress Is Calling North Carolina to Respond to the Baby Doe Dilemma," 20 Wake Forest L. Rev. 975 (1984).

For comment, "Charting a Course Between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process," see 73 N.C.L. Rev. 2063 (1995).

CASE NOTES

Editor's Note. — *Most of the following cases were decided prior to the enactment of this Chapter.*

Purpose of Section. — One of the specific purposes of former G.S. 7A-544 (see now this section) was the protection of minors from harm. Coleman v. Cooper, 89 N.C. App. 188, 366 S.E.2d 2, cert. denied, 322 N.C. 834, 371 S.E.2d 275 (1988).

Jurisdiction. — Trial court had authority pursuant to G.S. 7B-200(a)(6) to issue an ex parte order directing a mother to cease interference with a department's juvenile investigation concerning her children; however, where no request for nonsecure custody was presented and no petition alleging that the children were neglected was filed, the trial court lacked jurisdiction to award custody of the children to their father. In re K.C.G., 171 N.C. App. 488, 615 S.E.2d 76, 2005 N.C. App. LEXIS 1314 (2005).

Violation of former § 7A-544 (see now this section) could give rise to an action for negligence. Coleman v. Cooper, 89 N.C. App. 188, 366 S.E.2d 2, cert. denied, 322 N.C. 834, 371 S.E.2d 275 (1988).

Qualified Immunity for Department of Social Services Employees. — Employees of the Department of Social Services were entitled to qualified immunity in plaintiffs' action alleging a violation of plaintiffs' family privacy rights, where plaintiffs failed to establish that the employees acted outside of the authority granted them by this section, or so vigorously intruded into plaintiffs' family as to infringe their family privacy rights. Renn v. Garrison, 100 F.3d 344 (4th Cir. 1996).

Family Privacy and Integrity. — State statutes granting authority to the Department of Social Services to prevent the abuse or neglect of children take into account families' fundamental interest in family privacy and integrity. Renn v. Garrison, 100 F.3d 344 (4th Cir. 1996).

Department of Social Services employee did not act outside of the authority conferred on her by statute, or violate plaintiffs' rights to family privacy and integrity, by placing child in foster home or making telephone calls seeking information about child, after receiving reports that child was beaten by her father or otherwise abused. Renn v. Garrison, 100 F.3d 344 (4th Cir. 1996).

Physical Entry Into Home. — The statute does not require physical entry into the home of a child who is the subject of an investigation; thus, where a social worker personally drives to the home and seeks to speak with the children in person but does not seek to enter the home, such constitutes "a visit to the place where the juvenile resides." In re Stumbo, 143 N.C. App. 375, 547 S.E.2d 451, 2001 N.C. App. LEXIS 304 (2001).

Length of Investigation Did Not Violate Family's Privacy Rights. — Length of investigation by Department of Social Services Employee did not violate family's rights to privacy, where employee was required to extend his investigation beyond the allegations of the initial complaint alleging abuse by the many factors which suggested abuse may have occurred. Renn v. Garrison, 100 F.3d 344 (4th Cir. 1996).

Investigation Not Revealing Abuse or Neglect. — Trial court lacked subject matter jurisdiction to enter orders finding the mother's four minor children to be abused an neglected after the county social services department of the neighboring county, due to a conflict the county social services department had, conducted an investigation and found that allegations of abuse and neglect by the mother's church and the caretaker of the children were unfounded; once an official finding that no abuse and neglect had occurred, the trial court lost the authority to declare that it had occurred and to determine that the four minor children should be removed from the custody of the caretaker. In re S.D.A., 170 N.C. App. 354, 612 S.E.2d 362, 2005 N.C. App. LEXIS 1012 (2005).

Insufficient Evidence of Neglect to Trigger Investigative Requirements. — Anonymous call, reporting a naked child, two years of age, unsupervised in a driveway, did not, standing alone, constitute a report of abuse, neglect, or dependency, so the statutory investigative mandate was not properly invoked against the parents of the child that refused to let a caseworker privately interview the child or the child's siblings; there was no evidence of a pattern of a lack of supervision or other credible evidence that indicated a serious failing by the parents, and there was not sufficient evidence of neglect to trigger the investigative requirements of G.S. 7B-302. In re Stumbo, 357 N.C. 279, 582 S.E.2d 255, 2003 N.C. LEXIS 747 (2003).

For case reversing summary judgment in favor of defendants county and social worker as to their tort liability in failing to protect minors from harm, see Coleman v. Cooper, 89 N.C. App. 188, 366 S.E.2d 2, cert. denied, 322 N.C. 834, 371 S.E.2d 275 (1988).

Cited in In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006); In re T.R.P., 360 N.C. 588, 636 S.E.2d 787, 2006 N.C. LEXIS 1193 (2006).

OPINIONS OF ATTORNEY GENERAL

Consent to Drug Test. — A social worker conducting a child protective services assessment can legally ask a parent or caretaker suspected of substance abuse to consent to a urine screen. See opinion of Attorney General to Ms. Pheon E. Beal, Director, Division of Social Services, 2003 N.C.A.G. 8 (9/12/03).

§ 7B-303. Interference with assessment.

(a) If any person obstructs or interferes with an assessment required by G.S. 7B-302, the director may file a petition naming that person as respondent and requesting an order directing the respondent to cease the obstruction or interference. The petition shall contain the name and date of birth and address of the juvenile who is the subject of the assessment; shall include a concise statement of the basis for initiating the assessment, shall specifically describe the conduct alleged to constitute obstruction of or interference with the assessment; and shall be verified.

(b) For purposes of this section, obstruction of or interference with an assessment means refusing to disclose the whereabouts of the juvenile, refusing to allow the director to have personal access to the juvenile, refusing to allow the director to observe or interview the juvenile in private, refusing to allow the director access to confidential information and records upon request pursuant to G.S. 7B-302, refusing to allow the director to arrange for an evaluation of the juvenile by a physician or other expert, or other conduct that makes it impossible for the director to carry out the duty to assess the juvenile's condition.

(c) Upon filing of the petition, the court shall schedule a hearing to be held not less than five days after service of the petition and summons on the respondent. Service of the petition and summons and notice of hearing shall be made as provided by the Rules of Civil Procedure on the respondent; the juvenile's parent, guardian, custodian, or caretaker; and any other person determined by the court to be a necessary party. If at the hearing on the petition the court finds by clear, cogent, and convincing evidence that the respondent, without lawful excuse, has obstructed or interfered with an assessment required by G.S. 7B-302, the court may order the respondent to cease such obstruction or interference. The burden of proof shall be on the petitioner.

(d) If the director has reason to believe that the juvenile is in need of immediate protection or assistance, the director shall so allege in the petition and may seek an ex parte order from the court. If the court, from the verified petition and any inquiry the court makes of the director, finds probable cause to believe both that the juvenile is at risk of immediate harm and that the respondent is obstructing or interfering with the director's ability to assess the juvenile's condition, the court may enter an ex parte order directing the respondent to cease the obstruction or interference. The order shall be limited to provisions necessary to enable the director to conduct an assessment sufficient to determine whether the juvenile is in need of immediate protection or assistance. Within 10 days after the entry of an ex parte order under this subsection, a hearing shall be held to determine whether there is good cause for the continuation of the order or the entry of a different order. An order entered under this subsection shall be served on the respondent along with a copy of the petition, summons, and notice of hearing.

(e) The director may be required at a hearing under this section to reveal the identity of any person who made a report of suspected abuse, neglect, or dependency as required by G.S. 7B-301.

(f) An order entered pursuant to this section is enforceable by civil or criminal contempt as provided in Chapter 5A of the General Statutes. (1987, c. 409, s. 1; 1993, c. 516, s. 6; 1998-202, s. 6; 1999-456, s. 60; 2005-55, s. 5.)

Editor's Note. — Session Laws 2005-55, s. 13, provides: "The Department of Health and Human Services shall continue to assess the alternative response system of child protection as to the impact the system has in child safety, timeliness of response, timeliness of service, and coordination of local human services. The Department shall report the status of its evaluation to the Legislative Study Commission on Children and Youth, the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division before the convening of the 2006 Regular Session of the 2005 General Assembly."

CASE NOTES

Editor's Note. — *Most of the following cases were decided prior to the enactment of this Chapter.*

Lawful Excuse. — The "lawful excuse" provision in subsection (c) does not permit parents to interfere with or obstruct a child neglect or abuse investigation on Fourth Amendment grounds where neither a search nor a seizure is involved. In re Stumbo, 143 N.C. App. 375, 547 S.E.2d 451, 2001 N.C. App. LEXIS 304 (2001).

Statutory Investigative Mandate Not Properly Invoked Against Parents. — Anonymous call, reporting a naked child, two years of age, unsupervised in a driveway, did not, standing alone, constitute a report of abuse, neglect, or dependency, and, therefore, the statutory investigative mandate was not properly invoked against the parents of the child that refused to let a caseworker privately interview the child or the child's siblings; there was no evidence of a pattern of a lack of supervision or other credible evidence that indicated a serious failing by the parents. In re Stumbo, 357 N.C. 279, 582 S.E.2d 255, 2003 N.C. LEXIS 747 (2003).

Purpose of Hearing. — The purpose of a hearing under subsection (c) is to determine whether the respondents have obstructed or interfered with an investigation without lawful excuse, not to determine whether the underlying incident which led to the allegation of neglect or abuse actually involved neglect or abuse. In re Stumbo, 143 N.C. App. 375, 547 S.E.2d 451, 2001 N.C. App. LEXIS 304 (2001).

Jurisdiction. — Trial court had authority pursuant to G.S. 7B-200(a)(6) to issue an ex parte order directing a mother to cease interference with a department's juvenile investigation concerning her children; however, where no request for nonsecure custody was presented and no petition alleging that the children were neglected was filed, the trial court lacked jurisdiction to award custody of the children to their father. In re K.C.G., 171 N.C. App. 488, 615 S.E.2d 76, 2005 N.C. App. LEXIS 1314 (2005).

Damages and Attorney's Fees Not Recoverable. — United States District Court found no provision in former G.S. 7A-544.1 that would allow the plaintiffs to seek damages or attorneys' fees from the Department of Social Services in Obstruction Petition proceedings. Renn ex rel. Renn v. Garrison, 845 F. Supp. 1127 (E.D.N.C. 1994).

Refusal to Permit Evaluation. — Respondent's refusal to permit the Child Mental Health Evaluation of his two sons based, in part, upon his religious beliefs was not constitutionally protected and did not afford him a lawful excuse for his interference with the investigation by the Department of Social Services. In re Browning, 124 N.C. App. 190, 476 S.E.2d 465 (1996).

§ 7B-304: Repealed by Session Laws 2003, c. 140, s. 1, effective June 4, 2003.

§ 7B-305. Request for review by prosecutor.

The person making the report shall have five working days, from receipt of the decision of the director of the department of social services not to petition the court, to notify the prosecutor that the person is requesting a review. The prosecutor shall notify the person making the report and the director of the time and place for the review, and the director shall immediately transmit to the prosecutor a copy of a summary of the assessment. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-456, s. 60; 2005-55, s. 6.)

Editor's Note. — Session Laws 2005-55, s. 13, provides: "The Department of Health and Human Services shall continue to assess the alternative response system of child protection as to the impact the system has in child safety, timeliness of response, timeliness of service, and coordination of local human services. The Department shall report the status of its evaluation to the Legislative Study Commission on Children and Youth, the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division before the convening of the 2006 Regular Session of the 2005 General Assembly."

§ 7B-306. Review by prosecutor.

The prosecutor shall review the director's determination that a petition should not be filed within 20 days after the person making the report is notified. The review shall include conferences with the person making the report, the protective services worker, the juvenile, if practicable, and other persons known to have pertinent information about the juvenile or the juvenile's family. At the conclusion of the conferences, the prosecutor may affirm the decision made by the director, may request the appropriate local law enforcement agency to investigate the allegations, or may direct the director to file a petition. (1979, c. 815, s. 1; 1981, c. 469, s. 7; 1993, c. 516, s. 7; 1998-202, s. 6; 1999-456, s. 60.)

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

When Right to Counsel Attaches. — The trial court and the Court of Appeals erred in a prosecution for first-degree statutory sexual offense and two counts of felonious child abuse by suppressing defendant's incriminating statement to officers as being taken in violation of the Sixth Amendment to the United States Constitution. The filing of a petition alleging abuse and neglect commences a civil proceeding, and by its terms, the Sixth Amendment applies only to criminal cases. The Supreme Court could not say, as did the Court of Appeals, that the civil and criminal proceedings were so intertwined that the commencement of the civil proceeding triggered the protection involved in a criminal case. State v. Adams, 345 N.C. 745, 483 S.E.2d 156 (1997).

§ 7B-307. Duty of director to report evidence of abuse, neglect; investigation by local law enforcement; notification of Department of Health and Human Services and State Bureau of Investigation.

(a) If the director finds evidence that a juvenile may have been abused as defined by G.S. 7B-101, the director shall make an immediate oral and subsequent written report of the findings to the district attorney or the district attorney's designee and the appropriate local law enforcement agency within 48 hours after receipt of the report. The local law enforcement agency shall immediately, but no later than 48 hours after receipt of the information, initiate and coordinate a criminal investigation with the protective services assessment being conducted by the county department of social services. Upon completion of the investigation, the district attorney shall determine whether criminal prosecution is appropriate and may request the director or the director's designee to appear before a magistrate.

If the director receives information that a juvenile may have been physically harmed in violation of any criminal statute by any person other than the juvenile's parent, guardian, custodian, or caretaker, the director shall make an immediate oral and subsequent written report of that information to the district attorney or the district attorney's designee and to the appropriate local law enforcement agency within 48 hours after receipt of the information. The local law enforcement agency shall immediately, but no later than 48 hours after receipt of the information, initiate a criminal investigation. Upon completion of the investigation, the district attorney shall determine whether criminal prosecution is appropriate.

If the report received pursuant to G.S. 7B-301 involves abuse or neglect of a juvenile in child care, the director shall notify the Department of Health and Human Services within 24 hours or on the next working day of receipt of the report.

(b) If the director finds evidence that a juvenile has been abused or neglected as defined by G.S. 7B-101 in a child care facility, the director shall immediately so notify the Department of Health and Human Services and, in the case of sexual abuse, the State Bureau of Investigation, in such a way as does not violate the law guaranteeing the confidentiality of the records of the department of social services.

(c) Upon completion of the assessment, the director shall give the Department written notification of the results of the assessment required by G.S. 7B-302. Upon completion of an assessment of sexual abuse in a child care facility, the director shall also make written notification of the results of the assessment to the State Bureau of Investigation.

The director of the department of social services shall submit a report of alleged abuse, neglect, or dependency cases or child fatalities that are the result of alleged maltreatment to the central registry under the policies adopted by the Social Services Commission. (1979, c. 815, s. 1; 1983, c. 199; 1985, c. 757, s. 156(s)-(u); 1991, c. 593, s. 2; 1991 (Reg. Sess., 1992), c. 923, s. 4; 1993, c. 516, s. 8; 1997-443, s. 11A.118(a); 1997-506, s. 33; 1998-202, s. 6; 1999-456, s. 60; 2005-55, s. 7.)

Editor's Note. — Session Laws 2005-55, s. 13, provides: "The Department of Health and Human Services shall continue to assess the alternative response system of child protection as to the impact the system has in child safety, timeliness of response, timeliness of service, and coordination of local human services. The Department shall report the status of its evaluation to the Legislative Study Commission on Children and Youth, the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division before the convening of the 2006 Regular Session of the 2005 General Assembly."

Legal Periodicals. — For article, "Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment," see 67 N.C.L. Rev. 257 (1989).

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Social Worker's Role Changed to Agent of State. — In a case involving crimes against child victim where a social worker went beyond merely fulfilling her role as the victim's social worker and began working with the sheriff's department on the case prior to interviewing defendant, the social worker's role changed and became essentially like that of an agent of the State; accordingly, because the social worker did not advise defendant of her Miranda rights, the trial court erred in denying defendant's motion to suppress statements made during her interview with the social worker. State v. Morrell, 108 N.C. App. 465, 424 S.E.2d 147, appeal dismissed, 333 N.C. 463, 427 S.E.2d 626 (1993).

§ 7B-308. Authority of medical professionals in abuse cases.

(a) Any physician or administrator of a hospital, clinic, or other medical facility to which a suspected abused juvenile is brought for medical diagnosis or treatment shall have the right, when authorized by the chief district court judge of the district or the judge's designee, to retain physical custody of the juvenile in the facility when the physician who examines the juvenile certifies in writing that the juvenile who is suspected of being abused should remain for medical treatment or that, according to the juvenile's medical evaluation, it is unsafe for the juvenile to return to the juvenile's parent, guardian, custodian, or caretaker. This written certification must be signed by the certifying physician and must include the time and date that the judicial authority to retain custody is given. Copies of the written certification must be appended to the juvenile's medical and judicial records and another copy must be given to the juvenile's parent, guardian, custodian, or caretaker. The right to retain custody in the facility shall exist for up to 12 hours from the time and date contained in the written certification.

(b) Immediately upon receipt of judicial authority to retain custody, the physician, the administrator, or that person's designee shall so notify the director of social services for the county in which the facility is located. The director shall treat this notification as a report of suspected abuse and shall immediately begin an assessment of the case.

(1) If the assessment reveals (i) that it is the opinion of the certifying physician that the juvenile is in need of medical treatment to cure or alleviate physical distress or to prevent the juvenile from suffering serious physical injury, and (ii) that it is the opinion of the physician that the juvenile should for these reasons remain in the custody of the facility for 12 hours, but (iii) that the juvenile's parent, guardian, custodian, or caretaker cannot be reached or, upon request, will not consent to the treatment within the facility, the director shall within the initial 12-hour period file a juvenile petition alleging abuse and setting forth supporting allegations and shall seek a nonsecure custody order. A petition filed and a nonsecure custody order obtained in accordance with this subdivision shall come on for hearing under the regular provisions of this Subchapter unless the director and the certifying physician together voluntarily dismiss the petition.

(2) In all cases except those described in subdivision (1) above, the director shall conduct the assessment and may initiate juvenile proceedings and take all other steps authorized by the regular provisions of this Subchapter. If the director decides not to file a petition, the physician, the administrator, or that person's designee may ask the prosecutor to review this decision according to the provisions of G.S. 7B-305 and G.S. 7B-306.

(c) If, upon hearing, the court determines that the juvenile is found in a county other than the county of legal residence, in accord with G.S. 153A-257, the juvenile may be transferred, in accord with G.S. 7B-903(2), to the custody of the department of social services in the county of residence.

(d) If the court, upon inquiry, determines that the medical treatment rendered was necessary and appropriate, the cost of that treatment may be charged to the parents, guardian, custodian, or caretaker, or, if the parents are unable to pay, to the county of residence in accordance with G.S. 7B-903 and G.S. 7B-904.

(e) Except as otherwise provided, a petition begun under this section shall proceed in like manner with petitions begun under G.S. 7B-302.

(f) The procedures in this section are in addition to, and not in derogation of, the abuse and neglect reporting provisions of G.S. 7B-301 and the temporary custody provisions of G.S. 7B-500. Nothing in this section shall preclude a physician or administrator and a director of social services from following the procedures of G.S. 7B-301 and G.S. 7B-500 whenever these procedures are more appropriate to the juvenile's circumstances. (1979, c. 815, s. 1; 1981, c. 716, s. 2; 1995, c. 255, s. 1; 1998-202, s. 6; 1999-456, s. 60; 2005-55, s. 8.)

Editor's Note. — Session Laws 2005-55, s. 13, provides: "The Department of Health and Human Services shall continue to assess the alternative response system of child protection as to the impact the system has in child safety, timeliness of response, timeliness of service, and coordination of local human services. The Department shall report the status of its evaluation to the Legislative Study Commission on Children and Youth, the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division before the convening of the 2006 Regular Session of the 2005 General Assembly."

Legal Periodicals. — For survey of 1981 family law, see 60 N.C.L. Rev. 1379 (1982).

For comment, "The Child Abuse Amendments of 1984: Congress Is Calling North Carolina to Respond to the Baby Doe Dilemma," 20 Wake Forest L. Rev. 975 (1984).

For article, "Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment," see 67 N.C.L. Rev. 257 (1989).

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

The medical evaluation of juveniles is of critical importance in proceedings involving allegations of abuse and neglect under the Juvenile Code (formerly G.S. 7A-516 et seq. [see now G.S. 7B-100 et seq.]). In re Hayden, 96 N.C. App. 77, 384 S.E.2d 558 (1989).

§ 7B-309. Immunity of persons reporting and cooperating in an assessment.

Anyone who makes a report pursuant to this Article, cooperates with the county department of social services in a protective services assessment, testifies in any judicial proceeding resulting from a protective services report or assessment, or otherwise participates in the program authorized by this Article, is immune from any civil or criminal liability that might otherwise be incurred or imposed for that action provided that the person was acting in good faith. In any proceeding involving liability, good faith is presumed. (1979, c. 815, s. 1; 1981, s. 469, s. 8; 1993, c. 516, s. 9; 1998-202, s. 6; 1999-456, s. 60; 2005-55, s. 9.)

Editor's Note. — Session Laws 2005-55, s. 13, provides: "The Department of Health and Human Services shall continue to assess the alternative response system of child protection as to the impact the system has in child safety, timeliness of response, timeliness of service, and coordination of local human services. The Department shall report the status of its evaluation to the Legislative Study Commission on Children and Youth, the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division before the convening of the 2006 Regular Session of the 2005 General Assembly."

CASE NOTES

Editor's Note. — *Most of the following cases were decided prior to the enactment of this Chapter.*

Intent of Section. — Former G.S. 7A-550 (see now this section) was intended to encourage citizens to report suspected instances of child abuse to the Director of the Department of Social Services without fear of potential liability if the report was made in good faith. It has no application to employees of DSS in the performance of their official duties. Coleman v. Cooper, 89 N.C. App. 188, 366 S.E.2d 2, cert. denied, 322 N.C. 834, 371 S.E.2d 275 (1988).

Scope of Immunity. — When suspected child abuse occurs in a public school classroom, a report made in good faith by the principal of the school to his or her superior who is responsible for school personnel would clearly fall within the scope of the immunity contemplated by the statute. Davis v. Durham City Schools, 91 N.C. App. 520, 372 S.E.2d 318 (1988).

Statutory Good Faith Presumption Shields Reporter from Slander Per Se Action. — Summary judgment for the defendant on the issue of slander per se was appropriate where the plaintiff's description of retaliatory motives for defendant's report failed to rebut the statutory presumption created in favor of the defendant by the child abuse reporting provisions of G.S. 7B-301 and this section which together provide immunity not merely conditional upon proof of good faith, but a "good faith" immunity which endows the reporter with the mandatory presumption that he or she acted in good faith. Dobson v. Harris, 352 N.C. 77, 530 S.E.2d 829, 2000 N.C. LEXIS 433 (2000).

The report referred to in this section is clearly an initial report of child abuse, as specified in former G.S. 7A-543 (see now G.S. 7B-301), which is to be made to the Director of the Department of Social Services. Coleman v. Cooper, 89 N.C. App. 188, 366 S.E.2d 2, cert. denied, 322 N.C. 834, 371 S.E.2d 275 (1988).

Malicious Actions. — Where plaintiff alleged that defendant made false accusations of child abuse and neglect and injury and forecast evidence that the defendant knew the report to be false, a genuine issue of material fact existed — particularly as to whether the defendant acted with malice and therefore lost the immunity accorded by former 7A-550 — to withstand summary judgment in a slander per se cause of action. Dobson v. Harris, 134 N.C. App. 573, 521 S.E.2d 710, 1999 N.C. App. LEXIS 894 (1999), cert. denied, 351 N.C. 187, 541 S.E.2d 728 (1999).

Trial court correctly held that the wife's statements to the social services department that the husband molested her two sons were made with actual malice, and therefore negated any defense of privilege under G.S. 7B-309. Kroh v. Kroh, 152 N.C. App. 347, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002), cert. denied, 356 N.C. 673, 577 S.E.2d 120 (2003).

§ 7B-310. Privileges not grounds for failing to report or for excluding evidence.

No privilege shall be grounds for any person or institution failing to report that a juvenile may have been abused, neglected, or dependent, even if the knowledge or suspicion is acquired in an official professional capacity, except when the knowledge or suspicion is gained by an attorney from that attorney's client during representation only in the abuse, neglect, or dependency case. No privilege, except the attorney-client privilege, shall be grounds for excluding evidence of abuse, neglect, or dependency in any judicial proceeding (civil, criminal, or juvenile) in which a juvenile's abuse, neglect, or dependency is in issue nor in any judicial proceeding resulting from a report submitted under this Article, both as this privilege relates to the competency of the witness and to the exclusion of confidential communications. (1979, c. 815, s. 1; 1987, c. 323, s. 1; 1993, c. 514, s. 3; c. 516, s. 10; 1995, c. 509, s. 133; 1998-202, s. 6; 1999-456, s. 60.)

Legal Periodicals. — For note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

For comment, "The Child Abuse Amendments of 1984: Congress Is Calling North Carolina to Respond to the Baby Doe Dilemma," 20 Wake Forest L. Rev. 975 (1984).

For article, "Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment," see 67 N.C.L. Rev. 257 (1989).

CASE NOTES

***Editor's Note.** — Most of the following cases were decided prior to the enactment of this Chapter.*

Section 8-53.1 is read in pari materia with the Juvenile Code, and in particular with former § 7A-551 (see now this section). State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983); State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

Privilege Not Available in Child Abuse Cases. — By virtue of G.S. 8-53.1 and former G.S. 7A-551 (see now this section), the physician-patient privilege, created by G.S. 8-53 is not available in cases involving child abuse. State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

Under G.S. 7B-310, a trial court in a child neglect case did not err in admitting certain evidence in violation of a mother's psychologist-patient privilege; that privilege did not operate to bar relevant evidence in an action that concerned the abuse or neglect of a child. In re K.D., 178 N.C. App. 322, 631 S.E.2d 150, 2006 N.C. App. LEXIS 1393 (2006).

Public Duty Doctrine Inapplicable. — A school resource officer, who allegedly knew that a teacher was facilitating sexual liaisons between a 14-year-old girl and an 18-year-old boy, was not required, nor was he permitted, to weigh the safety interests of the public when he decided not to report the boy's possible statutory rape of the girl or the teacher's sexual exploitation of the girl and boy — rather, his duty to report abuse was imposed by statute and involved no deliberation or discretionary consideration; thus, his failure to report known child abuse was outside the scope of conduct generally associated with law enforcement and the public duty doctrine did not bar the claim. Smith v. Jackson County Bd. of Educ., 168 N.C. App. 452, 608 S.E.2d 399, 2005 N.C. App. LEXIS 347 (2005).

Section 8-53.1 and former § 7A-551 (see now this section)plainly facilitate the prosecution of child abusers, without regard to whether the medical information was obtained before or after the accused was officially charged with a crime. State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

The medical evaluation of juveniles is of critical importance in proceedings involving allegations of abuse and neglect under the Juvenile Code. In re Hayden, 96 N.C. App. 77, 384 S.E.2d 558 (1989).

Evidence That Defendant in Sexual Abuse Case Had Sexually Transmittable Disease. — Unequivocal evidence that a seven-year-old girl had been sexually abused would invoke former G.S. 7A-551 (see now this section) and G.S. 8-53.1. Therefore, medical records maintained by a county health department, revealing that defendant had been treated for gonorrhea, were admissible as evidence with regard to the cause or source of the child's disease. State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983).

Any privilege which defendant, who sought treatment of a sexually transmittable disease after he had been charged with sexual crimes against his children and taken into custody, might have been entitled to by G.S. 8-53 was nullified by G.S. 8-53.1 and former G.S. 7A-551 (see now this section). State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

§ 7B-311. Central registry; responsible individuals list.

(a) The Department of Health and Human Services shall maintain a central registry of abuse, neglect, and dependency cases and child fatalities that are the result of alleged maltreatment that are reported under this Article in order to compile data for appropriate study of the extent of abuse and neglect within the State and to identify repeated abuses of the same juvenile or of other juveniles in the same family. This data shall be furnished by county directors of social services to the Department of Health and Human Services and shall be confidential, subject to rules adopted by the Social Services Commission providing for its use for study and research and for other appropriate disclosure. Data shall not be used at any hearing or court proceeding unless based upon a final judgment of a court of law.

(b) The Department shall also maintain a list of responsible individuals identified by county directors of social services as the result of investigative assessment responses. The Department may provide information from this list to child caring institutions, child placing agencies, group home facilities, and other providers of foster care, child care, or adoption services that need to determine the fitness of individuals to care for or adopt children.

(c) It is unlawful for any public official or public employee to knowingly and willfully release information from either the central registry or the responsible individuals list to a person who is not authorized to receive the information. It is unlawful for any person who is authorized to receive information from the central registry or the responsible individuals list to release that information to an unauthorized person. It is unlawful for any person who is not authorized to receive information from the central registry or the responsible individuals list to access or attempt to access that information. A person who commits an offense described in this subsection is guilty of a Class 3 misdemeanor.

(d) The Social Services Commission shall adopt rules regarding the operation of the central registry and responsible individuals list, including:

(1) Procedures for filing data.
(2) Procedures for notifying a responsible individual of a determination of abuse or serious neglect.
(3) Procedures for correcting and expunging information.
(4) Determining persons who are authorized to receive information from the responsible individuals list.
(5) Releasing information from the responsible individuals list to authorized requestors.
(6) Gathering statistical information.
(7) Keeping and maintaining information placed in the registry and on the responsible individuals list.
(8) A definition of "serious neglect". (1979, c. 815, s. 1; 1993, c. 516, s. 11; 1997-443, s. 11A.118(a); 1998-202, s. 6; 1999-456, s. 60; 2005-399, s. 2.)

Editor's Note. — This section, as amended by Session Laws 2005-399, s. 2, effective October 1, 2005, is applicable to investigative assessment responses initiated by county departments of social services on or after that date.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§§ 7B-312 through 7B-319: Reserved for future codification purposes.

ARTICLE 3A.

Expunction; Responsible Individuals List.

§ 7B-320. Notification to individual responsible for abuse or substantial neglect.

(a) Within five working days after the completion of an investigative assessment response that results in a determination of abuse or serious neglect, the director shall notify the Department of the results of the assessment and shall give personal written notice to the responsible individual of the determination.

(b) If personal written notice is not obtained within 15 days of the determination being made, the director shall send the notice to the responsible individual by registered or certified mail, return receipt requested, and addressed to the responsible individual at the individual's last known address. Only the responsible individual may receive the notice.

(c) The notice shall include all of the following:

(1) A statement informing the individual of the nature of the investigative assessment response and whether the director determined abuse or serious neglect or both.
(2) A statement summarizing the substantial evidence supporting the director's determination without identifying the reporter or collateral contacts.

(3) A statement informing the individual that the individual's name has been placed on the responsible individuals list as provided in G.S. 7B-311, and that the Department of Health and Human Services may provide information from this list to child caring institutions, child placing agencies, group home facilities, and other providers of foster care, child care, or adoption services that need to determine the fitness of individuals to care for or adopt children.

(4) A clear description of the actions the individual must take to have his or her name removed from the responsible individuals list. The description shall include information regarding how to request an expunction by the director of the individual's name from the responsible individuals list and procedures for seeking review by the district attorney and for seeking judicial review of the director's decision not to remove the individual's name from the list. (2005-399, s. 3.)

Editor's Note. — Session Laws 2005-399, s. 5, made this Article effective October 1, 2005, and applicable to investigative assessment responses initiated by county departments of social services on or after that date.

Session Laws 2005-399, s. 3, enacted this section as G.S. 7B-312. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 7B-321. Requests for expunction; director review.

(a) An individual who has been identified as a responsible individual as the result of an investigative assessment response may, within 30 days after receipt of the notice under G.S. 7B-320(c), request that the director who determined the abuse or serious neglect and identified the individual as a responsible individual expunge the individual's name from the responsible individuals list. A request for expunction under this subsection shall be in writing, addressed to the director who determined the abuse or serious neglect and identified the individual as a responsible individual, and delivered in person or by certified mail, return receipt requested, within 30 days after receipt of notice.

(b) Upon receipt of a timely request for expunction under subsection (a) of this section, the director shall review all records, reports, and other information gathered during the investigative assessment response. The purpose of the review is to determine whether there is substantial evidence to support the determination and the placement of the individual's name on the responsible individuals list. Within 15 working days of receipt of the request for expunction, the director shall proceed as follows:

(1) If the director decides that there is not substantial evidence in the records, reports, and other information gathered during the investigative assessment response to support a determination of abuse or serious neglect and to support the identification of the individual as a responsible individual, the director shall notify the Department of Health and Human Services to expunge the individual's name from the responsible individuals list. The director shall also prepare a written statement of the director's decision and send the statement to the individual seeking expunction, by personal delivery or first-class mail.

(2) If the director decides that there is substantial evidence in the records, reports, and other information gathered during the investigative assessment response to support a determination of abuse or serious neglect and to support the identification of the individual as a responsible individual, the director may uphold or modify the director's prior decision accordingly and refuse the request for an expunction. The director shall prepare a written statement of the director's

decision including the reasons for the decision. The statement shall clearly indicate that it is a final decision and include information regarding the amount of time the individual has to request a review by the district attorney or to file a petition for expunction with the district court. The director shall send the statement to the individual seeking expunction by personal delivery or first-class mail. The director shall also include a second notice containing the information required by G.S. 7B-320(c) and a copy of a petition for expunction form.

(c) If the director does not provide a written response to a request for expunction within 15 working days after its receipt, the failure shall be considered a refusal to expunge the individual's name, and the individual may request a review of the decision by the district attorney or file a petition for expunction with the district court.

(d) If the director modifies the prior determination, the director shall notify the Department of Health and Human Services, which shall change its records upon receipt of the notification.

(e) An individual whose request for expunction has been refused by a director under this section may, within 30 days after receipt of the notice of refusal, request a review of the director's decision by the district attorney under G.S. 7B-322 or file a petition requesting expunction with the district court under G.S. 7B-323. (2005-399, s. 3.)

Editor's Note. — Session Laws 2005-399, s. 3, enacted this section as G.S. 7B-313. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 7B-322. District attorney review expunction request.

(a) Within 30 days of the receipt of notice of the director's refusal to expunge the individual's name under G.S. 7B-321(b) or (c), the individual may request a review of the director's decision by the district attorney of the prosecutorial district in which the abuse or serious neglect report arose. The district attorney may delegate the review of the director's decision to a designee within the district attorney's office. The individual shall request a review under this section by submitting a letter directed to the attention of the district attorney. The letter shall contain the name, date of birth, address of the individual seeking expunction, and the name of the juvenile who was the subject of the determination of abuse or serious neglect. Failure to make a timely request to the district attorney to review the director's decision shall constitute a waiver of the individual's right of review by the district attorney, but shall not bar the individual from filing a petition for expunction under G.S. 7B-323.

(b) The director shall provide the district attorney all the information the director used in making the determination. The district attorney shall review the director's decision to refuse to expunge the individual's name from the responsible individuals list, and within 30 days' receipt of the request to review, make a determination of agreement or disagreement with the director's decision.

(c) If the district attorney determines that there is not substantial evidence to support a determination of abuse or serious neglect and to support the identification of an individual as a responsible individual, the district attorney shall notify the individual and the director in writing. The director shall notify the Department of Health and Human Services within five working days of the district attorney's determination, and the Department shall change its records upon receipt of the notification.

(d) If the district attorney determines that there is substantial evidence to support a determination of abuse or serious neglect and to support the identification of an individual as a responsible individual, the district attorney shall notify the director, and the individual in writing. (2005-399, s. 3.)

Editor's Note. — Session Laws 2005-399, s. 3, enacted this section as G.S. 7B-314. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 7B-323. Petition for expunction; district court.

(a) Within 30 days of the receipt of notice of the director's decision under G.S. 7B-321(b) or (c), or within 30 days from the date of a determination by the district attorney under G.S. 7B-322, whichever is later, an individual may file a petition for expunction with the district court of the county in which the abuse or serious neglect report arose. The request shall be by a petition for expunction filed with the appropriate clerk of court's office with a copy delivered in person or by certified mail, return receipt requested, to the director. The petition for expunction shall contain the name, date of birth, and address of the individual seeking expunction, the name of the juvenile who was the subject of the determination of abuse or serious neglect, and facts that invoke the jurisdiction of the court. Failure to timely file a petition for expunction constitutes a waiver of the individual's right to file a petition for expunction and to a district court hearing.

(b) The clerk of court shall maintain a separate docket for expunction actions and upon receipt of a filed petition for expunction shall calendar the matter for hearing at a session of district court hearing juvenile matters and send notice of the hearing to the petitioner and to the director. Upon the request of a party, the court shall close the hearing to all persons, except officers of the court, the parties, and their witnesses. At the hearing, the director shall have the burden of proving by a preponderance of the evidence the correctness of the director's decision determining abuse or serious neglect and identifying the individual seeking expunction as a responsible individual. The hearing shall be before a judge without a jury. The rules of evidence applicable in civil cases shall apply. However, the court shall have discretion to permit the admission of any reliable and relevant evidence if the general purposes of the rules of evidence and the interests of justice will best be served by its admission.

(c) At the hearing, the following rights of the parties shall be preserved:

(1) The right to present sworn evidence, law, or rules that bear upon the case.

(2) The right to represent themselves or obtain the services of an attorney at their own expense.

(3) The right to subpoena witnesses, cross-examine witnesses of the other party, and make a closing argument summarizing the party's view of the case and the law.

(d) Within 30 days after completion of the hearing, the court shall enter a signed, written order containing findings of fact and conclusions of law. A copy of the order shall be served on each party or the party's attorney of record. If the court concludes that the director has not established by a preponderance of the evidence the correctness of the determination of abuse or serious neglect or the identification of the responsible individual, the court shall reverse the director's decision and order the director to notify the Department of Health and Human Services to expunge the individual's name from the responsible individuals list. If the court concludes that sufficient evidence has not been presented to support a determination of abuse, but there is sufficient evidence to support a determination of serious neglect and the identification of the individual seeking expunction as a responsible individual, the court shall modify the director's decision and order the director to notify the Department of Health and Human Services to change the entry on the responsible individuals list to that of neglect.

(e) Notwithstanding any time limitations contained in this section or the provisions of G.S. 7B-324(a)(3) or (4), a district court may review a determination of abuse or serious neglect at any time if the review serves the interests of justice or for extraordinary circumstances.

(f) A party may appeal the district court's decision under G.S. 7A-27(c). (2005-399, s. 3.)

Editor's Note. — Session Laws 2005-399, s. 3, enacted this section as G.S. 7B-315. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 7B-324. Persons ineligible to request expunction; stay of expunction proceeding pending juvenile court case.

(a) Any individual who has been identified as a responsible individual in an abuse or serious neglect case is not entitled to challenge the placement of the individual's name on the responsible individuals list if any of the following apply:

(1) The individual is criminally convicted as a result of the same incident. The district attorney shall inform the director of the result of the criminal proceeding, and the director shall immediately notify the Department of Health and Human Services. The Department shall consider this information when determining whether the individual's name should remain on or be expunged from the responsible individuals list.

(2) The individual is a respondent in a juvenile court proceeding regarding abuse or neglect resulting from the same incident. The director shall immediately notify the Department of Health and Human Services. The Department shall consider this information when determining whether the individual's name should remain on or be expunged from the responsible individuals list.

(3) That individual fails to make a timely request for expunction with the director who made the determination of abuse or serious neglect and identified the individual as a responsible individual.

(4) That individual fails to file a petition for expunction with the district court in a timely manner.

(5) That individual fails to keep the county department of social services informed of the individual's current address during any request for expunction so that the individual may receive notification of the director's decisions.

(b) If, prior to or during any proceeding provided for in this section, an individual seeking expunction is named as a respondent in a juvenile court case resulting from the same incident, the director, the district attorney, the district court judge, or the Court of Appeals shall stay any further proceedings for the expunction of that individual's name from the responsible individuals list until the juvenile court case is concluded or dismissed. If a juvenile court case resulting from the same determination of abuse or serious neglect is dismissed, or concludes without an adjudication of abuse or neglect, or with an adjudication that differs from the prior determination, the director shall notify the Department of Health and Human Services to expunge the individual's name from the responsible individuals list or modify the prior decision of the director accordingly. (2005-399, s. 3.)

Editor's Note. — Session Laws 2005-399, s. 3, enacted this section as G.S. 7B-316. It has been renumbered as this section at the direction of the Revisor of Statutes.

§§ 7B-325 through 7B-399: Reserved for future codification purposes.

ARTICLE 4.

Venue; Petitions.

§ 7B-400. Venue; pleading.

A proceeding in which a juvenile is alleged to be abused, neglected, or dependent may be commenced in the district in which the juvenile resides or is present. When a proceeding is commenced in a district other than that of the juvenile's residence, the court, on its own motion or upon motion of any party, may transfer the proceeding to the court in the district where the juvenile resides. A transfer under this section may be made at any time. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-456, s. 60.)

Editor's Note. — Articles 1-11, of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

Section 5 of Session Laws 1998-202, also effective July 1, 1999, repealed the former North Carolina Juvenile Code, Articles 41 through 59 of Chapter 7A, along with additional related provisions.

Where applicable, historical citations and case annotations to former sections have been added to the corresponding sections in new Chapter 7B.

At the end of new Chapter 7B are tables showing comparable sections and their disposition of new Chapter 7B.

Session Laws 1998-202, s. 36, contains a severability clause.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Court Not Limited To Only Circumstances Occurring Within Its District. — District court, in adjudicating a child neglected, was not limited to considering only those circumstances occurring within its district. To hold otherwise would have allowed abusive and neglectful parents to avoid court intervention by simply moving from county to county. In re E.C., 174 N.C. App. 517, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

Cited in In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1, 2004 N.C. App. LEXIS 129 (2004); In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005); In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006); In re M.B., 179 N.C. App. 572, 635 S.E.2d 8, 2006 N.C. App. LEXIS 1960 (2006).

§ 7B-401. Pleading and process.

The pleading in an abuse, neglect, or dependency action is the petition. The process in an abuse, neglect, or dependency action is the summons. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-456, s. 60.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Jurisdiction. — The issuance and service of process is the means by which the court obtains jurisdiction; thus, where no summons was issued, the court acquired jurisdiction over neither the persons nor the subject matter of the action, and was without authority to enter order adjudging a juvenile as neglected. In re Mitchell, 126 N.C. App. 432, 485 S.E.2d 623 (1997).

Commencement of Proceedings. — Pursuant to G.S. 7B-401 and G.S. 7B-405, a juvenile abuse, neglect, or dependency action is a creature of statute and "is commenced by the filing of a petition," which constitutes the initial pleading in such actions. In re A.R.G., 361 N.C. 392, 646 S.E.2d 349, 2007 N.C. LEXIS 597 (2007).

Cited in In re T.R.P., 360 N.C. 588, 636 S.E.2d 787, 2006 N.C. LEXIS 1193 (2006); In re D.C., — N.C. App. —, 644 S.E.2d 640, 2007 N.C. App. LEXIS 1168 (2007).

§ 7B-402. Petition.

(a) The petition shall contain the name, date of birth, address of the juvenile, the name and last known address of the juvenile's parent, guardian, or custodian, and allegations of facts sufficient to invoke jurisdiction over the juvenile. A person whose actions resulted in a conviction under G.S. 14-27.2 or G.S. 14-27.3 and the conception of the juvenile need not be named in the petition. The petition may contain information on more than one juvenile when the juveniles are from the same home and are before the court for the same reason.

(b) The petition, or an affidavit attached to the petition, shall contain the information required by G.S. 50A-209.

(c) Sufficient copies of the petition shall be prepared so that copies will be available for each parent if living separate and apart, the guardian, custodian, or caretaker, the guardian ad litem, the social worker, and any person determined by the court to be a necessary party. (1979, c. 815, s. 1; 1981, c. 469, s. 9; 1998-202, s. 6; 1999-456, s. 60; 2004-128, s. 11; 2005-320, s. 3.)

Editor's Note. — The first paragraph, as amended by Session Laws 2004-128, s. 11, effective December 1, 2004, is applicable to offenses committed on or after that date.

This section, as rewritten by Session Laws 2005-320, s. 1, effective October 1, 2005, is applicable to juvenile proceedings and civil actions pending or filed on or after that date.

CASE NOTES

Proper Allegation of First Degree Murder. — Petition alleging that "juvenile was delinquent as defined by former G.S. 7A-517(12) (see now G.S. 7B-1501) in that in Durham County and on or about December 30, 1997, the above named juvenile unlawfully, willfully and feloniously did of malice aforethought kill and murder victim" properly alleged first degree murder under G.S. 14-17, satisfied former G.S. 7A-560 (see now this section requirements of), and made transfer of case to Superior Court mandatory under former G.S.7A-608 (see now G.S. 7B-2200). In re K.R.B., 134 N.C. App. 328, 517 S.E.2d 200, 1999 N.C. App. LEXIS 744 (1999), cert. denied, 351 N.C. 188, 541 S.E.2d 713 (1999).

Failure to List Juvenile's Address. — In dependency proceedings brought under G.S. 7B-101, the failure of a petition to list an allegedly dependent juvenile's address pursuant to G.S. 7B-402 did not deprive the trial court of jurisdiction because this was "routine clerical information," and the trial court could easily determine from information provided in the petition whether the court had subject matter jurisdiction over the case. In re A.R.G., 361 N.C. 392, 646 S.E.2d 349, 2007 N.C. LEXIS 597 (2007).

Applied in In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

Cited in In re H.S.F., 177 N.C. App. 193, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006); In re T.R.P., 360 N.C. 588, 636 S.E.2d 787, 2006 N.C. LEXIS 1193 (2006).

§ 7B-403. Receipt of reports; filing of petition.

(a) All reports concerning a juvenile alleged to be abused, neglected, or dependent shall be referred to the director of the department of social services for screening. Thereafter, if it is determined by the director that a report should be filed as a petition, the petition shall be drawn by the director, verified before an official authorized to administer oaths, and filed by the clerk, recording the date of filing.

(b) A decision of the director of social services not to file a report as a petition shall be reviewed by the prosecutor if review is requested pursuant to G.S. 7B-305. (1979, c. 815, s. 1; 1981, c. 469, ss. 10, 11; 1998-202, s. 6; 1999-456, s. 60.)

Legal Periodicals. — For 1984 survey, "Termination of Parental Rights: Putting Love in Its Place," see 63 N.C.L. Rev. 1177 (1985).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

The primary purpose to be served by signature and verification is to obtain the written and sworn statement of the facts alleged in an official and authoritative form that may be used for any lawful purpose, either in or out of a court of law. In re Green, 67 N.C. App. 501, 313 S.E.2d 193 (1984).

The Juvenile Code requirements that the juvenile delinquency petition be signed and verified are essential to both the validity of the petition and to establishing the jurisdiction of the court. In re Green, 67 N.C. App. 501, 313 S.E.2d 193 (1984).

Verification of Petition. — Failure of the director of a county department of social services to sign and verify before a notary, pursuant to G.S. 7B-403(a), a petition for a finding that a minor child was a neglected juvenile rendered the petition fatally deficient and inoperative to invoke the subject matter jurisdiction of the trial court. In re T.R.P., 173 N.C. App. 541, 619 S.E.2d 525, 2005 N.C. App. LEXIS 2098 (2005).

Trial court lacked jurisdiction to enter a review order in a neglect action because the juvenile petition that initiated the case was not verified as mandated by G.S. 7B-403(a); the trial court could not exercise subject matter jurisdiction in the absence of the verification, and thus the trial court's order was void ab initio. In re T.R.P., 360 N.C. 588, 636 S.E.2d 787, 2006 N.C. LEXIS 1193 (2006).

Petitions for nonsecure custody filed by DSS did not comply with G.S. 7B-403, DSS was not an agency awarded custody of the minor children by a court of competent jurisdiction, DSS did not have standing under G.S. 7B-1103(a)(3) to file the termination of parental rights petitions, and the trial court did not have subject matter jurisdiction to enter the termination orders as: (1) the petition for adjudication with respect to child one contained a "Signature of Petitioner" as the "Director of DSS by an employee" and did not contain the signature of the director under G.S. 10B-3(25); (2) DSS filed an amended petition regarding child two with no signature in the "Signature of Petitioner" space; and (3) the orders awarding DSS custody were void ab initio. In re S.E.P., — N.C. App. —, 646 S.E.2d 617, 2007 N.C. App. LEXIS 1431 (2007).

Signature by District Attorney. — As long as juvenile intake counselor follows the statutory procedures before the signing of the petition, and the assistant district attorney does not encroach upon the important role of the intake counselor, the assistant district attorney may sign the petition as complainant. In re Stowe, 118 N.C. App. 662, 456 S.E.2d 336 (1995).

Cited in In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006); In re A.R.G., 361 N.C. 392, 646 S.E.2d 349, 2007 N.C. LEXIS 597 (2007); In re L.B., — N.C. App. —, 646 S.E.2d 411, 2007 N.C. App. LEXIS 1476 (2007).

§ 7B-404. Immediate need for petition when clerk's office is closed.

(a) When the office of the clerk is closed, a magistrate may be authorized by the chief district court judge to draw, verify, and issue petitions as follows:

(1) When the director of the department of social services requests a petition alleging a juvenile to be abused, neglected, or dependent, or

(2) When the director of the department of social services requests a petition alleging the obstruction of or interference with an assessment required by G.S. 7B-302.

(b) The authority of the magistrate under this section is limited to emergency situations when a petition is required in order to obtain a nonsecure custody order or an order under G.S. 7B-303. Any petition issued under this section shall be delivered to the clerk's office for processing as soon as that office is open for business. (1979, c. 815, s. 1; 1987, c. 409, s. 3; 1998-202, s. 6; 1999-456, s. 60; 2005-55, s. 10.)

Editor's Note. — Session Laws 2005-55, s. 13, provides: "The Department of Health and Human Services shall continue to assess the alternative response system of child protection as to the impact the system has in child safety, timeliness of response, timeliness of service, and coordination of local human services. The Department shall report the status of its evaluation to the Legislative Study Commission on Children and Youth, the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division before the convening of the 2006 Regular Session of the 2005 General Assembly."

§ 7B-405. Commencement of action.

An action is commenced by the filing of a petition in the clerk's office when that office is open or by the issuance of a juvenile petition by a magistrate when the clerk's office is closed, which issuance shall constitute filing. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-456, s. 60.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Verification of petition. — Failure of the director of a county department of social services to sign and verify before a notary, pursuant to G.S. 7B-403(a), a petition for a finding that a minor child was a neglected juvenile rendered the petition fatally deficient and inoperative to invoke the subject matter jurisdiction of the trial court; because there was no evidence in the record suggesting later filings sufficient to invoke subject matter jurisdiction as to the lower court's subsequent order from a review hearing, the trial court erred in proceeding on the matter due to lack of subject matter jurisdiction. In re T.R.P., 173 N.C. App. 541, 619 S.E.2d 525, 2005 N.C. App. LEXIS 2098 (2005).

Verification Secures Subject Matter Jurisdiction. — In a juvenile dependency matter wherein the juvenile petition was eventually signed and verified by a Department of Social Services representative, the trial court gained subject matter jurisdiction and could properly act on the matter from that day forward; therefore, the trial court had authority to enter a permanency planning order. In re L.B., — N.C. App. —, 639 S.E.2d 23, 2007 N.C. App. LEXIS 84 (2007).

Commencement of Proceedings. — Pursuant to G.S. 7B-401 and G.S. 7B-405, a juvenile abuse, neglect, or dependency action is a creature of statute and "is commenced by the filing of a petition," which constitutes the initial pleading in such actions. In re A.R.G., 361 N.C. 392, 646 S.E.2d 349, 2007 N.C. LEXIS 597 (2007).

Cited in In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), aff'd, — N.C. —, 625 S.E.2d 779 (2006); In re T.R.P., 360 N.C. 588, 636 S.E.2d 787, 2006 N.C. LEXIS 1193 (2006); In re D.R.S., — N.C. App. —, 638 S.E.2d 626, 2007 N.C. App. LEXIS 23 (2007); In re L.B., — N.C. App. —, 646 S.E.2d 411, 2007 N.C. App. LEXIS 1476 (2007).

§ 7B-406. Issuance of summons.

(a) Immediately after a petition has been filed alleging that a juvenile is abused, neglected, or dependent, the clerk shall issue a summons to the parent, guardian, custodian, or caretaker requiring them to appear for a hearing at the time and place stated in the summons. No summons is required for any person whose actions resulted in a conviction under G.S. 14-27.2 or G.S. 14-27.3 and the conception of the juvenile. A copy of the petition shall be attached to each summons. Service of the summons shall be completed as provided in G.S.

7B-407, but the parent of the juvenile shall not be deemed to be under a disability even though the parent is a minor.

(b) A summons shall be on a printed form supplied by the Administrative Office of the Courts and shall include:

(1) Notice of the nature of the proceeding;
(2) Notice of any right to counsel and information about how to seek the appointment of counsel prior to a hearing;
(3) Notice that, if the court determines at the hearing that the allegations of the petition are true, the court will conduct a dispositional hearing to consider the needs of the juvenile and enter an order designed to meet those needs and the objectives of the State; and
(4) Notice that the dispositional order or a subsequent order:
    a. May remove the juvenile from the custody of the parent, guardian, or custodian.
    b. May require that the juvenile receive medical, psychiatric, psychological, or other treatment and that the parent participate in the treatment.
    c. May require the parent to undergo psychiatric, psychological, or other treatment or counseling for the purpose of remedying the behaviors or conditions that are alleged in the petition or that contributed to the removal of the juvenile from the custody of that person.
    d. May order the parent to pay for treatment that is ordered for the juvenile or the parent.
    e. May, upon proper notice and hearing and a finding based on the criteria set out in G.S. 7B-1111, terminate the parental rights of the respondent parent.

(c) The summons shall advise the parent that upon service, jurisdiction over that person is obtained and that failure to comply with any order of the court pursuant to G.S. 7B-904 may cause the court to issue a show cause order for contempt.

(d) A summons shall be directed to the person summoned to appear and shall be delivered to any person authorized to serve process. (1979, c. 815, s. 1; 1987 (Reg. Sess., 1988), c. 1090, s. 2; 1995, c. 328, s. 1; 1998-202, s. 6; 1999-456, s. 60; 2000-183, s. 1; 2001-208, s. 1; 2001-487, s. 101; 2004-128, s. 12.)

Editor's Note. — Subsection (a), as amended by Session Laws 2004-128, s. 12, effective December 1, 2004, is applicable to offenses committed on or after that date.

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Jurisdiction. — The issuance and service of process is the means by which the court obtains jurisdiction; thus, where no summons was issued, the court acquired jurisdiction over neither the persons nor the subject matter of the action, and was without authority to enter order adjudging a juvenile as neglected. In re Mitchell, 126 N.C. App. 432, 485 S.E.2d 623 (1997).

Juvenile petition was filed June 11, 2004, and the summons was issued four days later, but the summons was returned by the sheriff on June 30, 2004, unserved; on July 8, 2004, the mother attended a hearing regarding the allegations her minor child was neglected and dependent. The mother was not only present in court, but also agreed to continue the matter until July 22, 2004, and there was no evidence that the mother raised any objection at that hearing regarding insufficient service of process or personal jurisdiction; thus, her actions amounted to waiver of her right to challenge the trial court's exercise of personal jurisdiction over her regardless of whether she was served with a juvenile summons in compliance with G.S. 1A-1-4. In re A.J.M., 177 N.C. App. 745, 630 S.E.2d 33, 2006 N.C. App. LEXIS 1220 (2006).

Cited in In re Poole, 151 N.C. App. 472, 568 S.E.2d 200, 2002 N.C. App. LEXIS 775 (2002); In re E.C., 174 N.C. App. 517, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

§ 7B-407. Service of summons.

The summons shall be served under G.S. 1A-1, Rule 4(j) upon the parent, guardian, custodian, or caretaker, not less than five days prior to the date of the scheduled hearing. The time for service may be waived in the discretion of the court.

If the parent, guardian, custodian, or caretaker entitled to receive a summons cannot be found by a diligent effort, the court may authorize service of the summons and petition by publication under G.S. 1A-1, Rule 4(j1). The cost of the service by publication shall be advanced by the petitioner and may be charged as court costs as the court may direct.

If the parent, guardian, custodian, or caretaker is served as herein provided and fails without reasonable cause to appear and to bring the juvenile before the court, the parent, guardian, custodian, or caretaker may be proceeded against as for contempt of court. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-456, s. 60; 2003-304, s. 1.)

Legal Periodicals. — For comment on due process in juvenile proceedings, see 3 N.C. Cent. L.J. 255 (1972).

For survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

Trial Court Is Without Jurisdiction Where No Notice Was Served. — A trial court did not have jurisdiction to enter orders in a juvenile delinquency proceeding where no summons, petition or other notice was ever served on the juvenile or her parents, guardian or custodian prior to any of the hearings. In re McAllister, 14 N.C. App. 614, 188 S.E.2d 723 (1972).

Statement on return that service was accomplished implies that it was done in the manner required by law. In re Leggett, 67 N.C. App. 745, 314 S.E.2d 144 (1984).

It is the service of summons, rather than the return of the officer, that confers jurisdiction. In re Leggett, 67 N.C. App. 745, 314 S.E.2d 144 (1984); In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

Failure of Record to Show Time and Manner of Service. — Failure of a record of a juvenile delinquency proceeding to show the exact time and manner of service of the summons and petition upon the juvenile and his parents was not fatal where the record affirmatively showed that the juvenile and his mother were in fact accorded sufficient notice of the hearing at which he was adjudicated delinquent to provide adequate opportunity to prepare, that at least seven days prior to the hearing he had been represented by privately employed counsel, and that he was represented by such counsel at the hearing, which had already been once continued. In re Collins, 12 N.C. App. 142, 182 S.E.2d 662 (1971).

Service by Publication. — Notice to the father by publication of a neglect proceeding against his daughter was proper since the agency's affidavit stated that the father could not be found by a diligent effort because he was a transient person with no permanent residence. In re Shaw, 152 N.C. App. 126, 566 S.E.2d 744, 2002 N.C. App. LEXIS 863 (2002).

Service on Only One Parent Required. — In order to have a child declared dependent, it is not necessary to serve the petition on both parents, but only on one of them or the guardian or custodian. In re Yow, 40 N.C. App. 688, 253 S.E.2d 647, cert. denied, 297 N.C. 610, 257 S.E.2d 223 (1979).

In order to have a child declared dependent, it is not necessary to serve the petition on both parents, but only on one of them. In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

U.S. Const., Amend. XIV did not proscribe a finding of dependency binding upon the mother of a child so that his custody could be placed with a suitable person, where the mother was not served with any notice before the first hearing, but where the facts showed that his father was served with notice, and it was found as a fact that the mother's address was unknown and no evidence to dispute the finding was in the record. In re Yow, 40 N.C. App. 688, 253 S.E.2d 647, cert. denied, 297 N.C. 610, 257 S.E.2d 223 (1979).

Jurisdiction Acquired by Service on One Parent. — Juvenile court, which acquired jurisdiction over the subject matter when the summons was served upon mother, although it was not served upon father as required by this section, had the authority to decide the issue of neglect and dependency of three children. In re

Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

Cited in In re Poole, 151 N.C. App. 472, 568 S.E.2d 200, 2002 N.C. App. LEXIS 775 (2002); In re Shaw, 152 N.C. App. 126, 566 S.E.2d 744, 2002 N.C. App. LEXIS 863 (2002).

§ 7B-408. Copy of petition and notices to guardian ad litem.

Immediately after a petition has been filed alleging that a juvenile is abused or neglected, the clerk shall provide a copy of the petition and any notices of hearings to the local guardian ad litem office. (2003-140, s. 6)

§§ 7B-409 through 7B-413: Reserved for future codification purposes.

Article 5.

Temporary Custody; Nonsecure Custody; Custody Hearings.

§ 7B-500. Taking a juvenile into temporary custody; civil and criminal immunity.

(a) Temporary custody means the taking of physical custody and providing personal care and supervision until a court order for nonsecure custody can be obtained. A juvenile may be taken into temporary custody without a court order by a law enforcement officer or a department of social services worker if there are reasonable grounds to believe that the juvenile is abused, neglected, or dependent and that the juvenile would be injured or could not be taken into custody if it were first necessary to obtain a court order. If a department of social services worker takes a juvenile into temporary custody under this section, the worker may arrange for the placement, care, supervision, and transportation of the juvenile.

(b) The following individuals shall, without a court order, take into temporary custody an infant under seven days of age that is voluntarily delivered to the individual by the infant's parent who does not express an intent to return for the infant:

(1) A health care provider, as defined under G.S. 90-21.11, who is on duty or at a hospital or at a local or district health department or at a nonprofit community health center.

(2) A law enforcement officer who is on duty or at a police station or sheriff's department.

(3) A social services worker who is on duty or at a local department of social services.

(4) A certified emergency medical service worker who is on duty or at a fire or emergency medical services station.

(c) An individual who takes an infant into temporary custody under subsection (b) of this section shall perform any act necessary to protect the physical health and well-being of the infant and shall immediately notify the department of social services or a local law enforcement agency. Any individual who takes an infant into temporary custody under subsection (b) of this section may inquire as to the parents' identities and as to any relevant medical history, but the parent is not required to provide the information. The individual shall notify the parent that the parent is not required to provide the information.

(d) Any adult may, without a court order, take into temporary custody an infant under seven days of age that is voluntarily delivered to the individual by the infant's parent who does not express an intent to return for the infant. Any individual who takes an infant into temporary custody under this section shall perform any act necessary to protect the physical health and well-being of the infant and shall immediately notify the department of social services or a local law enforcement agency. An individual who takes an infant into temporary custody under this subsection may inquire as to the parents' identities and as to any relevant medical history, but the parent is not required to provide the information. The individual shall notify the parent that the parent is not required to provide the information.

(e) An individual described in subsection (b) or (d) of this section is immune from any civil or criminal liability that might otherwise be incurred or imposed as a result of any omission or action taken pursuant to the requirements of subsection (c) or (d) of this section as long as that individual was acting in good faith. The immunity established by this subsection does not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. (1979, c. 815, s. 1; 1985, c. 408, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 1; 1994, Ex. Sess., c. 27, s. 2; 1995, c. 391, s. 1; 1997-443, s. 11A.118(a); 1998-202, s. 6; 1999-456, s. 60; 2001-291, s. 2.)

Cross References. — For immunity from prosecution for child abandonment under G.S. 14-322 and 14-322.1 for parent voluntarily delivering infant less than 7 days old as provided in this section, see G.S. 14-322.3.

Editor's Note. — Articles 1-11, of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

Section 5 of Session Laws 1998-202, also effective July 1, 1999, repealed the former North Carolina Juvenile Code, Articles 41 through 59 of Chapter 7A, along with additional related provisions.

Where applicable, historical citations and case annotations to former sections have been added to the corresponding sections in new Chapter 7B.

At the end of new Chapter 7B are tables showing comparable sections and their disposition of new Chapter 7B.

Session Laws 1998-202, s. 36, contains a severability clause.

Session Laws 2001-291, s. 6, provides: "The Department of Health and Human Services, Division of Public Health, shall develop recommendations for a plan to inform the public as to the provisions of this act [Session Laws 2001-291, the Infant Homicide Prevention Act, which decriminalized abandonment of an infant under seven days of age when that infant is voluntarily delivered to certain health care providers, law enforcement officials, social services personnel, or emergency medical service personnel]. The plan shall contain information on responsible parenting in addition to information about the provisions of the act. The plans shall be targeted at adolescents and young adults, and shall be developed in consultation with law enforcement officials, medical professionals, and representatives of the Department of Public Instruction. Not later than April 1, 2002, the Department of Health and Human Services shall report its recommendations, and the projected cost for implementing its recommendations, to the chairpersons of the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, the Senate Appropriations Committee on Justice and Public Safety, and the House Appropriations Subcommittee on Justice and Public Safety."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

In addition to the plan developed pursuant to Session Laws 2001-291, s. 6, Session Laws 2003-284, s. 10.8B(a) and (b), effective July 1, 2003, provides: "(a) The Department of Health and Human Services, Division of Public Health and the Division of Social Services, shall incorporate education and awareness of the Infant Homicide Prevention Act pursuant to S.L. 2001-291, into other State-funded programs at the local level.

"(b) The Department shall report on its activities to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, and the Fiscal Research Division not later than April 1, 2004."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to

funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5, contains a severability clause.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article on the efficacy of a probable cause requirement in juvenile proceedings, see 59 N.C.L. Rev. 723 (1981).

For article on rights and interests of parent, child, family and state, see 4 Campbell L. Rev. 85 (1981).

For comment, "The Child Abuse Amendments of 1984: Congress Is Calling North Carolina to Respond to the Baby Doe Dilemma," 20 Wake Forest L. Rev. 975 (1984).

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Jurisdiction. — Trial court had authority pursuant to G.S. 7B-200(a)(6) to issue an ex parte order directing a mother to cease interference with a department's juvenile investigation concerning her children; however, where no request for nonsecure custody was presented and no petition alleging that the children were neglected was filed, the trial court lacked jurisdiction to award custody of the children to their father. In re K.C.G., 171 N.C. App. 488, 615 S.E.2d 76, 2005 N.C. App. LEXIS 1314 (2005).

Custody Did Not Violate Family Rights to Privacy and Integrity. — Department of Social Services employee did not act outside of the authority conferred on her by statute, or violate plaintiffs' rights to family privacy and integrity, by placing child in foster home or making telephone calls seeking information about child, after receiving reports that child was beaten by her father or otherwise abused. Renn v. Garrison, 100 F.3d 344 (4th Cir. 1996).

Court erred in ordering an infant placed in guardianship because homelessness and joblessness did not per se support an abuse or neglect finding; but the court committed no error in admitting social services and guardian ad litem reports or alleged hearsay where the objection to the hearsay was unpreserved. In re Ivey, 156 N.C. App. 398, 576 S.E.2d 386, 2003 N.C. App. LEXIS 123 (2003).

Cited in Whittington v. Hendren (In re Hendren), 156 N.C. App. 364, 576 S.E.2d 372, 2003 N.C. App. LEXIS 132 (2003); In re Q.V., 164 N.C. App. 737, 596 S.E.2d 867, 2004 N.C. App. LEXIS 1140 (2004); In re E.C., 174 N.C. App. 517, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005); In re C.W., — N.C. App. —, 641 S.E.2d 725, 2007 N.C. App. LEXIS 596 (2007).

§ 7B-501. Duties of person taking juvenile into temporary custody.

(a) A person who takes a juvenile into custody without a court order under G.S. 7B-500 shall proceed as follows:

(1) Notify the juvenile's parent, guardian, custodian, or caretaker that the juvenile has been taken into temporary custody and advise the parent, guardian, custodian, or caretaker of the right to be present with the juvenile until a determination is made as to the need for nonsecure custody. Failure to notify the parent that the juvenile is in custody shall not be grounds for release of the juvenile.

(2) Release the juvenile to the juvenile's parent, guardian, custodian, or caretaker if the person having the juvenile in temporary custody decides that continued custody is unnecessary.

(3) The person having temporary custody shall communicate with the director of the department of social services who shall consider prehearing diversion. If the decision is made to file a petition, the director shall contact the judge or person delegated authority pursuant to G.S. 7B-502 for a determination of the need for continued custody.

(b) A juvenile taken into temporary custody under this Article shall not be held for more than 12 hours, or for more than 24 hours if any of the 12 hours falls on a Saturday, Sunday, or legal holiday, unless:

(1) A petition or motion for review has been filed by the director of the department of social services, and

(2) An order for nonsecure custody has been entered by the court. (1979, c. 815, s. 1; 1981, c. 335, ss. 1, 2; 1994, Ex. Sess., c. 17, s. 1; c. 27, s. 3; 1995, c. 391, s. 2; 1998-202, s. 6; 1999-456, s. 60.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For comment, "The Child Abuse Amendments of 1984: Congress Is Calling North Carolina to Respond to the Baby Doe Dilemma," 20 Wake Forest L. Rev. 975 (1984).

§ 7B-502. Authority to issue custody orders; delegation.

In the case of any juvenile alleged to be within the jurisdiction of the court, the court may order that the juvenile be placed in nonsecure custody pursuant to criteria set out in G.S. 7B-503 when custody of the juvenile is necessary.

Any district court judge shall have the authority to issue nonsecure custody orders pursuant to G.S. 7B-503. The chief district court judge may delegate the court's authority to persons other than district court judges by administrative order which shall be filed in the office of the clerk of superior court. The administrative order shall specify which persons shall be contacted for approval of a nonsecure custody order pursuant to G.S. 7B-503. (1979, c. 815, s. 1; 1981, c. 425; 1983, c. 590, s. 1; 1998-202, s. 6; 1999-456, s. 60.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Jurisdiction. — Trial court had authority pursuant to G.S. 7B-200(a)(6) to issue an ex parte order directing a mother to cease interference with a department's juvenile investigation concerning her children; however, where no request for nonsecure custody was presented and no petition alleging that the children were neglected was filed, the trial court lacked jurisdiction to award custody of the children to their father. In re K.C.G., 171 N.C. App. 488, 615 S.E.2d 76, 2005 N.C. App. LEXIS 1314 (2005).

Court erred in ordering an infant placed in guardianship because homelessness and joblessness did not per se support an abuse or neglect finding; but the court committed no error in admitting social services and guardian ad litem reports or alleged hearsay where the objection to the hearsay was unpreserved. In re Ivey, 156 N.C. App. 398, 576 S.E.2d 386, 2003 N.C. App. LEXIS 123 (2003).

Cited in In re Poole, 151 N.C. App. 472, 568 S.E.2d 200, 2002 N.C. App. LEXIS 775 (2002); In re C.W., — N.C. App. —, 641 S.E.2d 725, 2007 N.C. App. LEXIS 596 (2007).

§ 7B-503. Criteria for nonsecure custody.

(a) When a request is made for nonsecure custody, the court shall first consider release of the juvenile to the juvenile's parent, relative, guardian, custodian, or other responsible adult. An order for nonsecure custody shall be made only when there is a reasonable factual basis to believe the matters alleged in the petition are true, and

(1) The juvenile has been abandoned; or

(2) The juvenile has suffered physical injury or sexual abuse; or

(3) The juvenile is exposed to a substantial risk of physical injury or sexual abuse because the parent, guardian, custodian, or caretaker has created the conditions likely to cause injury or abuse or has failed to provide, or is unable to provide, adequate supervision or protection; or

(4) The juvenile is in need of medical treatment to cure, alleviate, or prevent suffering serious physical harm which may result in death, disfigurement, or substantial impairment of bodily functions, and the

juvenile's parent, guardian, custodian, or caretaker is unwilling or unable to provide or consent to the medical treatment; or

(5) The parent, guardian, custodian, or caretaker consents to the nonsecure custody order; or

(6) The juvenile is a runaway and consents to nonsecure custody.

A juvenile alleged to be abused, neglected, or dependent shall be placed in nonsecure custody only when there is a reasonable factual basis to believe that there are no other reasonable means available to protect the juvenile. In no case shall a juvenile alleged to be abused, neglected, or dependent be placed in secure custody.

(b) Whenever a petition is filed under G.S. 7B-302(d1), the court shall rule on the petition prior to returning the child to a home where the alleged abuser or abusers are or have been present. If the court finds that the alleged abuser or abusers have a history of violent behavior against people, the court shall order the alleged abuser or abusers to submit to a complete mental health evaluation by a licensed psychologist or psychiatrist. The court may order the alleged abuser or abusers to pay the cost of any mental health evaluation required under this section. (1979, c. 815, s. 1; 1981, c. 426, ss. 1-4; c. 526; 1983, c. 590, ss. 2-6; 1987, c. 101; 1987 (Reg. Sess., 1988), c. 1090, s. 3; 1989, c. 550; 1998-202, s. 6; 1999-318, s. 4; 1999-456, s. 60.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article on rights and interest of parent, child, family and state, see 4 Campbell L. Rev. 85 (1981).

For article, "Coercive Governmental Intervention and the Family: A Comment on North Carolina's Proposed Standards," see 7 Campbell L. Rev. 145 (1984).

CASE NOTES

Editor's Note. *— Some of the following cases were decided prior to the enactment of this Chapter.*

Jurisdiction Required. — Subdivision (d) of this section requires that the trial court have jurisdiction before exercising the powers granted thereunder. In re Transp. of Juveniles, 102 N.C. App. 806, 403 S.E.2d 557 (1991).

Trial court had authority pursuant to G.S. 7B-200(a)(6) to issue an ex parte order directing a mother to cease interference with a department's juvenile investigation concerning her children; however, where no request for nonsecure custody was presented and no petition alleging that the children were neglected was filed, the trial court lacked jurisdiction to award custody of the children to their father. In re K.C.G., 171 N.C. App. 488, 615 S.E.2d 76, 2005 N.C. App. LEXIS 1314 (2005).

Standard of Proof for Termination and Removal Distinguished. — There is a substantive difference between the quantum of adequate proof of neglect and dependency for purposes of termination and for purposes of removal. The most significant difference is that while parental rights may not be terminated for threatened future harm, the Department of Social Services may obtain temporary custody of a child when there is a risk of neglect in the future. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

The task at the temporary custody or removal stage is to determine whether the child is exposed to a substantial risk of physical injury because the parent is unable to provide adequate protection. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

Findings of Fact Required. — Trial court erred in concluding that child was dependent there were no findings of fact concerning the mother's ability to provide care or supervision for the child or that the mother lacked an alternative child care arrangement to support the court's conclusion that the child was dependent. In re E.C., 174 N.C. App. 517, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

Court erred in ordering an infant placed in guardianship because homelessness and joblessness did not per se support an abuse or neglect finding; but the court committed no error in admitting social services and guardian ad litem reports or alleged hearsay where the objection to the hearsay was unpreserved. In re Ivey, 156 N.C. App. 398, 576 S.E.2d 386, 2003 N.C. App. LEXIS 123 (2003).

Removal of Child Upheld. — Evidence held sufficient to show that seven-year old child was exposed to a substantial risk of physical injury because of her mother's inability to maintain secure living arrangements for her, so as to permit the Department of Social Services to remove her from her mother's custody until such accommodations could be provided. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

Applied in In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

§ 7B-504. Order for nonsecure custody.

The custody order shall be in writing and shall direct a law enforcement officer or other authorized person to assume custody of the juvenile and to make due return on the order. A copy of the order shall be given to the juvenile's parent, guardian, custodian, or caretaker by the official executing the order.

An officer receiving an order for custody which is complete and regular on its face may execute it in accordance with its terms. The officer is not required to inquire into the regularity or continued validity of the order and shall not incur criminal or civil liability for its due service. (1979, c. 815, s. 1; 1989, c. 124; 1998-202, s. 6; 1999-456, s. 60.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Cited in In re H.S.F., 177 N.C. App. 193, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

§ 7B-505. Place of nonsecure custody.

A juvenile meeting the criteria set out in G.S. 7B-503 may be placed in nonsecure custody with the department of social services or a person designated in the order for temporary residential placement in:

(1) A licensed foster home or a home otherwise authorized by law to provide such care; or
(2) A facility operated by the department of social services; or
(3) Any other home or facility, including a relative's home approved by the court and designated in the order.

In placing a juvenile in nonsecure custody under this section, the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that placement with the relative would be contrary to the best interests of the juvenile. In placing a juvenile in nonsecure custody under this section, the court shall also consider whether it is in the juvenile's best interest to remain in the juvenile's community of residence. In placing a juvenile in nonsecure custody under this section, the court shall consider the Indian Child Welfare Act, Pub. L. No. 95-608, 25 U.S.C. §§ 1901, et seq., as amended, and the Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056, as amended, as they may apply. Placement of a juvenile with a relative outside of this State must be in accordance with the Interstate Compact on the Placement of Children, Article 38 of this Chapter. (1979, c. 815, s. 1; 1983, c. 639, ss. 1, 2; 1997-390, s. 4; 1997-443, s. 11A.118(a); 1998-202, s. 6; 1998-229, ss. 3, 20; 1999-456, s. 60; 2002-164, s. 4.7.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

***Editor's Note.** — The following case was decided prior to the enactment of this Chapter.*

The trial court had jurisdiction to enter a temporary nonsecure custody order placing children who had been visiting noncustodial parent in North Carolina, but whose "home state" under the former UCCJA was Iowa, with DSS where there was a reasonable factual basis to believe that one child had been sexually abused and hospitalized for depression and the other child had been physically abused and was hospitalized for stress disorder, pending application to home state to determine if Iowa was willing to exercise jurisdiction. In re Van Kooten, 126 N.C. App. 764, 487 S.E.2d 160 (1997), appeal dismissed, 347 N.C. 576, 502 S.E.2d 618 (1998).

Placement With Relatives. — When, in a dependency proceeding, a trial court placed a child's custody with the child's foster parents without finding it was contrary to the child's best interests to place her with willing relatives, pursuant to G.S. 7B-903(a)(2)c, this was error because, inter alia, G.S. 7B-505 required the trial court, in entering a nonsecure custody order, to first consider the child's placement with a relative; G.S. 7B-506(h) continued this requirement at each hearing to determine the need for the child's continued custody outside of her home, so the general assembly intended to apply this requirement to reviews of custody placements. In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

§ 7B-506. Hearing to determine need for continued nonsecure custody.

(a) No juvenile shall be held under a nonsecure custody order for more than seven calendar days without a hearing on the merits or a hearing to determine the need for continued custody. A hearing on nonsecure custody conducted under this subsection may be continued for up to 10 business days with the consent of the juvenile's parent, guardian, custodian, or caretaker and, if appointed, the juvenile's guardian ad litem. In addition, the court may require the consent of additional parties or may schedule the hearing on custody despite a party's consent to a continuance. In every case in which an order has been entered by an official exercising authority delegated pursuant to G.S. 7B-502, a hearing to determine the need for continued custody shall be conducted on the day of the next regularly scheduled session of district court in the city or county where the order was entered if such session precedes the expiration of the applicable time period set forth in this subsection: Provided, that if such session does not precede the expiration of the time period, the hearing may be conducted at another regularly scheduled session of district court in the district where the order was entered.

(b) At a hearing to determine the need for continued custody, the court shall receive testimony and shall allow the guardian ad litem, or juvenile, and the juvenile's parent, guardian, custodian, or caretaker the right to introduce evidence, to be heard in the person's own behalf, and to examine witnesses. The State shall bear the burden at every stage of the proceedings to provide clear and convincing evidence that the juvenile's placement in custody is necessary. The court shall not be bound by the usual rules of evidence at such hearings.

(c) The court shall be bound by criteria set forth in G.S. 7B-503 in determining whether continued custody is warranted.

(c1) In determining whether continued custody is warranted, the court shall consider the opinion of the mental health professional who performed an evaluation under G.S. 7B-503(b) before returning the juvenile to the custody of that individual.

(d) If the court determines that the juvenile meets the criteria in G.S. 7B-503 and should continue in custody, the court shall issue an order to that effect. The order shall be in writing with appropriate findings of fact and signed and entered within 30 days of the completion of the hearing. The findings of fact shall include the evidence relied upon in reaching the decision and purposes which continued custody is to achieve.

(e) If the court orders at the hearing required in subsection (a) of this section that the juvenile remain in custody, a subsequent hearing on continued custody shall be held within seven business days of that hearing, excluding Saturdays, Sundays, and legal holidays when the courthouse is closed for transactions, and pending a hearing on the merits, hearings thereafter shall be held at intervals of no more than 30 calendar days.

(f) Hearings conducted under subsection (e) of this section may be waived only with the consent of the juvenile's parent, guardian, custodian, or caretaker, and, if appointed, the juvenile's guardian ad litem.

The court may require the consent of additional parties or schedule a hearing despite a party's consent to waiver.

(g) Reserved.

(h) At each hearing to determine the need for continued custody, the court shall:

(1) Inquire as to the identity and location of any missing parent and as to whether paternity is at issue. The court shall include findings as to the efforts undertaken to locate the missing parent and to serve that parent, as well as efforts undertaken to establish paternity when paternity is an issue. The order may provide for specific efforts aimed at determining the identity and location of any missing parent, as well as specific efforts aimed at establishing paternity.

(2) Inquire as to whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order temporary placement of the juvenile with the relative unless the court finds that placement with the relative would be contrary to the best interests of the juvenile. In placing a juvenile in nonsecure custody under this section, the court shall consider the Indian Child Welfare Act, Pub. L. No. 95-608, 25 U.S.C. §§ 1901, et seq., as amended, and the Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056, as amended, as they may apply. Placement of a juvenile with a relative outside of this State must be in accordance with the Interstate Compact on the Placement of Children set forth in Article 38 of this Chapter; and

(3) Inquire as to whether there are other juveniles remaining in the home from which the juvenile was removed and, if there are, inquire as to the specific findings of the assessment conducted under G.S. 7B-302 and any actions taken or services provided by the director for the protection of the other juveniles. (1979, c. 815, s. 1; 1981, c. 469, s. 13; 1987 (Reg. Sess., 1988), c. 1090, s. 4; 1994, Ex. Sess., c. 27, s. 1; 1997-390, ss. 5, 6; 1998-229, s. 4; 1998-202, s. 6; 1998-229, ss. 4.1, 21; 1999-318, s. 5; 1999-456, s. 60; 2001-208, ss. 16, 24; 2001-487, s. 101; 2003-337, s. 9; 2005-55, s. 11; 2007-276, s. 1.)

Editor's Note. — Session Laws 2005-55, s. 13, provides: "The Department of Health and Human Services shall continue to assess the alternative response system of child protection as to the impact the system has in child safety, timeliness of response, timeliness of service, and coordination of local human services. The Department shall report the status of its evaluation to the Legislative Study Commission on Children and Youth, the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division before the convening of the 2006 Regular Session of the 2005 General Assembly."

Effect of Amendments. — Session Laws 2007-276, s. 1, effective October 1, 2007, substituted "the right" for "an opportunity" in the first sentence of subsection (b).

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. *— The following case notes were decided prior to the enactment of this Chapter.*

The determination of "reasonable efforts" under former § 7A-577(h) is a conclusion of law because it requires the exercise of judgment; appellate review of a trial court's conclusions of law is limited to whether they are supported by findings of fact. In re Helms, 127 N.C. App. 505, 491 S.E.2d 672 (1997).

Reasonable Efforts Shown. — The DSS made reasonable efforts to prevent child's removal from her home where the DSS entered into four different protection plans with the mother regarding the care and protection of the child in an effort by DSS to stabilize the child's home environment and protect her from violent individuals and drugs, and to encourage the mother to apply for food stamps, AFDC, and Medicaid. In re Helms, 127 N.C. App. 505, 491 S.E.2d 672 (1997).

Agency Had Standing Under Nonsecure Custody Order. — DSS had standing to file a termination of parental rights petition as it had been granted indefinite custody of a child under a nonsecure custody order issued under G.S. 7B-506(a), and G.S. 7B-1103(a)(3) did not limit standing to parties granted custody by an order entered pursuant to G.S. 7B-905, but required only that DSS be granted custody by a court of competent jurisdiction. In re T.M., — N.C. App. —, 643 S.E.2d 471, 2007 N.C. App. LEXIS 802 (2007).

Hearing on five petitions alleging abuse, neglect, and/or dependency was clearly denominated a hearing to determine the need for continued custody. The judge therefore had the discretion to either continue nonsecure custody or to return the children to their home; he did not have the authority to dismiss the petitions because in so doing he made an unauthorized determination of the merits of the case. There is no express statutory authority allowing the judge to dismiss the petitions at a five-day hearing. In re Guarante, 109 N.C. App. 598, 427 S.E.2d 883 (1993).

Placement With Relatives. — When, in a dependency proceeding, a trial court placed a child's custody with the child's foster parents without finding it was contrary to the child's best interests to place her with willing relatives, pursuant to G.S. 7B-903(a)(2)c, this was error because, inter alia, G.S. 7B-505 required the trial court, in entering a nonsecure custody order, to first consider the child's placement with a relative; G.S. 7B-506(h) continued this requirement at each hearing to determine the need for the child's continued custody outside of her home, so the general assembly intended to apply this requirement to reviews of custody placements. In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

Cited in In re Poole, 151 N.C. App. 472, 568 S.E.2d 200, 2002 N.C. App. LEXIS 775 (2002); In re B.N.H., 170 N.C. App. 157, 611 S.E.2d 888, 2005 N.C. App. LEXIS 885 (2005); In re H.S.F., 177 N.C. App. 193, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

§ 7B-507. Reasonable efforts.

(a) An order placing or continuing the placement of a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order:

(1) Shall contain a finding that the juvenile's continuation in or return to the juvenile's own home would be contrary to the juvenile's best interest;

(2) Shall contain findings as to whether a county department of social services has made reasonable efforts to prevent or eliminate the need for placement of the juvenile, unless the court has previously determined under subsection (b) of this section that such efforts are not required or shall cease;

(3) Shall contain findings as to whether a county department of social services should continue to make reasonable efforts to prevent or eliminate the need for placement of the juvenile, unless the court has previously determined or determines under subsection (b) of this section that such efforts are not required or shall cease;

(4) Shall specify that the juvenile's placement and care are the responsibility of the county department of social services and that the agency is to provide or arrange for the foster care or other placement of the juvenile; and

(5) May provide for services or other efforts aimed at returning the juvenile to a safe home or at achieving another permanent plan for the juvenile.

A finding that reasonable efforts have not been made by a county department of social services shall not preclude the entry of an order authorizing the juvenile's placement when the court finds that placement is necessary for the protection of the juvenile. Where efforts to prevent the need for the juvenile's placement were precluded by an immediate threat of harm to the juvenile, the court may find that the placement of the juvenile in the absence of such efforts was reasonable.

(b) In any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:

(1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time;

(2) A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances as defined in G.S. 7B-101;

(3) A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent; or

(4) A court of competent jurisdiction has determined that: the parent has committed murder or voluntary manslaughter of another child of the parent; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; or has committed a felony assault resulting in serious bodily injury to the child or another child of the parent.

(c) At any hearing at which the court finds that reasonable efforts to eliminate the need for the juvenile's placement are not required or shall cease, the court shall direct that a permanency planning hearing as required by G.S. 7B-907 be held within 30 calendar days after the date of the hearing and, if practicable, shall set the date and time for the permanency planning hearing. At any hearing at which the court finds and orders that reasonable efforts to reunify a family shall cease, the affected parent, guardian, or custodian or that parent, guardian, or custodian's counsel may give notice to preserve the parent, guardian, or custodian's right to appeal the finding and order in accordance with G.S. 7B-1001(a)(5). Notice may be given in open court or in writing within 10 days of the hearing at which the court orders the efforts to reunify the family to cease. The party giving notice shall be permitted to make a detailed offer of proof as to any evidence that person sought to offer in opposition to cessation of reunification that the court refused to admit as evidence or to consider.

(d) In determining reasonable efforts to be made with respect to a juvenile and in making such reasonable efforts, the juvenile's health and safety shall be the paramount concern. Reasonable efforts to preserve or reunify families may be made concurrently with efforts to plan for the juvenile's adoption, to place the juvenile with a legal guardian, or to place the juvenile in another permanent arrangement. (1998-229, ss. 4.1, 21.1; 1999-456, s. 60; 2001-487, s. 2; 2005-398, s. 1.)

Editor's Note. — This section was originally enacted by Session Laws 1998-229, s. 4.1 as 7A-577.1 and was then amended and recodified by s. 21.1 of that act as 7B-506.1. It has been renumbered as 7B-507 at the direction of the Revisor of Statutes.

Subsection (c), as rewritten by Session Laws 2005-398, s. 1, effective October 1, 2005, is applicable to petitions or actions filed on or after that date.

CASE NOTES

Applicability. — When a trial court granted children's custody to their grandparents and released department of social services from further responsibility, G.S. 7B-507(a), which requires findings as to the agency's obligation of reasonable efforts to eliminate the need for the children's placement in the agency's custody, did not apply. In re Padgett, 156 N.C. App. 644, 577 S.E.2d 337, 2003 N.C. App. LEXIS 324 (2003).

Award of guardianship did not cease social services department's duty to continue reunification efforts with the mother because the dispositional order did not make a guardianship the permanent plan. Therefore, the trial court was not required to make findings pursuant to G. S. 7B-507(b). In re E.C., 174 N.C. App. 517, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

Reunification Efforts Not Warranted at Permanency Planning Hearing. — Given its findings, the trial court, at the permanency planning hearing, had no obligation to further attempt to reunify mother and child and, indeed, had the obligation to locate permanent placement for the child outside of her home. In re Dula, 143 N.C. App. 16, 544 S.E.2d 591, 2001 N.C. App. LEXIS 226 (2001), aff'd, 354 N.C. 356, 554 S.E.2d 336 (2001).

Appointment of Permanent Legal Guardians in Disposition Order Held Improper. — Trial court erred in appointing permanent legal guardians in its disposition order where the mother did not have statutorily required notice that a permanent plan was being considered and the trial court did not make the findings mandated by G.S. 7B-907(b), (c), and (f). In re D.C., — N.C. App. —, 644 S.E.2d 640, 2007 N.C. App. LEXIS 1168 (2007).

Insufficient Evidence to Terminate Reunification Efforts. — Order terminating efforts to reunite mother and two year old daughter and directing termination of mother's parental rights was reversed as overwhelming evidence was that mother was cooperating with the reunification plan and was making progress and only the guardian ad litem recommended reunification efforts cease. In re Eckard, 144 N.C. App. 187, 547 S.E.2d 835, 2001 N.C. App. LEXIS 449 (2001).

Trial court's order which changed a mother's permanency planning order from reunification efforts with her two minor children to termination of her parental rights was based on findings of fact which were deemed insufficient to support the conclusions of law, and accordingly, there was no compliance with the requirement of subsection (b) of this section, and the order was reversed; the trial court failed to make specific factual findings that efforts towards reunification with the mother would be futile or that such efforts were inconsistent with the children's health, safety, and need for a permanent home, and the findings listed were actually conclusions of law. In re Weiler, 158 N.C. App. 473, 581 S.E.2d 134, 2003 N.C. App. LEXIS 1185 (2003).

Trial court erred in entering a permanency order relieving an agency from reunification efforts between a father and his children; the court failed to make required findings of fact pursuant to G.S. 7B-507(b) and G.S. 7B-907(b), and the evidence did not show that reunification was futile. In re Everett, 161 N.C. App. 475, 588 S.E.2d 579, 2003 N.C. App. LEXIS 2201 (2003).

Evidence Sufficient to Terminate Reunification Efforts. — Despite an appellate court's determination that several of the trial court's findings of fact were not supported by clear, cogent, and convincing evidence in a neglect and abuse case, it also found that several findings of fact were so supported and provided sufficient evidence to uphold the neglect and abuse adjudication of a mother's infant child based on the mother's (1) whereabouts to have been unknown upon the baby's discharge from the hospital, (2) testing positive for marijuana since the adjudication hearing, (3) refusal to attend several substance abuse assessments, (4) failure to make progress on her psychological problems, and (5) abuse and neglect adjudication regarding an older daughter. In re M.J.G., 168 N.C. App. 638, 608 S.E.2d 813, 2005 N.C. App. LEXIS 435 (2005).

In a case involving G.S. 7B-507(a) and G.S. 7B-907(c), the trial court did not err in granting guardianship of the mother's three older children to the maternal aunt because the best interests of the children were paramount, and the trial court had no assurances the mother had made sufficient progress for the children to be returned to the mother's care. In re T.K., 171 N.C. App. 35, 613 S.E.2d 739, 2005 N.C. App. LEXIS 1191 (2005).

Trial court's findings supported its conclusion that the children were dependent under G.S. 7B-101(9) because it found that the mother could not care for her children without constant assistance, and that such assistance was not available to her. In re J.J., — N.C. App. —, 637 S.E.2d 258, 2006 N.C. App. LEXIS 2412 (2006).

Trial court did not err in failing to order the local social services department to assist the mother in her reunification efforts where the evidence supported the trial court's findings that continued reunification efforts were unlikely to succeed and were not in the children's best interests. In re D.C., — N.C. App. —, 644 S.E.2d 640, 2007 N.C. App. LEXIS 1168 (2007).

Termination of a mother's visitation with a child was not an abuse of discretion under G.S. 7B-507, G.S. 7B-901, G.S. 7B-903, and G.S. 7B-905 and was supported by findings of the parents' unsuccessful parenting of a sibling and their lack of progress in working with a department of social services to parent the child. In re C.M., — N.C. App. —, 644 S.E.2d 588, 2007 N.C. App. LEXIS 1043 (2007).

Trial court's 17 findings supported its conclusion that further reunification efforts with the parents would be futile for purposes of G.S. 7B-507(b)(1) and (3), including that: (1) the parents were mildly mentally retarded; (2) the mother shared characteristics with parents known to abuse their children; (3) the mother failed to comply with a sibling's case plan; (4) the department of social services had offered the parents intensive case management services after the child's birth; and (5) there was a concern about the father's ability to be a primary caretaker. In re C.M., — N.C. App. —, 644 S.E.2d 588, 2007 N.C. App. LEXIS 1043 (2007).

Decision to cease reunification efforts and visitation was not manifestly unsupported because there was clear and convincing evidence supporting the trial court's dispositional finding that the parents failed to cooperate with various social workers when their first child was placed in protective custody, failed to fully comply with family service plans relating to the removal of their first child, did not make reasonable efforts at reunification with their first child, and did not recognize appropriate responsibility or involvement in the injuries of their first child. In re N.G., — N.C. App. —, 650 S.E.2d 45, 2007 N.C. App. LEXIS 1970 (2007).

Concurrent Permanent Placement Plan of Reunification and Adoption Held Proper. — Concurrent permanent placement plan of reunification and adoption as allowed by G.S. 7B-507(d) did not conflict with the requirement of G.S. 7B-907(a) to obtain permanent placement within a reasonable period of time; concurrent plans leading to adoption of children by their foster parents and reunification with their mother were proper. In re J.J.L., 170 N.C. App. 368, 612 S.E.2d 404, 2005 N.C. App. LEXIS 1010 (2005).

Placement with County Social Services Department. — Trial court did not err in placing the minor child in the custody of the county social services department despite the father's contention that the minor child could have been placed with relatives; no showing was made that suitable relatives existed, especially since the father's paternity was at issue, and thus placement with the paternal grandparents as suggested by the father might not be in the best interests of the minor child since the minor child might find that they were not the minor child's relatives after all. In re D.S.A., — N.C. App. —, 641 S.E.2d 18, 2007 N.C. App. LEXIS 375 (2007).

Applied in In re H. W., 163 N.C. App. 438, 594 S.E.2d 211, 2004 N.C. App. LEXIS 414 (2004); In re M.R.D.C., 166 N.C. App. 693, 603 S.E.2d 890, 2004 N.C. App. LEXIS 2030 (2004), cert. denied, 359 N.C. 321, 611 S.E.2d 413 (2005).

Cited in In re K.S, — N.C. App. —, 646 S.E.2d 541, 2007 N.C. App. LEXIS 1164 (2007); In re C.M.S., — N.C. App. —, 646 S.E.2d 592, 2007 N.C. App. LEXIS 1433 (2007).

§ 7B-508. Telephonic communication authorized.

All communications, notices, orders, authorizations, and requests authorized or required by G.S. 7B-501, 7B-503, and 7B-504 may be made by telephone when other means of communication are impractical. All written orders pursuant to telephonic communication shall bear the name and the title of the person communicating by telephone, the signature and the title of the official entering the order, and the hour and the date of the authorization. (1979, c. 815, s. 1; 1981, c. 469, s. 13; 1987 (Reg. Sess., 1988), c. 1090, s. 4; 1994, Ex. Sess., c. 27, s. 1; 1997-390, ss. 5, 6; 1998-202, s. 6; 1998-229, s. 4; 1999-456, s. 60.)

Editor's Note. — This section was originally enacted as G.S. 7B-507. It has been renumbered as this section at the direction of the Revisor of Statutes.

ARTICLE 6.

Basic Rights.

§ 7B-600. Appointment of guardian.

(a) In any case when no parent appears in a hearing with the juvenile or when the court finds it would be in the best interests of the juvenile, the court may appoint a guardian of the person for the juvenile. The guardian shall operate under the supervision of the court with or without bond and shall file only such reports as the court shall require. The guardian shall have the care, custody, and control of the juvenile or may arrange a suitable placement for the juvenile and may represent the juvenile in legal actions before any court. The guardian may consent to certain actions on the part of the juvenile in place of the parent including (i) marriage, (ii) enlisting in the armed forces, and (iii) enrollment in school. The guardian may also consent to any necessary remedial, psychological, medical, or surgical treatment for the juvenile. The authority of the guardian shall continue until the guardianship is terminated by court order, until the juvenile is emancipated pursuant to Article 35 of Subchapter IV of this Chapter, or until the juvenile reaches the age of majority.

(b) In any case where the court has determined that the appointment of a relative or other suitable person as guardian of the person for a juvenile is in the best interest of the juvenile and has also made findings in accordance with G.S. 7B-907 that guardianship is the permanent plan for the juvenile, the court may not terminate the guardianship or order that the juvenile be reintegrated into a parent's home unless the court finds that the relationship between the guardian and the juvenile is no longer in the juvenile's best interest, that the guardian is unfit, that the guardian has neglected a guardian's duties, or that the guardian is unwilling or unable to continue assuming a guardian's duties. If a party files a motion or petition under G.S. 7B-906 or G.S. 7B-1000, the court may, prior to conducting a review hearing, do one or more of the following:

(1) Order the county department of social services to conduct an investigation and file a written report of the investigation regarding the performance of the guardian of the person of the juvenile and give testimony concerning its investigation.

(2) Utilize the community resources in behavioral sciences and other professions in the investigation and study of the guardian.

(3) Ensure that a guardian ad litem has been appointed for the juvenile in accordance with G.S. 7B-601 and has been notified of the pending motion or petition.

(4) Take any other action necessary in order to make a determination in a particular case.

(c) If the court appoints an individual guardian of the person pursuant to this section, the court shall verify that the person being appointed as guardian of the juvenile understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile. (1979, c. 815, s. 1; 1997-390, s. 7; 1998-202, s. 6; 1999-456, s. 60; 2000-124, s. 1; 2003-140, s. 9(a).)

Editor's Note. — Articles 1-11, of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

Section 5 of Session Laws 1998-202, also effective July 1, 1999, repealed the former North Carolina Juvenile Code, Articles 41 through 59 of Chapter 7A, along with additional related provisions.

Where applicable, historical citations and case annotations to former sections have been added to the corresponding sections in new Chapter 7B.

At the end of new Chapter 7B are tables showing comparable sections and their disposition of new Chapter 7B.

Session Laws 1998-202, s. 36, contains a severability clause.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. *— The following case was decided prior to the enactment of this Chapter.*

Removal of Guardian. — A legal guardian of a child's person, unlike a mere custodian, is not removable for a mere change of circumstances; unfitness or neglect of duty must be shown. In re Williamson, 77 N.C. App. 53, 334 S.E.2d 428 (1985), cert. denied, 316 N.C. 194, 341 S.E.2d 584 (1986).

Appointment of Guardian Was Proper. — Guardian was properly appointed for child where the dispositional order demonstrated that the trial court found guardianship to be in the child's best interest following the presentation at the adjudicatory hearing of all the evidence concerning the mother's failure to properly care for the child, and after the review of the social service department's and guardian ad litem's reports. Additionally, the mother did not appear at the dispositional hearing, providing the court with additional grounds to appoint a guardian. In re E.C., 174 N.C. App. 517, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

Amended G.S. 7B-906(b) and G.S. 7B-600(b) applied to a review conducted in October 2002 because the amended statutes applied to reviews that were commenced after October 1, 2000. In re J.D.C., 174 N.C. App. 157, 620 S.E.2d 49, 2005 N.C. App. LEXIS 2250 (2005).

Based on its consideration of reports from a home study conducted by a county department of social services in Virginia, a trial court adequately complied with G.S. 7B-600(c) and G.S. 7B-907(f) in placing children in the guardianship of their maternal grandparents. In re J.E., — N.C. App. —, 643 S.E.2d 70, 2007 N.C. App. LEXIS 801 (2007).

Applicability. — Trial court's denial of a mother's request to regain legal and physical custody of her minor child, who was in the legal custody of the county department of social services and under the guardianship of the child's grandparents, was reversed and remanded because while the court held multiple proceedings pursuant to G.S. 7B-906, there was never a finding made that guardianship was the permanent plan under G.S. 7B-907; therefore, G.S. 7B-600(b) was inapplicable, and the trial court erred by imposing the burden of proof upon the mother. In re J.D.C., 174 N.C. App. 157, 620 S.E.2d 49, 2005 N.C. App. LEXIS 2250 (2005).

Cited in In re J.L.S., 168 N.C. App. 721, 608 S.E.2d 823, 2005 N.C. App. LEXIS 453 (2005); In re L.M.C., 170 N.C. App. 676, 613 S.E.2d 256, 2005 N.C. App. LEXIS 1089 (2005).

§ 7B-601. Appointment and duties of guardian ad litem.

(a) When in a petition a juvenile is alleged to be abused or neglected, the court shall appoint a guardian ad litem to represent the juvenile. When a juvenile is alleged to be dependent, the court may appoint a guardian ad litem to represent the juvenile. The juvenile is a party in all actions under this Subchapter. The guardian ad litem and attorney advocate have standing to represent the juvenile in all actions under this Subchapter where they have been appointed. The appointment shall be made pursuant to the program established by Article 12 of this Chapter unless representation is otherwise provided pursuant to G.S. 7B-1202 or G.S. 7B-1203. The appointment shall terminate when the permanent plan has been achieved for the juvenile and approved by the court. The court may reappoint the guardian ad litem pursuant to a showing of good cause upon motion of any party, including the guardian ad litem, or of the court. In every case where a nonattorney is appointed as a guardian ad litem, an attorney shall be appointed in the case in order to assure protection of the juvenile's legal rights throughout the proceeding. The duties of the guardian ad litem program shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to facilitate, when appropriate, the settlement of disputed issues; to offer evidence and examine witnesses at adjudication; to explore options with the court at the dispositional hearing; to conduct follow-up investigations to insure that the orders of the court are being properly executed; to report to the court when the needs of the juvenile are not being met; and to protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court.

(b) The court may authorize the guardian ad litem to accompany the juvenile to court in any criminal action wherein the juvenile may be called on to testify in a matter relating to abuse.

(c) The guardian ad litem has the authority to obtain any information or reports, whether or not confidential, that may in the guardian ad litem's opinion be relevant to the case. No privilege other than the attorney-client privilege may be invoked to prevent the guardian ad litem and the court from obtaining such information. The confidentiality of the information or reports shall be respected by the guardian ad litem, and no disclosure of any information or reports shall be made to anyone except by order of the court or unless otherwise provided by law. (1979, c. 815, s. 1; 1981, c. 528; 1983, c. 761, s. 159; 1987 (Reg. Sess., 1988), c. 1090, s. 5; 1993, c. 537, s. 1; 1995, c. 324, s. 21.13; 1998-202, s. 6; 1999-432, s. 1; 1999-456, s. 60.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For comment, "The Child Abuse Amendments of 1984: Congress Is Calling North Carolina to Respond to the Baby Doe Dilemma," 20 Wake Forest L. Rev. 975 (1984).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

Former § 7A-586 (see now this section) did not prevent the application of other pertinent statutory provisions. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

Whether appointment of a guardian ad litem for a minor is necessary is controlled by § 1A-1, Rule 17(b). In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

Trial court erred in failing to appoint a guardian ad litem (GAL) for the child from the beginning of a termination proceeding; a GAL and an attorney advocate performed distinct and separate roles, so the appointment of the attorney advocate as the GAL after three and a half days of testimony was insufficient, even though the advocate had been involved in the case from an earlier time. In re R.A.H., 171 N.C. App. 427, 614 S.E.2d 382, 2005 N.C. App. LEXIS 1256 (2005).

Because five different guardian ad litems (GAL) made sporadic appearances for a mother's children at different hearings over a three-year period, and the only GAL actually appointed by the court never appeared at any hearing, there was no GAL discharging their duty to protect and promote the best interests of the children until formally relieved of the responsibility by the court as required by G.S. 7B-601(a). In re J.E., — N.C. App. —, 644 S.E.2d 28, 2007 N.C. App. LEXIS 1048 (2007).

Authority of Guardian ad Litem to Inquire as to Child's Adoption. — It was the duty and right of guardian ad litem to inquire into Department of Social Services' handling of child's adoption, and it was within the district court's jurisdiction to order DSS to turn over requested information, despite its confidential nature. In re N.C.L., 89 N.C. App. 79, 365 S.E.2d 213, cert. denied, 322 N.C. 481, 370 S.E.2d 226 (1988).

Continuing Duty to Conduct Follow-Up Investigations. — Former G.S. 7A-586 (see now this section) gave the guardian ad litem many more responsibilities and duties than a guardian ad litem ordinarily had. The guardian ad litem had the continuing duty to conduct follow-up investigations and to report to the court when the needs of the juveniles were not being met. Wilkinson v. Riffel, 72 N.C. App. 220, 324 S.E.2d 31 (1984).

Right of Guardian to Confidential Information. — Former G.S. 7A-586 (see now this section) specifically gave the court the power to order that the guardian ad litem have confidential information which in the opinion of the guardian ad litem is relevant to the case. Wilkinson v. Riffel, 72 N.C. App. 220, 324 S.E.2d 31 (1984).

The court may order the release of confidential information to a guardian ad litem if the guardian ad litem needs the information to determine whether the needs of the juveniles are being met. Wilkinson v. Riffel, 72 N.C. App. 220, 324 S.E.2d 31 (1984).

District Court's Jurisdiction Held Not Ended by Notice of Adoption Petition. — District court jurisdiction attached on March 25, 1987, when guardian ad litem filed a motion in district court to compel Department of Social Services (DSS) to grant his requests to visit child and to obtain information on any prospective adoptive parents, and subsequent notice, received on March 31, 1987, to the effect that a petition for adoption had been filed, did not end the district court's jurisdiction. In re N.C.L., 89 N.C. App. 79, 365 S.E.2d 213, cert. denied, 322 N.C. 481, 370 S.E.2d 226 (1988).

Cited in In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639, 2005 N.C. App. LEXIS 797 (2005); In re J.S.L., 177 N.C. App. 151, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006).

Applied in In re L.B., — N.C. App. —, 639 S.E.2d 23, 2007 N.C. App. LEXIS 84 (2007).

§ 7B-602. Parent's right to counsel; guardian ad litem.

(a) In cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right. When a petition is filed alleging that a juvenile is abused, neglected, or dependent, the clerk shall appoint provisional counsel for each parent named in the petition and indicate the appointment on the juvenile summons or attached notice. At the first hearing, the court shall dismiss the provisional counsel if the respondent parent:

(1) Does not appear at the hearing;
(2) Does not qualify for court-appointed counsel;
(3) Has retained counsel; or
(4) Waives the right to counsel.

The court shall confirm the appointment of counsel if subdivisions (1) through (4) of this subsection are not applicable to the respondent parent.

The court may reconsider a parent's eligibility and desire for appointed counsel at any stage of the proceeding.

(b) In addition to the right to appointed counsel set forth above, a guardian ad litem shall be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent who is under the age of 18 years and who is not married or otherwise emancipated. The appointment of a guardian ad litem under this subsection shall not affect the minor parent's entitlement to a guardian ad litem pursuant to G.S. 7B-601 in the event that the minor parent is the subject of a separate juvenile petition.

(c) On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent in accordance with G.S. 1A-1, Rule 17, if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest. The parent's counsel shall not be appointed to serve as the guardian ad litem.

(d) Communications between the guardian ad litem appointed under this section and the parent and between the guardian ad litem and the parent's counsel shall be privileged and confidential to the same extent that communications between the parent and the parent's counsel are privileged and confidential.

(e) Guardians ad litem appointed under this section may engage in all of the following practices:

(1) Helping the parent to enter consent orders, if appropriate.
(2) Facilitating service of process on the parent.
(3) Assuring that necessary pleadings are filed.
(4) Assisting the parent and the parent's counsel, if requested by the parent's counsel, to ensure that the parent's procedural due process requirements are met. (1979, c. 815, s. 1; 1981, c. 469, s. 14; 1998-202, s. 6; 1999-456, s. 60; 2000-144, s. 16; 2001-208, s. 2; 2001-487, s. 101; 2005-398, s. 2.)

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, G.S. 7A-498 et seq.

Editor's Note. — This section, as rewritten by Session Laws 2005-398, s. 2, effective October 1, 2005, is applicable to petitions or actions filed on or after that date.

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *Some of the following cases were decided prior to the enactment of this Chapter.*

Right to Counsel, Generally. — In a child dependency proceeding, services of counsel cannot be forced upon an unwilling defendant; however, the waiver of counsel, like the waiver of all constitutional rights, must be knowing and voluntary, and the record must show that the defendant is literate and competent, that he understands the consequences of his waiver, and that, in waiving his right, he is voluntarily exercising his own free will. In re S.L.L., 167 N.C. App. 362, 605 S.E.2d 498, 2004 N.C. App. LEXIS 2190 (2004).

Counsel Not Required in Every Termination Proceeding. — It cannot be said that the Constitution requires the appointment of counsel in every parental termination proceeding; the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings is to be answered in the first instance by the trial court, subject to appellate review. Lassiter v. Department of Social Servs., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640, rehearing denied, 453 U.S. 927, 102 S. Ct. 889, 69 L. Ed. 2d 1023 (1981).

Trial Court Erred by Equating Request for New Counsel With Waiver of Court-Appointed Counsel. — In a child dependency proceeding, a new trial was required since the trial court erred by equating the father's request for a new counsel with a waiver of court-appointed counsel, and requiring the father to proceed to trial pro se. In re S.L.L., 167 N.C. App. 362, 605 S.E.2d 498, 2004 N.C. App. LEXIS 2190 (2004).

Section G.S. 7B-602(b) Analysis Compared to G.S. 7B-1101 Analysis for Appointment of Guardian Ad Litem. — Court saw no reason why the analysis of the issues arising under G.S. 7B-1101 were not applicable to the same issues arising under G.S. 7B-602(b) with respect to whether to appoint a guardian ad litem; the G.S. 7B-1101 analysis centered on the intertwining of the parent's condition and the child's neglect. In re C.B., 171 N.C. App. 341, 614 S.E.2d 579, 2005 N.C. App. LEXIS 1205 (2005).

Counsel Not Shown to Be Ineffective. — Although father had a right to effective counsel under G.S. 7B-602(a) in a termination of parental rights proceeding, he failed to show how his attorney's tardiness caused him to be denied a fair hearing, failed to identify what direct testimony was missed, and did not explain how counsel's failure to hear the testimony prejudiced father. In re L.C., — N.C. App. —, 638 S.E.2d 638, 2007 N.C. App. LEXIS 83 (2007).

Failure to Appoint Guardian Ad Litem. — Trial court erroneously failed to appoint a guardian ad litem for the mother as required by G.S. 7B-602 where the mother had mental health issues, a depressive disorder and borderline personality disorder, which resulted in the daughter's dependency. In re L.M.C., 170 N.C. App. 676, 613 S.E.2d 256, 2005 N.C. App. LEXIS 1089 (2005).

G.S. 7B-602 required that a guardian ad litem (GAL) be appointed if the juvenile was alleged to be "dependent" and the parent was incapable as a result of mental illness of providing the proper care and supervision of the juvenile; G.S. 7B-602 was not limited to termination cases, and the trial court's failure to sua sponte appoint a GAL for the mother in a dependency case was error where the trial court was on notice of the mother's alleged mental conditions, and made references to and questioned the mother's mental condition in several orders. In re D.D.Y., 171 N.C. App. 347, 621 S.E.2d 15, 2005 N.C. App. LEXIS 1257 (2005).

Because a petition did not mention any developmental disabilities or limitations and the mother's brief cited nothing in the record indicating that her inability to care for her children without constant assistance was due to her mental health issues, the court did not err in failing to appoint a guardian ad litem. In re J.J., — N.C. App. —, 637 S.E.2d 258, 2006 N.C. App. LEXIS 2412 (2006).

In a neglect and dependency proceeding, the trial court erred in not appointing a guardian ad litem pursuant to G.S. 7B-602(b)(1) for a mother because she was found to be suffering from mental illness, including depression and a borderline personality disorder. In re T.T., — N.C. App. —, 641 S.E.2d 344, 2007 N.C. App. LEXIS 489 (2007).

G.S. 7B-602(b)(1) did not require the appointment of a guardian ad litem for the father as the dependency allegations did not focus on the father's incapacity; rather, the majority of the dependency allegations focused on the father's alleged abuse and neglect as exhibited by his noncompliance with court-ordered domestic violence counseling and a pattern of abuse against his wife and other children. In re H. W., 163 N.C. App. 438, 594 S.E.2d 211, 2004 N.C. App. LEXIS 414 (2004).

Mother Was Not Entitled to Appointment of Guardian Ad Litem During Termination of Parental Rights Action. — Mother was not entitled to the appointment of a guardian ad litem in an action to terminate her parental rights; the mother's sparse references to her need to counseling and drug treatment did not rise to the level of being so intertwined with the neglect of her children and to be virtually inseparable and while the Department of Social Services recommended counseling, there was no significant evidence in the record to suggest that the mother's parental rights were terminated due to any mental illness or substance abuse. In re As.L.G., 173 N.C. App. 551, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005).

Appointment of a guardian ad litem was not compelled because the mother's mental illness was not a central factor in the trial court findings. In re J.M.W., — N.C. App. —, 635 S.E.2d 916, 2006 N.C. App. LEXIS 2116 (2006).

Allegations of Parental Condition Triggers Appointment of Guardian Ad Litem. — Department of social services "alleged" that the mother's dependency and mental illness were the cause of her child's problems so, even without allegations of specific facts, it was error under G.S. 7B-602 for the lower court not to appoint a guardian ad litem for her before it adjudicated whether her child was dependent and neglected under G.S. 7B-101(9), (15). In re C.B., 171 N.C. App. 341, 614 S.E.2d 579, 2005 N.C. App. LEXIS 1205 (2005).

Adoption as a Consequence of Neglect Proceedings. — Where the signing of the adoption consent forms occurred following and as a consequence of a neglect proceeding which the department of social services initiated, the signing of the papers directly related to the neglect proceedings and respondent was entitled to counsel when she signed the forms. In re Maynard, 116 N.C. App. 616, 448 S.E.2d 871 (1994).

Delay in Appointment of Guardian Ad Litem Did Not Cause Prejudice as Mother Was Adeqately Represented at Critical Stages. — Because the mother was adequately represented by the guardian ad litem at every critical stage of the case, the one and a half month delay in appointing a guardian ad litem did not cause the mother prejudice. In re H. W., 163 N.C. App. 438, 594 S.E.2d 211, 2004 N.C. App. LEXIS 414 (2004).

Cited in In re O.C., 171 N.C. App. 457, 615 S.E.2d 391, 2005 N.C. App. LEXIS 1272 (2005), cert. denied, — N.C. —, 623 S.E.2d 587 (2005); In re E.C., 174 N.C. App. 517, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005); In re L.W., 175 N.C. App. 387, 623 S.E.2d 626, 2006 N.C. App. LEXIS 55 (2006); In re J.S.L., 177 N.C. App. 151, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006); In re D.H., 177 N.C. App. 700, 629 S.E.2d 920, 2006 N.C. App. LEXIS 1195 (2006).

§ 7B-603. Payment of court-appointed attorney or guardian ad litem.

(a) An attorney or guardian ad litem appointed pursuant to G.S. 7B-601 shall be paid a reasonable fee fixed by the court or by direct engagement for specialized guardian ad litem services through the Administrative Office of the Courts.

(a1) The court may require payment of the fee for an attorney or guardian ad litem appointed pursuant to G.S. 7B-601 from a person other than the juvenile as provided in G.S. 7A-450.1, 7A-450.2, and 7A-450.3. In no event shall the parent or guardian be required to pay the fees for a court-appointed attorney or guardian ad litem in an abuse, neglect, or dependency proceeding unless the juvenile has been adjudicated to be abused, neglected, or dependent or, in a proceeding to terminate parental rights, unless the parent's rights have been terminated. If the party is ordered to reimburse the State for attorney or guardian ad litem fees and fails to comply with the order at the time of disposition, the court shall file a judgment against the party for the amount due the State.

(b) An attorney appointed pursuant to G.S. 7B-602 or pursuant to any other provision of the Juvenile Code for which the Office of Indigent Defense Services is responsible for providing counsel shall be paid a reasonable fee in accordance with rules adopted by the Office of Indigent Defense Services.

(b1) The court may require payment of the fee for an attorney appointed pursuant to G.S. 7B-602 or G.S. 7B-1101 from the respondent. In no event shall the respondent be required to pay the fees for a court-appointed attorney in an abuse, neglect, or dependency proceeding unless the juvenile has been adjudicated to be abused, neglected, or dependent or, in a proceeding to terminate parental rights, unless the respondent's rights have been terminated. At the dispositional hearing or other appropriate hearing, the court shall make a determination whether the respondent should be held responsible for reimbursing the State for the respondent's attorneys' fees. This determination shall include the respondent's financial ability to pay.

If the court determines that the respondent is responsible for reimbursing the State for the respondent's attorneys' fees, the court shall so order. If the respondent does not comply with the order at the time of disposition, the court shall file a judgment against the respondent for the amount due the State.

(c) Repealed by Session Laws 2005-254, s. 2, effective October 1, 2005, and applicable to the appointment of counsel on or after that date. (1979, c. 815, s. 1; 1983, c. 726, ss. 2, 3; 1987 (Reg. Sess., 1988), c. 1090, s. 6; 1991, c. 575, s. 1; 1998-202, s. 6; 1999-456, s. 60; 2000-144, s. 17; 2005-254, s. 2.)

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, G.S. 7A-498 et seq.

Editor's Note. — This section, as rewritten by Session Laws 2005-254, s. 2, effective October 1, 2005, is applicable to appointment of counsel on or after that date.

ARTICLE 7.

Discovery.

§ 7B-700. Regulation of discovery; protective orders.

(a) Upon written motion of a party and a finding of good cause, the court may at any time order that discovery be denied, restricted, or deferred.

(b) The court may permit a party seeking relief under subsection (a) of this section to submit supporting affidavits or statements to the court for in camera inspection. If, thereafter, the court enters an order granting relief under subsection (a) of this section, the material submitted in camera must be available to the Court of Appeals in the event of an appeal. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-456, s. 60.)

Editor's Note. — Articles 1-11, of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

Section 5 of Session Laws 1998-202, also effective July 1, 1999, repealed the former North Carolina Juvenile Code, Articles 41 through 59 of Chapter 7A, along with additional related provisions.

Where applicable, historical citations and case annotations to former sections have been added to the corresponding sections in new Chapter 7B.

At the end of new Chapter 7B are tables showing comparable sections and their disposition of new Chapter 7B.

Session Laws 1998-202, s. 36, contains a severability clause.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Denial to Interview Child Was Not Abuse of Discretion. — Trial court did not err by denying a mother's motion to interview her son for whom a proceeding was initiated against the mother for termination of her parental rights because, as evidenced by the multiple findings of fact contained within multiple court orders, any contact the mother had with the child was disruptive to his own therapeutic progress and it was clear from the record that the trial court was concerned with the mother's behavior in attempting to learn of the child's whereabouts, particularly since the mother abducted the child from his school bus stop while he was in foster care. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

Denial of Continuance Was Not Abuse of Discretion. — Trial court did not commit an abuse of discretion by applying an administrative order governing all discovery in abuse, neglect, and dependency proceedings and denying the parents' motions to continue because the gravamen of the problem fell with the inability of the attorneys to make time to review the records in accordance with the administrative order. In re J.S., — N.C. App. —, 641 S.E.2d 395, 2007 N.C. App. LEXIS 494 (2007).

Article 8.

Hearing Procedures.

§ 7B-800. Amendment of petition.

The court may permit a petition to be amended when the amendment does not change the nature of the conditions upon which the petition is based. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-456, s. 60.)

Editor's Note. — Articles 1-11, of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

Section 5 of Session Laws 1998-202, also effective July 1, 1999, repealed the former North Carolina Juvenile Code, Articles 41 through 59 of Chapter 7A, along with additional related provisions.

Where applicable, historical citations and case annotations to former sections have been added to the corresponding sections in new Chapter 7B.

At the end of new Chapter 7B are tables showing comparable sections and their disposition of new Chapter 7B.

Session Laws 1998-202, s. 36, contains a severability clause.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

Allowing Amendment Discretionary. — Where petition sufficiently alleged the offense of larceny, and amendment in no way changed the nature of the offense, but simply identified more specifically the owner of the property allegedly stolen, allowing the amendment under these circumstances was within the sound discretion of the court. In re Jones, 11 N.C. App. 437, 181 S.E.2d 162, appeal dismissed, 279 N.C. 616, 184 S.E.2d 267 (1971), decided under former § 7A-285.

Improper Petition Amendment. — Trial court erred in adjudicating a child to be a neglected juvenile where the petition alleged only that the child was a dependent juvenile, the trial court had essentially amended the nature of the juvenile petition by allowing the department to proceed on a claim of neglect, and as a result the mother had no notice of the claim of neglect. In re D.C., — N.C. App. —, 644 S.E.2d 640, 2007 N.C. App. LEXIS 1168 (2007).

Construction. — The North Carolina Supreme Court construed former G.S. 7A-627 (see now this section) to permit a juvenile petition to be amended only if the amended petition does not charge the juvenile with a different offense. In re Davis, 114 N.C. App. 253, 441 S.E.2d 696 (1994).

§ 7B-801. Hearing.

(a) At any hearing authorized or required under this Subchapter, the court in its discretion shall determine whether the hearing or any part of the hearing shall be closed to the public. In determining whether to close the hearing or any part of the hearing, the court shall consider the circumstances of the case, including, but not limited to, the following factors:

(1) The nature of the allegations against the juvenile's parent, guardian, custodian or caretaker;
(2) The age and maturity of the juvenile;
(3) The benefit to the juvenile of confidentiality;
(4) The benefit to the juvenile of an open hearing; and
(5) The extent to which the confidentiality afforded the juvenile's record pursuant to G.S. 132-1.4(l) and G.S. 7B-2901 will be compromised by an open hearing.

(b) No hearing or part of a hearing shall be closed by the court if the juvenile requests that it remain open.

(c) The adjudicatory hearing shall be held in the district at such time and place as the chief district court judge shall designate, but no later than 60 days from the filing of the petition unless the judge pursuant to G.S. 7B-803 orders that it be held at a later time. (1979, c. 815, s. 1; 1998-202, s. 6; 1998-229, ss. 5, 22; 1999-456, s. 60.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

Exclusion of Public. — It has never been the practice in juvenile proceedings wholly to exclude parents, relatives or friends, or to refuse juveniles the benefit of counsel. Even so, such proceedings are usually conducted without admitting the public generally. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), aff'd sub nom. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

Prejudice Not Shown After Continuance. — Father failed to show prejudice from the completion of a dispositional hearing 84 days after the conclusion of the adjudication hearing and 54 days after the deadline established by G.S. 7B-901 as the delay was due in part to the father's failure to complete his psychological evaluation and the parents' joint motion for a continuance as: (1) the trial court continued the dispositional hearing under G.S. 7B-803 based on its need to review the father's psychological evaluation; (2) the parents requested a continuance of the case; (3) the adjudication hearing was conducted within the 60-day deadline established by G.S. 7B-801(c); (4) the dispositional order was entered less than 30 days after the dispositional hearing under G.S. 7B-905(a); and (5) reunification efforts were not ceased until the dispositional hearing. In re C.M., — N.C. App. —, 644 S.E.2d 588, 2007 N.C. App. LEXIS 1043 (2007).

It is a discretionary matter with the trial judge whether the general public (which includes newspaper reporters) is excluded from a juvenile hearing. In re Potts, 14 N.C. App. 387, 188 S.E.2d 643, cert. denied, 281 N.C. 622, 190 S.E.2d 471 (1972).

Failure to Show Delay was Prejudicial. — Failure to hold a timely hearing as required under G.S. 7B-801 and G.S. 7B-803 was not erroneous where respondents failed to show prejudice as a result of any delay; at the adjudication and dispositional stage it was the status of the juvenile that was at issue, and because parental status was not at issue, it was more difficult for respondents to show prejudice. In re B.M., — N.C. App. —, 643 S.E.2d 644, 2007 N.C. App. LEXIS 833 (2007).

Authority to Adjudicate. — Trial court had authority or jurisdiction to hear the case because the adjudicatory hearing was commenced within the 60-day period after the Department of Social Services filed its neglect petition. In re T.M., — N.C. App. —, 638 S.E.2d 236, 2006 N.C. App. LEXIS 2514 (2006).

Cited in In re Stratton, 159 N.C. App. 461, 583 S.E.2d 323, 2003 N.C. App. LEXIS 1503 (2003), appeal dismissed, 357 N.C. 506, 588 S.E.2d 472 (2003); In re B.N.H., 170 N.C. App. 157, 611 S.E.2d 888, 2005 N.C. App. LEXIS 885 (2005); In re T.R.P., 360 N.C. 588, 636 S.E.2d 787, 2006 N.C. LEXIS 1193 (2006).

§ 7B-802. Conduct of hearing.

The adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition. In the adjudicatory hearing, the court shall protect the rights of the juvenile and the juvenile's parent to assure due process of law. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-456, s. 60.)

Legal Periodicals. — For note on juries in the juvenile justice system, see 48 N.C.L. Rev. 666 (1970).

For comment on due process in juvenile proceedings, see 3 N.C. Cent. L.J. 255 (1972).

For survey of 1972 case law on the right to counsel for the "undisciplined child," see 51 N.C.L. Rev. 1023 (1973).

For article on rights and interests of parent, child, family and state, see 4 Campbell L. Rev. 85 (1981).

CASE NOTES

I. General Consideration.
II. Due Process Rights.

I. GENERAL CONSIDERATION.

Editor's Note. — *Most of the following cases were decided prior to the enactment of this Chapter.*

Juvenile Proceedings Are Designed to Foster Individualized Disposition. — Juvenile proceedings are something less than a full blown determination of criminality. They are designed to foster individualized disposition of juvenile offenders under protection of the courts in accordance with constitutional safeguards. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev'd on other grounds, 291 N.C. 640, 231 S.E.2d 614 (1977).

Juvenile proceedings are not criminal prosecutions. Nor is a finding of delinquency in a juvenile proceeding synonymous with conviction of a crime. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), aff'd sub nom., McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); In re Jones, 11 N.C. App. 437, 181 S.E.2d 162, appeal dismissed, 279 N.C. 616, 184 S.E.2d 267 (1971); State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972); In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

But Such Proceedings Are Criminal for Purposes of U.S. Const., Amend. V. — Juvenile proceedings must be regarded as "criminal" for purposes of U.S. Const., Amend. V, the privilege against self-incrimination. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

Juvenile delinquency hearings place juveniles in danger of confinement, and, therefore, the proceedings are to be treated as criminal proceedings, and conducted with due process in accord with constitutional safeguards of U.S. Const., Amend. V. In re Chavis, 31 N.C. App. 579, 230 S.E.2d 198 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 203 (1977).

And Double Jeopardy Rule Applies. — Although distinctions between juvenile proceedings and criminal prosecutions still exist, they are sufficiently similar in nature that the double jeopardy provisions of the United States and North Carolina Constitutions are applicable to them. Accordingly, jeopardy attaches to the initial petition once an adjudicatory hearing on the merits is held. In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

Duty of District Court. — It is the constant duty of the district court to give each child subject to its jurisdiction such oversight and control as will be conducive to the welfare of the child and to the best interest of the State, and to ensure that the juvenile be carefully afforded all constitutional safeguards at every stage of the hearings. In re Eldridge, 9 N.C. App. 723, 177 S.E.2d 313 (1970).

Trial Judge May Question Witnesses. — The trial judge in a juvenile delinquency proceeding may question the witnesses to elicit relevant testimony and to aid in arriving at the truth. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

And May Give Opinion on Evidence. — The provisions of former G.S. 1-180 prohibiting a court from giving an opinion on the evidence do not apply in a juvenile delinquency proceeding where no jury is present. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

Standards for Evaluation of Evidence. — The North Carolina Juvenile Code gives defendants in juvenile adjudication hearings, with certain exceptions, all rights afforded adult offenders, and thus the juvenile respondents are entitled to have the evidence presented in their adjudicatory hearing evaluated by the same standards as apply in criminal proceedings against adults. In re Meaut, 51 N.C. App. 153, 275 S.E.2d 200 (1981).

A juvenile respondent is entitled to have evidence evaluated by the same standards as apply in criminal proceedings against adults. In re Dulaney, 74 N.C. App. 587, 328 S.E.2d 904 (1985); In re Howett, 76 N.C. App. 142, 331 S.E.2d 701 (1985); In re Bass, 77 N.C. App. 110, 334 S.E.2d 779 (1985).

When a parent is absent from a termina-

tion proceeding and the trial court preserves the adversarial nature of the proceeding by allowing the parent's counsel to cross examine witnesses, with the questions and answers being recorded, the parent must demonstrate some actual prejudice in order to prevail upon appeal. In re Murphy, 105 N.C. App. 651, 414 S.E.2d 396, aff'd, 332 N.C. 663, 422 S.E.2d 577 (1992).

Absence of parent. — The respondent/mother's failure to be present at the adjudicatory hearing did not relieve the trial court of its duty to find, based on competent evidence, that the allegations of neglect contained in the petition were supported by clear and convincing evidence; nor was the father's purported consent sufficient to support a finding of neglect. Thrift v. Buncombe County Dep't of Soc. Servs., 137 N.C. App. 559, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000).

A motion to dismiss a juvenile petition is recognized by North Carolina statutory and case law. In re Grubb, 103 N.C. App. 452, 405 S.E.2d 797 (1991); In re J.A., 103 N.C. App. 720, 407 S.E.2d 873 (1991).

In order to withstand a motion to dismiss the charges contained in a juvenile petition, there must be substantial evidence of each of the material elements of the offense charged; the evidence must be considered in the light most favorable to the state, and the state is entitled to every reasonable inference of fact which may be drawn from the evidence. In re Bass, 77 N.C. App. 110, 334 S.E.2d 779 (1985).

Restitution Order Held Unauthorized. — Where juvenile was not petitioned or adjudicated for the delinquent act of damaging the personal property of a certain victim, the court was without authority to order him to pay any restitution to her. In re Hull, 89 N.C. App. 138, 365 S.E.2d 221 (1988).

Time Period for Adjudication of Neglect. — Relevant time period for adjudication of neglect was from birth to the filing of the petition. In re A.B., 179 N.C. App. 605, 635 S.E.2d 11, 2006 N.C. App. LEXIS 2027 (2006).

Cited in In re Shaw, 152 N.C. App. 126, 566 S.E.2d 744, 2002 N.C. App. LEXIS 863 (2002); In re A.W., 164 N.C. App. 593, 596 S.E.2d 294, 2004 N.C. App. LEXIS 1039 (2004); In re L.T.R., — N.C. App. —, 639 S.E.2d 122, 2007 N.C. App. LEXIS 157 (2007); In re D.C., — N.C. App. —, 644 S.E.2d 640, 2007 N.C. App. LEXIS 1168 (2007).

II. DUE PROCESS RIGHTS.

Editor's Note. *— The following cases were decided prior to the enactment of this Chapter.*

Juveniles Are Entitled to Constitutional Safeguards. — A juvenile cited under a petition to appear for an inquiry into his alleged delinquency is entitled to the constitutional safeguards of due process and fairness. In re Jones, 11 N.C. App. 437, 181 S.E.2d 162, appeal dismissed, 279 N.C. 616, 184 S.E.2d 267 (1971).

A juvenile is entitled to certain constitutional safeguards and fairness. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

Juveniles in delinquency proceedings are entitled to constitutional safeguards similar to those afforded adult criminal defendants. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev'd on other grounds, 291 N.C. 640, 231 S.E.2d 614 (1977).

Scope of juvenile due process is not as extensive as that incident to adversary adjudication for adult criminal defendants. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev'd on other grounds, 291 N.C. 640, 231 S.E.2d 614 (1977).

Requirements of Due Process. — So long as proceedings in the juvenile court meet the requirements of due process, they are constitutionally sound and must be upheld. This means that: (1) The basic requirements of due process and fairness must be satisfied in a juvenile court adjudication of delinquency. (2) U.S. Const., Amend. XIV applies to prohibit the use of a coerced confession of a juvenile. (3) Notice must be given in juvenile proceedings which would be deemed constitutionally adequate in a civil or criminal proceeding; that is, notice must be given the juvenile and his parents sufficiently in advance of scheduled court proceedings to afford them reasonable opportunity to prepare, and the notice must set forth the alleged misconduct with particularity. (4) In juvenile proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to counsel and, if unable to afford counsel, to the appointment of same. (5) Juvenile proceedings to determine delinquency, as a result of which the juvenile may be committed to a State institution, must be regarded as "criminal" for purposes of U.S. Const., Amend. V, the privilege against self-incrimination. The privilege applies in juvenile proceedings the same as in adult criminal cases. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), aff'd sub nom. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

Due process for a juvenile includes written notice of specific charges in advance of hearing; notification to child and parent of the right to counsel and that, if necessary, counsel will be appointed; the privilege against self-incrimination; proof of the offense charged beyond a reasonable doubt; and determination of delinquency based on sworn testimony subject to cross-examination in the absence of a valid confession. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev'd on other grounds, 291

N.C. 640, 231 S.E.2d 614 (1977).

Due process safeguards include notice of the charge or charges upon which the petition is based. In re Jones, 11 N.C. App. 437, 181 S.E.2d 162, appeal dismissed, 279 N.C. 616, 184 S.E.2d 267 (1971).

Counsel Is Required in Delinquency Proceedings. — The due process clause of U.S. Const., Amend. XIV requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child. In re Garcia, 9 N.C. App. 691, 177 S.E.2d 461 (1970).

But counsel is not constitutionally required at the hearing on an undisciplined child petition. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

And This Distinction Does Not Deny Equal Protection. — Allowing a child to be adjudged undisciplined and placed on probation without benefit of counsel, while at the same time requiring counsel before a child may be adjudged delinquent, does not deny equal protection of the laws to the undisciplined child. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

Trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

Absent a statute providing for a jury trial, it is almost universally held that in juvenile court delinquency proceedings the alleged delinquent has no right under the pertinent state or federal Constitution to demand that the issue of his delinquency be determined by a jury. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), aff'd sub nom. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

Dual Role as Judge and Prosecutor Is Unconstitutional. — Due process rights of a juvenile were violated where the trial judge examined the witnesses for the State because of the absence of the district attorney or other counsel to represent the State. In re Thomas, 45 N.C. App. 525, 263 S.E.2d 355 (1980).

The presiding judge in a juvenile proceeding that could lead to detention should not assume the role of prosecuting attorney where the juvenile is represented by counsel and the hearing is adversary in nature. Such procedure would clearly violate due process in adult criminal prosecutions, nor would a dual role of judge and prosecutor measure up to the essentials of due process and fair treatment in juvenile proceedings where detention could result. In re Thomas, 45 N.C. App. 525, 263 S.E.2d 355 (1980).

Limitation on Right to Confront Witness. — Although former G.S. 7A-631 guaranteed respondent the right to confront and cross-examine witnesses, the right to confront witnesses in civil cases is subject to "due limitations." In re Barkley, 61 N.C. App. 267, 300 S.E.2d 713 (1983).

Where excluded party's presence during testimony might intimidate witness and influence his answers, due to that party's position of authority over the testifying witness, any right under this Article to confront the witnesses is properly limited. In re Barkley, 61 N.C. App. 267, 300 S.E.2d 713 (1983).

Applicability of Former G.S. 7A-631 to Hearing After Its Repeal. — Former G.S. 7A-631, which provided that the trial court in an adjudicatory hearing should protect a parent's privilege against self-incrimination, was repealed effective July 1, 1999; thus, the statute did not protect a child's mother's right against self-incrimination in a juvenile abuse and neglect proceeding. In re Pittman, 149 N.C. App. 756, 561 S.E.2d 560, 2002 N.C. App. LEXIS 303 (2002), cert. denied, 538 U.S. 982, 123 S. Ct. 1799, 155 L. Ed. 2d 673 (2003).

§ 7B-803. Continuances.

The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile. (1979, c. 815, s. 1; 1987 (Reg. Sess., 1988), c. 1090, s. 9; 1998-202, s. 6; 1999-456, s. 60.)

CASE NOTES

Denial of Continuance Proper. — Trial court properly denied mother's request for a continuance in termination of parental rights case where nothing in the record indicated that the court requested or needed additional information in the best interests of the children, that more time was needed for expeditious discovery, that the mother did not receive sufficient notice of the hearing, that extraordinary circumstances necessitated a continuance in the case, and that the mother's absence from the hearing was voluntary or due to her own negligence in failing to obtain adequate transportation. In re Mitchell, 148 N.C. App. 483, 559 S.E.2d 237, 2002 N.C. App. LEXIS 43 (2002).

Trial court did not abuse its discretion by denying a mother's third motion to continue in the proceeding commenced to terminate her parental rights to her son because, though she was incarcerated prior to the hearing, such incarceration was the result of her own actions in abducting the child and the preceding continuance was allowed expressly for the purpose of allowing the mother to gather the documents that she asserted she needed to obtain. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

Failure to Show Delay was Prejudicial. — Failure to hold a timely hearing as required under G.S. 7B-801 and G.S. 7B-803 was not erroneous where respondents failed to show prejudice as a result of any delay; at the adjudication and dispositional stage it was the status of the juvenile that was at issue, and because parental status was not at issue, it was more difficult for respondents to show prejudice. In re B.M., — N.C. App. —, 643 S.E.2d 644, 2007 N.C. App. LEXIS 833 (2007).

The grounds for a motion for a continuance must be fully established. In re Lail, 55 N.C. App. 238, 284 S.E.2d 731 (1981) (decided under prior law).

Prejudice Not Shown After Continuance. — Father failed to show prejudice from the completion of a dispositional hearing 84 days after the conclusion of the adjudication hearing and 54 days after the deadline established by G.S. 7B-901 as the delay was due in part to the father's failure to complete his psychological evaluation and the parents' joint motion for a continuance as: (1) the trial court continued the dispositional hearing under G.S. 7B-803 based on its need to review the father's psychological evaluation; (2) the parents requested a continuance of the case; (3) the adjudication hearing was conducted within the 60-day deadline established by G.S. 7B-801(c); (4) the dispositional order was entered less than 30 days after the dispositional hearing under G.S. 7B-905(a); and (5) reunification efforts were not ceased until the dispositional hearing. In re C.M., — N.C. App. —, 644 S.E.2d 588, 2007 N.C. App. LEXIS 1043 (2007).

Motion Based upon Absence of Witness. — When the motion for a continuance is based upon the absence of a witness, the motion should be supported by an affidavit indicating the facts to be proved by the witness. In re Lail, 55 N.C. App. 238, 284 S.E.2d 731 (1981) (decided under prior law).

Evidence was Sufficient to Support Neglect Finding. — Fact that the mother admitted to using cocaine for at least two months prior to the child's birth, the mother and the child tested positive for cocaine at the time of the child's birth, that there were incidents of domestic violence between respondents, and that the mother refused to sign a safety assessment plan, provided clear and convincing evidence supporting a finding of neglect. In re B.M., — N.C. App. —, 643 S.E.2d 644, 2007 N.C. App. LEXIS 833 (2007).

Cited in In re T.M., — N.C. App. —, 638 S.E.2d 236, 2006 N.C. App. LEXIS 2514 (2006).

§ 7B-804. Rules of evidence.

Where the juvenile is alleged to be abused, neglected, or dependent, the rules of evidence in civil cases shall apply. (1979, c. 815, s. 1; 1981, ch. 469, s. 17; 1998-202, s. 6; 1999-456, s. 60.)

CASE NOTES

Psychological Reports. — The clear intent of the legislature is that a hearing upon a motion for review is in the nature of a dispositional hearing rather than an adjudicatory hearing, and that the formal rules of evidence, G.S. 8C-1, do not apply. Therefore, the trial court could properly consider written psychological reports in determining, on motion brought by parents whose parental rights had been terminated under former G.S. 7A-289.34, whether the needs of children would be best served by modification of its previous orders concerning visitation. In re Montgomery, 77 N.C. App. 709, 336 S.E.2d 136 (1985), decided prior to enactment of this Chapter.

Absence of parent. — The respondent/mother's failure to be present at the adjudicatory hearing did not relieve the trial court of its duty to find, based on competent evidence, that the allegations of neglect contained in the petition were supported by clear and convincing evidence; nor was the father's purported consent sufficient to support a finding of neglect. Thrift v. Buncombe County Dep't of Soc. Servs., 137 N.C. App. 559, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000).

Cited in In re E.P, — N.C. App. —, 645 S.E.2d 772, 2007 N.C. App. LEXIS 1163 (2007).

§ 7B-805. Quantum of proof in adjudicatory hearing.

The allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-456, s. 60.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *Most of the following cases were decided prior to the enactment of this Chapter.*

Standards of Evidence. — In a juvenile adjudicatory hearing, the respondent is entitled to have the evidence evaluated by the same standards as apply in criminal proceedings against adults. The State, therefore, must present substantial evidence of each essential element of the offense charged and of respondent's being the perpetrator. In re Walker, 83 N.C. App. 46, 348 S.E.2d 823 (1986).

Clear and Convincing Evidence Required. — Allegations of child abuse and neglect must be proven by clear and convincing evidence. In re Pittman, 149 N.C. App. 756, 561 S.E.2d 560, 2002 N.C. App. LEXIS 303 (2002), cert. denied, 538 U.S. 982, 123 S. Ct. 1799, 155 L. Ed. 2d 673 (2003).

Court reversed a trial court's order adjudicating a mother's children as neglected, because the county department of social services did not present any evidence by which the trial court could have made any findings of fact or conclusions of law as required by G.S. 7B-807, and nevertheless, the trial court entered certain findings of fact, one of which recited verbatim the summary of the department's intervention, which report had not been introduced into evidence. In re A.W., 164 N.C. App. 593, 596 S.E.2d 294, 2004 N.C. App. LEXIS 1039 (2004).

While the findings of fact and conclusions of law showed, by clear and convincing evidence pursuant to G.S. 7B-805, that a father neglected his three-month-old infant under G.S. 7B-101(15), based on an incident where the infant suffered a severe head injury while in his father's sole care, which could not have been attributed to rolling off the couch as the father contended happened when he went to get a bottle for the infant, the proof was insufficient to show that the mother had neglected the infant; she was not at home when the incident occurred and there were no other incidents involving the infant. In re J.A.G., 172 N.C. App. 708, 617 S.E.2d 325, 2005 N.C. App. LEXIS 1785 (2005).

Disagreement among expert physicians as to whether a six-month-old child's broken clavicle, compression fracture of the spine, and hemorrhaged eyes were caused by accidents or by non-accidental trauma, as well as a trial court's findings that the child's regular pediatrician saw no reason for concern about child abuse and that there was no evidence that her parents had problems affecting their parenting ability, supported the trial court's conclusion of law that clear and convincing evidence was not presented to show that the child was abused or neglected under G.S. 7B-805. In re A.R.H., 177 N.C. App. 797, 629 S.E.2d 925, 2006 N.C. App. LEXIS 1183 (2006).

Finding of child abuse under G.S. 7B-101(1) was improper because the only evidence of record was a spanking by the father with a belt, resulting in a bruise on the child's buttocks, which did not rise to the level of "serious injury" to constitute abuse by clear and convincing evidence, as required by G.S. 7B-805. In re C.B., — N.C. App. —, 636 S.E.2d 336, 2006 N.C. App. LEXIS 2237 (2006).

Trial court did not err in concluding that the minor child was a neglected juvenile, as the allegation in the petition that the minor child was neglected because the minor child lived in an environment injurious to the minor child's welfare was proven by clear and convincing evidence; indeed, the evidence showed that the minor child's older sibling was adjudicated abused and neglected because the mother's boyfriend, who was cohabitating with the mother at the time of the abuse, pled guilty to several felony sex offenses. In re D.S.A., — N.C. App. —, 641 S.E.2d 18, 2007 N.C. App. LEXIS 375 (2007).

The trial court is required to make ultimate findings of fact based on the evidence and to enter clear and specific conclusions of law based on the findings of fact. In re Gleisner, 141 N.C. App. 475, 539 S.E.2d 362, 2000 N.C. App. LEXIS 1308 (2000).

Binding Effect of Order Failing to State Standard of Proof When Not Appealed. — A trial court's failure to state the standard of proof used in making a determination of abuse or neglect constitutes error. However, because no appeal was taken or other relief sought from trial court's failure to state the standard of proof used in an order adjudging respondent's children abused and neglected, it remained a valid final order which was binding in a later proceeding on the facts. In re Wheeler, 87 N.C. App. 189, 360 S.E.2d 458 (1987).

Estoppel to Relitigate Issue Decided in Previous Proceeding. — The trial court did not err by concluding that petitioner was authorized to file petition to terminate parental rights, nor by ruling that the parties were estopped from relitigating abuse and neglect issues decided in previous proceeding in which respondent was found to have sexually abused his children, where the trial court did not rely solely upon the previous order in a way that would have impermissibly predetermined the outcome of the termination hearing, and did not deny respondent the opportunity to present evidence relevant to these issues, but merely prohibited the parties from relitigating whether respondent had, in fact, sexually abused his children. In re Wheeler, 87 N.C. App. 189, 360 S.E.2d 458 (1987).

Statement of standard. — Trial court met the requirements of former G.S. 7A-635 (see now this section) and former G.S. 7A-637 (see now G.S. 7B-807 and 7B-2410) by stating the standard used at the adjudication stage of the proceeding; he was not also required to recite that his decision at the disposition stage of the proceeding was discretionary. Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

Court's statement on the first page of its adjudication order stating: "For purposes of adjudication, the court finds the following facts have been proven by clear and convincing evidence" satisfies G.S. 7B-805 by stating the standard of proof was satisfied. In re E.N.S., 164 N.C. App. 146, 595 S.E.2d 167, 2004 N.C. App. LEXIS 706 (2004), cert. denied, 359 N.C. 189, 606 S.E.2d 903 (2004).

Differing Standards for Adjudicatory and Dispositional Hearings. — Trial court did not err in consolidating the adjudicatory and dispositional hearings for evidentiary purposes in the mother's case alleging abuse and neglect against her child, as there was no requirement that those two stages be conducted at separate hearings and the trial court still applied the proper, separate evidentiary standards, namely "clear and convincing evidence" for the adjudicatory stage and the "best interests of the child" standard for the disposition stage. In re O.W., 164 N.C. App. 699, 596 S.E.2d 851, 2004 N.C. App. LEXIS 971 (2004).

Absence of parent. — The respondent/mother's failure to be present at the adjudicatory hearing did not relieve the trial court of its duty to find, based on competent evidence, that the allegations of neglect contained in the petition were supported by clear and convincing evidence; nor was the father's purported consent sufficient to support a finding of neglect. Thrift v. Buncombe County Dep't of Soc. Servs., 137 N.C. App. 559, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000).

Trial court erred in entering a consent judgment finding that a mother had neglected her children; pursuant to G.S. 7B-902, consent by the father of a child was insufficient to bind the mother when the mother was not present at the hearing and did not consent to the judgment, and testimony by a social worker did not meet the clear and convincing evidence requirement of G.S. 7B-805. In re J.R., 163 N.C. App. 201, 592 S.E.2d 746, 2004 N.C. App. LEXIS 290 (2004).

The evidence before the trial court was sufficient to support its findings of abuse and neglect where: (1) Child, while in respondent's sole care, suffered multiple burns over a wide portion of her body; (2) no accidental cause was established, and the child in fact stated that respondent burned her; (3) the burns were serious, requiring prompt medical attention; (4) respondent did not seek treatment for the child's injuries and refused to permit social worker to do so; and (5) the child was taken for treatment only upon the intervention of the sheriff's department, over respondent's opposition. In re Hayden, 96 N.C. App. 77, 384 S.E.2d 558 (1989).

A finding of neglect by clear and convincing evidence was proper where the children were kept at home, and they did not receive proper medical care, supervision, or adequate nutrition. In re Bell, 107 N.C. App. 566, 421 S.E.2d 590, appeal withdrawn, 333 N.C. 168, 426 S.E.2d 699 (1992).

The trial court's findings of fact regarding child's status as an abused juvenile were supported by clear and convincing evidence where the child testified that her father had shown her a picture of a woman wearing a see-through dress, the child's friend drew a picture in court of what she had seen, i.e. the father's anatomy, a social worker testified that the child had told her that her father had "asked her to touch his penis," and a doctor testified that the child had told her that her father had asked her to look at a "dirty book." In re Cogdill, 137 N.C. App. 504, 528 S.E.2d 600 (2000), 2000 N.C. App. LEXIS 425.

Evidence before the trial court was sufficient to support its findings of abuse and neglect where three physicians, two of whom were experts in the area of child abuse, testified that the juvenile was the victim of Munchausen syndrome by proxy, a form of child abuse with a substantial risk of morbidity and even mortality, possibly induced by the mother either smothering the juvenile or administering a toxin. In re McCabe, 157 N.C. App. 673, 580 S.E.2d 69, 2003 N.C. App. LEXIS 949 (2003).

Despite an appellate court's determination that several of the trial court's findings of fact were not supported by clear, cogent, and convincing evidence in a neglect and abuse case, it also found that several findings of fact were so supported and provided sufficient evidence to uphold the neglect and abuse adjudication of a mother's infant child based on the mother's (1) whereabouts to have been unknown upon the baby's discharge from the hospital, (2) testing positive for marijuana since the adjudication hearing, (3) refusal to attend several substance abuse assessments, (4) failure to make progress on her psychological problems, and (5) abuse and neglect adjudication regarding an older daughter. In re M.J.G., 168 N.C. App. 638, 608 S.E.2d 813, 2005 N.C. App. LEXIS 435 (2005).

Social services department presented clear, cogent, and convincing evidence from which the trial court could find and conclude that child was at risk of some physical, mental, or emotional impairment where the mother kept the child at her cousin's home in a filthy room with clothes and dirty diapers strewn about, she would leave the home for several days at a time and, upon her return, she would sleep for long periods of time with the child in the bed and would not awaken when the child cried, the mother came home drunk or under the influence of drugs on one occasion and attempted to remove the child from the home in the middle of the night, and the mother was unable to complete a substance abuse treatment program because of frequent altercations with other residents. In re E.C., 174 N.C. App. 517, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

Abuse and neglect determination was supported by clear and convincing evidence as required by G.S./A 7B-805, including evidence that the child's skull fracture was a depression fracture caused by non-accidental means, the mother's explanations were inconsistent with the injuries observed, the injuries occurred while the child was in the physical custody of the mother, the injuries were severe, and the mother failed to obtain medical attention for the child. In re T.H.T., — N.C. App. —, 648 S.E.2d 519, 2007 N.C. App. LEXIS 1812 (2007).

Finding that areas of the brain effected by infarctions would not regenerate was supported by clear and convincing evidence. — In a case alleging abuse, neglect, and dependency, a medical expert explained that with an infarction, part of the brain tissue begins to swell, will become damaged, and will either scar down or just go away; the damaged portion of the brain typically will not regenerate. Thus, based on the expert's testimony, the trial court's finding of fact that the areas effected by the infarctions will not regenerate was supported by clear and convincing evidence. In re J.A.G., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 1091 (June 7, 2005).

Evidence supported a finding of neglect under former § 7A-635 where the trial court found that respondent parents intended to live with their new infant in the home of the maternal grandparents where their previous child died; where the child's father had been convicted of causing the infant's death; where the mother had been advised regarding the cause of this non-accidental death but continued to support the father's version of events; where the parents had neither expressed nor exhibited any concern for the future safety of their newborn in their home; and where the father "extended most of the care for the juvenile" during the visits of the parents with the child. In re McLean, 135 N.C. App. 387, 521 S.E.2d 121, 1999 N.C. App. LEXIS 1150 (1999).

Evidence of Neglect Was Not Supported by Clear and Convincing Evidence. — In a case alleging abuse, neglect, and dependency, the finding that the mother had neglected in the past to appropriately care for the child was not supported by clear and convincing evidence, because: (1) although the mother testified that she neither placed any devices on the sofa to prevent the child from falling off nor placed any pillows in front of the sofa in the event that the child did roll off, the child was unable to roll over, and was not otherwise mobile, during the prior instances when the parents placed him on the sofa; (2) it was not unusual for parents to place an immobile infant on a sofa, couch, or bed; and (3) the child had never missed any doctor's appointments, was developing appropriately, and had no prior injuries. In re J.A.G., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 1091 (June 7, 2005).

Trial court did not err in dismissing the neglect and dependency petitions because the department of social services failed to present clear and convincing evidence that the parents' substance abuse problems created a substantial risk of harm to the children. In re E.P, — N.C. App. —, 645 S.E.2d 772, 2007 N.C. App. LEXIS 1163 (2007).

Trial court properly adjudicated a child to be a neglected juvenile where the testimony showed that the mother had left the child alone in a motel room when she was only 16 months old. In re D.C., — N.C. App. —, 644 S.E.2d 640, 2007 N.C. App. LEXIS 1168 (2007).

Evidence of Statutory Rape Insufficient to Support Dependency Finding. — Fact that the father could have been criminally liable for statutory rape pursuant to G.S. 14-27.7A(a), standing alone, was insufficient to support a conclusion that the father was unable to provide appropriate care for the child, and thus that the child was a dependent child. In re J.L., — N.C. App. —, 643 S.E.2d 604, 2007 N.C. App. LEXIS 840 (2007).

Finding that mother was not willing to investigate the needs of the child in a safe environment was not supported by clear and convincing evidence in a case alleging abuse, neglect, and dependency; in one week, the mother provided the county department of social services with at least four names of individuals who could potentially care for the child, if necessary. In re J.A.G., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 1091 (June 7, 2005).

Applied in In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

Cited in In re Smith, 146 N.C. App. 302, 552 S.E.2d 184, 2001 N.C. App. LEXIS 869 (2001); In re Shaw, 152 N.C. App. 126, 566 S.E.2d 744, 2002 N.C. App. LEXIS 863 (2002); Adams v. Bank United of Tex. F.S.B., 167 N.C. App. 395, 606 S.E.2d 149, 2004 N.C. App. LEXIS 2384 (2004), cert. denied, 359 N.C. 410, — S.E.2d — (2005); In re C.P., — N.C. App. —, 641 S.E.2d 13, 2007 N.C. App. LEXIS 377 (2007).

§ 7B-806. Record of proceedings.

All adjudicatory and dispositional hearings shall be recorded by stenographic notes or by electronic or mechanical means. Records shall be reduced to a written transcript only when timely notice of appeal has been given. The court may order that other hearings be recorded. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-456, s. 60.)

CASE NOTES

Editor's Note. *— Some of the following cases were decided prior to the enactment of this Chapter.*

Sufficiency of the Recording of Proceedings. — Where it appeared that very little of the testimony from a termination of parental rights proceeding was not recorded, and the interruptions in the recording due to the ending of tapes and the malfunctioning of equipment were only very brief, and where the trial court's extensive findings indicated a careful evaluation of all of the evidence, the appellate court's review of the record, without the benefit of a narration of the missing evidence, failed to show any prejudice to the mother from the missing testimony. In re Clark, 159 N.C. App. 75, 582 S.E.2d 657, 2003 N.C. App. LEXIS 1444 (2003).

When, in a termination of parental rights proceeding, one day's testimony was not recorded, the father appealing the trial court's subsequent judgment did not show that he was prejudiced, as he made no attempt to reconstruct the evidence not recorded, made only general allegations of prejudice in his appellate brief, and a review of the transcript indicated much of the missing testimony was clearly referenced and repeated by the witnesses, including the father, during the hearing's second day. In re Bradshaw, 160 N.C. App. 677, 587 S.E.2d 83, 2003 N.C. App. LEXIS 1910 (2003).

Party Failed to Reconstruct Destroyed Transcript. — Mother's argument that she had been denied due process in a review hearing on a change to her child's permanence plan was rejected where the record on appeal had been settled without any transcript from an earlier review hearing, at no point did the mother attempt to provide the appellate court with a narrative of that proceeding in the trial court, and as a result it could not be said that she had done all that she could do to reconstruct the missing transcript. In re L.B., — N.C. App. —, 646 S.E.2d 411, 2007 N.C. App. LEXIS 1476 (2007).

Proceedings under former § 7A-636 (see now this section) are to be reported as other "civil trials" in accordance with G.S. 7A-198. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

§ 7B-807. Adjudication.

(a) If the court finds that the allegations in the petition have been proven by clear and convincing evidence, the court shall so state. If the court finds that the allegations have not been proven, the court shall dismiss the petition with prejudice, and if the juvenile is in nonsecure custody, the juvenile shall be released to the parent, guardian, custodian, or caretaker.

(b) The adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law. The order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-456, s. 60; 2001-208, s. 17; 2001-487, s. 101; 2005-398, s. 3.)

Editor's Note. — Subsection (b), as amended by Session Laws 2005-398, s. 3, effective October 1, 2005, is applicable to petitions or actions filed on or after that date.

CASE NOTES

Editor's Note. — *Most of the following cases were decided prior to the enactment of this Chapter.*

Legislative Intent. — Although G.S. 7B-1109 does not specifically require the trial court to affirmatively state in its order terminating parental rights that the allegations of the petition were proved by clear and convincing evidence, this section does require such a statement, and without such an affirmative statement the appellate court is unable to determine if the proper standard of proof was utilized for its ruling on parental termination. In re Church, 136 N.C. App. 654, 525 S.E.2d 478, 2000 N.C. App. LEXIS 107 (2000).

When construing this section and 7B-1109(f) together to determine legislative intent, like this section, G.S. 7B-1109(f) requires the trial court to affirmatively state in its order the standard of proof utilized in the termination proceeding. In re Church, 136 N.C. App. 654, 525 S.E.2d 478, 2000 N.C. App. LEXIS 107 (2000).

The statutory use of "shall" is a mandate to trial judges requiring them to affirmatively state that the allegations of the juvenile petition are proved beyond a reasonable doubt. Failure to follow the mandate of the statute is error. In re Wade, 67 N.C. App. 708, 313 S.E.2d 862 (1984).

If the judge finds that the allegations in the petition have been proved, as provided in G.S. 7A-635 (see now G.S. 7B-805 and 7B-2409), i.e., beyond a reasonable doubt, he shall so state. The failure of the trial judge to follow the clear mandate of the statute is error. In re Johnson, 76 N.C. App. 159, 331 S.E.2d 756 (1985).

It is reversible error for a trial court to fail to state affirmatively that an adjudication of delinquency is based upon proof beyond a reasonable doubt. In re Walker, 83 N.C. App. 46, 348 S.E.2d 823 (1986).

The order of the trial judge must affirmatively state that the allegations are proved beyond a reasonable doubt, even in cases where the juvenile admits the offense alleged. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

The statutory use of the word "shall" mandates trial judges to affirmatively state that the reasonable doubt standard was followed. Failure of the trial judge to follow the clear mandate of the statute is error. In re Mitchell, 87 N.C. App. 164, 359 S.E.2d 809 (1987).

Binding Effect of Order Failing to State Standard of Proof When Not Appealed. — A trial court's failure to state the standard of proof used in making a determination of abuse or neglect constitutes error. However, because no appeal was taken or other relief sought from trial court's failure to state the standard of proof used in an order adjudging respondent's children abused and neglected, it remained a valid final order which was binding in a later proceeding on the facts. In re Wheeler, 87 N.C. App. 189, 360 S.E.2d 458 (1987).

Estoppel to Relitigate Issue Decided in Previous Proceeding. — The trial court did not err by concluding that petitioner was authorized to file petition to terminate parental rights, nor by ruling that the parties were estopped from relitigating abuse and neglect issues decided in previous proceeding in which respondent was found to have sexually abused his children, where the trial court did not rely solely upon the previous order in a way that would have impermissibly predetermined the outcome of the termination hearing, and did not deny respondent the opportunity to present evidence relevant to these issues, but merely prohibited the parties from relitigating whether respondent had, in fact, sexually abused his children. In re Wheeler, 87 N.C. App. 189, 360 S.E.2d 458 (1987).

Adjudication Supported by Evidence. — Trial court's finding of abuse and neglect were based on clear and convincing evidence where three physicians, two of whom were experts in the area of child abuse, testified that the juvenile was the victim of Munchausen syndrome by proxy, a form of child abuse with a substantial risk of morbidity and even mortality, possibly induced by the mother either smothering the juvenile or administering a toxin. In re McCabe, 157 N.C. App. 673, 580 S.E.2d 69, 2003 N.C. App. LEXIS 949 (2003).

In a case where there was an adjudication of dependency, neglect, and abuse, any error in the admission of the child's hearsay statements was harmless because the other evidence alone supported a finding of dependency and neglect. The evidence at trial clearly showed (1) the mother violated a safety plan by leaving the child alone with men who were alleged to be sexually abusing her; (2) an examining doctor found extensive eroding dental caries going into the gums and a one-inch linear scar on the child's lower leg that was opined to be inflicted by the mother with either a shoe, a stick with thorns, or the metal part of a belt; (3) the mother called the child a "whore" and a "bitch" and further stated that the child was no longer her daughter and that she was on her own and no longer had a mother; and (4) expert testimony that the child displayed symptoms of anxiety, anger, disassociation, and post-traumatic stress disorder. In re M.G.T.-B., 177 N.C. App. 771, 629 S.E.2d 916, 2006 N.C. App. LEXIS 1182 (2006).

Evidentiary Standard. — Trial court's order that stated that it was concluding "through clear, cogent, and convincing evidence" that the mother had abused and neglected her child sufficiently stated the standard of proof, as statutory law did not require that the standard of proof be set forth in any specific form, and, thus, recitation of the standard in the order was acceptable. In re O.W., 164 N.C. App. 699, 596 S.E.2d 851, 2004 N.C. App. LEXIS 971 (2004).

Trial court's findings in abuse and neglect case against mother which recited little more than a recitation of the allegations that the county social services department made against her and restated some testimony given at a related hearing were not proper "ultimate findings of fact," and, thus, a remand of the case from the appellate court was required so that the proper findings could be made. In re O.W., 164 N.C. App. 699, 596 S.E.2d 851, 2004 N.C. App. LEXIS 971 (2004).

County department of social services did not satisfy its burden of proving the allegations in its juvenile petitions by clear, cogent, and convincing evidence under G.S. 7B-1109 because the subject children were not neglected juveniles under G.S. 7B-101(15), nor dependant juveniles under G.S. 7B-101(9); the trial court in its ruling properly entered uncontested findings of fact that: (1) the father possessed a gun, but did not point it at the mother or the children during a domestic disturbance; (2) the parents' three oldest children left their residence with the father, but no kidnapping was reported, and an Amber Alert was not issued; (3) the district attorney's office dismissed the charges against the father for communicating threats to and assault by pointing a gun at the mother; and (4) the father was not in possession of a gun when he was arrested. In re H.M., — N.C. App. —, 641 S.E.2d 715, 2007 N.C. App. LEXIS 594 (2007).

Findings Not Proven by Clear Evidence. — Court reversed a trial court's order adjudicating a mother's children as neglected under G.S. 7B-101(15) because the county department of social services did not present any evidence by which the trial court could have made any findings of fact or conclusions of law as required by G.S. 7B-807, and nevertheless, the trial court entered certain findings of fact, one of which recited verbatim the summary of the department's intervention, which report had not been introduced into evidence; thus, the trial court erred by entering findings of fact not proven by clear, cogent, and convincing evidence, as required by G.S. 7B-805, and a new trial was ordered. In re A.W., 164 N.C. App. 593, 596 S.E.2d 294, 2004 N.C. App. LEXIS 1039 (2004).

Trial court met the requirements of this section by stating the standard used at the adjudication stage of the proceeding; he was not also required to recite that his decision at the disposition stage of the proceeding was discretionary. Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

Late Filing of Adjudication and Disposition Orders Not Grounds for Reversal Where No Prejudice. — Court's failure to file child neglect adjudication and disposition orders within 30 days as required under respectively, G.S. 7B- 807(b) and G.S. 7B-905(a), was not grounds for reversal because the mother could not show how she was prejudiced by the late filing. In re E.N.S., 164 N.C. App. 146, 595 S.E.2d 167, 2004 N.C. App. LEXIS 706 (2004), cert. denied, 359 N.C. 189, 606 S.E.2d 903 (2004).

Failure to Timely Hold Hearing Not Grounds for Reversal. — Trial court's failure to timely hold the hearing required by G.S. 7B-807(b) did not necessitate reversal because the mother failed to show that the mother was prejudiced by the trial court's failure; neither the mother's visitation with the child nor the mother's rights to appeal were affected. In re T.H.T., — N.C. App. —, 648 S.E.2d 519, 2007 N.C. App. LEXIS 1812 (2007).

Applied in In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639, 2005 N.C. App. LEXIS 797 (2005); In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005); In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006).

Cited in In re Clark, 159 N.C. App. 75, 582 S.E.2d 657, 2003 N.C. App. LEXIS 1444 (2003); In re E.N.S., 164 N.C. App. 146, 595 S.E.2d 167, 2004 N.C. App. LEXIS 706 (2004), cert. denied, 359 N.C. 189, 606 S.E.2d 903 (2004); In re L.E.B., 169 N.C. App. 375, 610 S.E.2d 424, 2005 N.C. App. LEXIS 598 (2005); In re B.N.H., 170 N.C. App. 157, 611 S.E.2d 888, 2005 N.C. App. LEXIS 885 (2005); In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS

1798 (2005); In re T.M., — N.C. App. —, 638 S.E.2d 236, 2006 N.C. App. LEXIS 2514 (2006); Owen v. Keeter (In re C.L.K.), — N.C. App. —, 643 S.E.2d 458, 2007 N.C. App. LEXIS 804 (2007); In re J.L., — N.C. App. —, 643 S.E.2d 604, 2007 N.C. App. LEXIS 840 (2007); In re D.C., — N.C. App. —, 644 S.E.2d 640, 2007 N.C. App. LEXIS 1168 (2007).

§ 7B-808. Predisposition report.

(a) The court shall proceed to the dispositional hearing upon receipt of sufficient social, medical, psychiatric, psychological, and educational information. No predisposition report shall be submitted to or considered by the court prior to the completion of the adjudicatory hearing. The court may proceed with the dispositional hearing without receiving a predisposition report if the court makes a written finding that a report is not necessary.

(b) The director of the department of social services shall prepare the predisposition report for the court containing the results of any mental health evaluation under G.S. 7B-503, a placement plan, and a treatment plan the director deems appropriate to meet the juvenile's needs.

(c) The chief district court judge may adopt local rules or make an administrative order addressing the sharing of the reports among parties, including an order that prohibits disclosure of the report to the juvenile if the court determines that disclosure would not be in the best interest of the juvenile. Such local rules or administrative order may not:

(1) Prohibit a party entitled by law to receive confidential information from receiving that information.

(2) Allow disclosure of any confidential source protected by statute. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-456, s. 60; 2003-140, s. 2; 2004-203, s. 17.)

Legal Periodicals. — For 1984 survey, "Termination of Parental Rights: Putting Love in Its Place," see 63 N.C.L. Rev. 1177 (1985).

CASE NOTES

Continuance at Request of Juvenile. — Former G.S. 7A-639 (see now G.S. 7B-808 and 7B-2413) and former G.S. 7A-640 (see now G.S. 7B-901 and 7B-2501) make clear the legislative intent that the dispositional hearing must be continued for the juvenile respondent to present evidence when he requests such a continuance. This is particularly so in light of the provision of former G.S. 7A-632 (see now G.S. 7B-803 and 7B-2406) that "The judge may continue at any time any case to allow additional factual evidence, social information or other information needed in the best interest of the juvenile or in the interest of justice." In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979), decided prior to enactment of this Chapter.

Court's Order Upheld in Spite of Absence of Required Information. — The court rejected the defendant's contention that the juvenile court erred in making its dispositional order because it had insufficient social, medical, psychiatric, psychological, and educational information regarding the juvenile, under former 7A-639, where the juvenile and his parents refused to participate in any assessments with the court counselor either before or after the adjudicatory hearing. In re Clapp, 137 N.C. App. 14, 526 S.E.2d 689, 2000 N.C. App. LEXIS 252 (2000).

Trial Court Did Not Improperly Consider Dispositional Evidence. — Trial court did not improperly consider dispositional evidence in determining whether minor children were abused and neglected, because there was substantial evidence upon which the trial court could conclude the minor children were abused and neglected, and, in the judgment, the trial court rendered one set of findings of fact; thereafter, in the same judgment, the trial court rendered its adjudicatory and dispositional conclusions of law. Thus, the findings of fact were used to support both the adjudication and dispositional orders. In re Mashburn, 162 N.C. App. 386, 591 S.E.2d 584, 2004 N.C. App. LEXIS 175 (2004), appeal dismissed, — N.C. —, 603 S.E.2d 884 (2004).

ARTICLE 9.

Dispositions.

§ 7B-900. Purpose.

The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction. If possible, the initial approach should involve working with the juvenile and the juvenile's family in their own home so that the appropriate community resources may be involved in care, supervision, and treatment according to the needs of the juvenile. Thus, the court should arrange for appropriate community-level services to be provided to the juvenile and the juvenile's family in order to strengthen the home situation. (1979, c. 815, s. 1; 1995 (Reg. Sess., 1996), c. 609, s. 1; 1998-202, s. 6; 1999-456, s. 60.)

Editor's Note. — Articles 1-11, of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

Section 5 of Session Laws 1998-202, also effective July 1, 1999, repealed the former North Carolina Juvenile Code, Articles 41 through 59 of Chapter 7A, along with additional related provisions.

Where applicable, historical citations and case annotations to former sections have been added to the corresponding sections in new Chapter 7B.

At the end of new Chapter 7B are tables showing comparable sections and their disposition of new Chapter 7B.

Session Laws 1998-202, s. 36, contains a severability clause.

Legal Periodicals. — For article on rights and interests of parent, child, family and State, see 4 Campbell L. Rev. 85 (1981).

For note on community-based care for juvenile offenders, see 18 Wake Forest L. Rev. 610 (1982).

For article, "Leandro v. State and the Constitutional Limitation on School Suspensions and Expulsions in North Carolina" see 83 N.C. L. Rev. 1507 (2005).

CASE NOTES

***Editor's Note.** — Most of the following cases were decided prior to the enactment of this Chapter.*

Purpose of Juvenile Code. — The stated purpose of the North Carolina Juvenile Code is to avoid commitment of the juvenile to training school (now youth development center) if he could be helped through community-level resources. In re Hughes, 50 N.C. App. 258, 273 S.E.2d 324 (1981).

Discretion of Court. — It was the legislature's intention that the district courts exercise sound discretion in fashioning an appropriate response to each particular instance of delinquency. In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

Duty of District Court. — It is the constant duty of the district court to give each child subject to its jurisdiction such oversight and control as will conduce to the welfare of the child and to the best interest of the State, and to ensure that the juvenile be carefully afforded all constitutional safeguards at every stage of the hearings. In re Eldridge, 9 N.C. App. 723, 177 S.E.2d 313 (1970).

The court is required to consider the welfare of the delinquent child as well as the best interest of the State. In re Hardy, 39 N.C. App. 610, 251 S.E.2d 643 (1979).

What Judge Must Determine. — This section necessarily requires the judge to first determine the needs of the juvenile and then to determine the appropriate community resources required to meet those needs in order to strengthen the home situation of the juvenile. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Determination of Child's Interest. — What is or is not in the best interest of the child must be determined in tandem with the perception of the legislature as to what is in the best interest of the state as enunciated by the terms of the Juvenile Code and by its general theme as deduced from the impetus behind its enactment. In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

Restitution Not in Children's Best Interest. — Where there was insufficient evidence before the juvenile court that the juveniles had or could reasonably acquire the means to pay $539.50 each in restitution within twelve months, it was not in their best interest to require such. In re McKoy, 138 N.C. App. 143, 530 S.E.2d 334, 2000 N.C. App. LEXIS 550 (2000).

Least Restrictive Disposition Must Be Selected. — In selecting among dispositional alternatives, the trial judge is required to select the least restrictive disposition, taking into account the seriousness of the offense, degree of culpability, age, prior record, and circumstances of the particular case. The judge must also weigh the State's best interest and select a disposition consistent with public safety, and within the judge's statutorily granted authority. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Court Limited to Using Available Dispositional Alternatives. — The district court's authority in juvenile dispositions is limited to utilization of currently existing programs or those for which the funding and machinery for implementation is in place. In re Jackson, 84 N.C. App. 167, 352 S.E.2d 449 (1987).

When a student has been lawfully suspended or expelled pursuant to G.S. 115C-391 and the school has not provided a suitable alternative educational forum, court-ordered public school attendance is not a dispositional alternative available to the juvenile court judge, absent a voluntary reconsideration of or restructuring of the suspension by the school board to allow the student's restoration to an educational program within its system. In re Jackson, 84 N.C. App. 167, 352 S.E.2d 449 (1987).

District Court Not Authorized to Require Creation of Foster Home. — The district court is not authorized to require a county Department of Social Services, either by itself or in conjunction with another agency, to implement the creation of a foster home with appropriate staff, wherein juveniles might be permanently domiciled for program treatment and delivery of services. In re Wharton, 305 N.C. 565, 290 S.E.2d 688 (1982).

Identical Judgments Erroneous for Varying Offenses and Culpability. — The juvenile court failed to consider the express purposes of the Juvenile Code where it entered identical judgments in all six cases tried together, and in which the juveniles ranged in age from 6 to 14, were found to have committed and admitted committing different offenses, and had varying degrees of culpability. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

Applied in In re Dexter, 147 N.C. App. 110, 553 S.E.2d 922, 2001 N.C. App. LEXIS 1067 (2001).

Cited in In re Schrimpsher, 143 N.C. App. 461, 546 S.E.2d 407 (2001); In re M.J.G., 168 N.C. App. 638, 608 S.E.2d 813, 2005 N.C. App. LEXIS 435 (2005); In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006).

§ 7B-901. Dispositional hearing.

The dispositional hearing shall take place immediately following the adjudicatory hearing and shall be concluded within 30 days of the conclusion of the adjudicatory hearing. The dispositional hearing may be informal and the court may consider written reports or other evidence concerning the needs of the juvenile. The juvenile and the juvenile's parent, guardian, or custodian shall have the right to present evidence, and they may advise the court concerning the disposition they believe to be in the best interests of the juvenile. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition. The court may exclude the public from the hearing unless the juvenile moves that the hearing be open, which motion shall be granted. (1979, c. 815, s. 1; 1981, c. 469, s. 18; 1998-202, s. 6; 1999-456, s. 60; 2003-62, s. 1; 2005-398, s. 4; 2007-276, s. 2.)

Editor's Note. — This section, as rewritten by Session Laws 2005-398, s. 4, effective October 1, 2005, is applicable to petitions or actions filed on or after that date.

Effect of Amendments. — Session Laws 2007-276, s. 2, effective October 1, 2007, substituted "the right" for "an opportunity" in the third sentence.

CASE NOTES

Editor's Note. *— Most of the following cases were decided prior to the enactment of this Chapter.*

Evidentiary Standards. — Formal rules of evidence do not apply to dispositional hearings in abuse and neglect cases. In re M.J.G., 168 N.C. App. 638, 608 S.E.2d 813, 2005 N.C. App. LEXIS 435 (2005).

Trial court did not err in consolidating the adjudicatory and dispositional hearings for evidentiary purposes in the mother's case alleging abuse and neglect against her child, as there was no requirement that those two stages be conducted at separate hearings and the trial court still applied the proper, separate evidentiary standards, namely "clear and convincing evidence" for the adjudicatory stage and the "best interests of the child" standard for the disposition stage. In re O.W., 164 N.C. App. 699, 596 S.E.2d 851, 2004 N.C. App. LEXIS 971 (2004).

What Evidence Must Be Considered. — Whenever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court, subject to the discretionary powers of the trial court to exclude cumulative testimony. Without hearing and considering such evidence, the trial court cannot make an informed and intelligent decision concerning the best interest of the child. In re Shue, 311 N.C. 586, 319 S.E.2d 567 (1984).

At a dispositional hearing the trial judge is not restricted to consideration of only those acts for which there had been an adjudication. If the information presented is determined by the trial judge to be reliable, accurate and competently obtained, he may properly consider it. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Corroborative Evidence Properly Excluded. — Trial court did not err under G.S. 7B-901 by excluding corroborative evidence from the mother's sister, regarding statements made by the minor child about abuse by her father, which merely supported the testimony of the mother; additionally, the transcript was abounding with testimony regarding the abuse of the child by her father. In re J.S., — N.C. App. —, 641 S.E.2d 395, 2007 N.C. App. LEXIS 494 (2007).

Trial courts may properly consider all written reports and materials submitted in connection with dispositional proceedings. In re Shue, 63 N.C. App. 76, 303 S.E.2d 636 (1983), modified, 311 N.C. 586, 319 S.E.2d 567 (1984).

Admissibility of Psychological Reports. — The clear intent of the legislature is that a hearing upon a motion for review is in the nature of a dispositional hearing rather than an adjudicatory hearing, and that the formal Rules of Evidence, G.S. 8C-1, do not apply. Therefore, the trial court could properly consider written psychological reports in determining on motion brought by parents whose parental rights had been terminated under former G.S. 7A-289.34 (see now 7B-1113), whether the needs of children would be best served by modification of its previous orders concerning visitation. In re Montgomery, 77 N.C. App. 709, 336 S.E.2d 136 (1985).

Trial court did not err in considering the psychological evaluation of the mother in reaching its decision on disposition in which counseling for the child. In re T.M., — N.C. App. —, 638 S.E.2d 236, 2006 N.C. App. LEXIS 2514 (2006).

Consideration of Unadjudicated Acts Unrelated to Petition. — Trial courts giving consideration at a dispositional hearing to unadjudicated acts allegedly committed by a juvenile, unrelated to that for which he stands petitioned, must first determine that such information is reliable and accurate and that it was competently obtained. This does not mean that a full "trial" must be held to make the required determination about the unrelated acts. The trial court should have wide discretion in making the required determination from the sources available to it, but it must make the determination. In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

This section permits the use of unadjudicated acts as evidence to be considered for disposition. In re Barkley, 61 N.C. App. 267, 300 S.E.2d 713 (1983).

Cross-Examination as to Prior Unadjudicated Acts Not Irrelevant. — Cross-examination of juvenile at dispositional hearing about twice running away from county receiving home was not irrelevant merely because the acts about which she was questioned occurred prior to the delinquent act for which she was placed on probation and nothing in the record indicated that she had been adjudicated undisciplined for these acts. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Effect of Failure to Hold Hearing. — Where the judge held no dispositional hearing and denied juvenile the opportunity to present evidence as to disposition, and there was no evidence to support the findings made by the judge with respect to disposition, commitment order would be reversed so that the court could conduct a dispositional hearing. In re Lail, 55 N.C. App. 238, 284 S.E.2d 731 (1981).

Court erred in ordering an infant placed in guardianship because homelessness and joblessness did not per se support an abuse or neglect finding; but the court committed no error in admitting social services and guardian ad litem reports or alleged hearsay where the objection to the hearsay was unpreserved. In re Ivey, 156 N.C. App. 398, 576 S.E.2d 386, 2003 N.C. App. LEXIS 123 (2003).

Continuance at Request of Juvenile. — Former G.S. 7A-639 (see now G.S. 7B-808) and former G.S. 7A-640 (see now G.S. 7B-901) made clear the legislative intent that the dispositional hearing must be continued for the juvenile respondent to present evidence when he requests such a continuance. This is particularly so in light of the provision of former G.S. 7A-632 (see now G.S. 7B-803 and 7B-2406) that "The judge may continue at any time any case to allow additional factual evidence, social information or other information needed in the best interest of the juvenile or in the interest of justice." In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979); In re Lail, 55 N.C. App. 238, 284 S.E.2d 731 (1981).

Burden on Parents and Department. — The language of former G.S. 7A-640 (see now this section) and former G.S. 7A-657 (see now 7B-906) does not place any burden of proof upon either the parents or Department of Social Services during the dispositional hearing or the review hearing. The essential requirement at the dispositional hearing and the review hearing is that sufficient evidence be presented to the trial court so that it can determine what is in the best interest of the child. In re Shue, 311 N.C. 586, 319 S.E.2d 567 (1984).

Evidence of Neglect Obtained From Agency and Guardian Ad Litem Reports Properly Admitted. — Despite an appellate court's determination that several of the trial court's findings of fact were not supported by clear, cogent, and convincing evidence in a neglect and abuse case, it also found that several findings of fact were so supported and provided sufficient evidence to uphold the neglect and abuse adjudication of a mother's infant child based on the mother's (1) whereabouts to have been unknown upon the baby's discharge from the hospital, (2) testing positive for marijuana since the adjudication hearing, (3) refusal to attend several substance abuse assessments, (4) failure to make progress on her psychological problems, and (5) abuse and neglect adjudication regarding an older daughter; the trial court did not err by admitting the evidence of the DSS and guardian ad litem's reports, because the formal rules of evidence did not apply to dispositional hearings. In re M.J.G., 168 N.C. App. 638, 608 S.E.2d 813, 2005 N.C. App. LEXIS 435 (2005); In re C.B., 171 N.C. App. 341, 614 S.E.2d 579, 2005 N.C. App. LEXIS 1205 (2005).

Prejudice Not Shown. — Father failed to show prejudice from the completion of a dispositional hearing 84 days after the conclusion of the adjudication hearing and 54 days after the deadline established by G.S. 7B-901 as the delay was due in part to the father's failure to complete his psychological evaluation and the parents' joint motion for a continuance as: (1) the trial court continued the dispositional hearing under G.S. 7B-803 based on its need to review the father's psychological evaluation; (2) the parents requested a continuance of the case; (3) the adjudication hearing was conducted within the 60-day deadline established by G.S. 7B-801(c); (4) the dispositional order was entered less than 30 days after the dispositional hearing under G.S. 7B-905(a); and (5) reunification efforts were not ceased until the dispositional hearing. In re C.M., — N.C. App. —, 644 S.E.2d 588, 2007 N.C. App. LEXIS 1043 (2007).

Termination of Visitation. — Termination of a mother's visitation with a child was not an abuse of discretion under G.S. 7B-507, G.S. 7B-901, G.S. 7B-903, and G.S. 7B-905 and was supported by findings of the parents' unsuccessful parenting of a sibling and their lack of progress in working with a department of social services to parent the child. In re C.M., — N.C. App. —, 644 S.E.2d 588, 2007 N.C. App. LEXIS 1043 (2007).

Applied in In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

Cited in In re Stratton, 159 N.C. App. 461, 583 S.E.2d 323, 2003 N.C. App. LEXIS 1503 (2003), appeal dismissed, 357 N.C. 506, 588 S.E.2d 472 (2003); In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006).

§ 7B-902. Consent judgment in abuse, neglect, or dependency proceeding.

Nothing in this Article precludes the court from entering a consent order or judgment on a petition for abuse, neglect, or dependency when all parties are present, the juvenile is represented by counsel, and all other parties are either represented by counsel or have waived counsel, and sufficient findings of fact are made by the court. (1981, c. 371, s. 1; 1998-202, s. 6; 1999-456, s. 60.)

CASE NOTES

Default. — Just as a default judgment or judgment on the pleadings is inappropriate in a proceeding involving termination of parental rights, it is equally inappropriate in an adjudication of neglect. Thrift v. Buncombe County Dep't of Soc. Servs., 137 N.C. App. 559, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000).

Absence of Parents. — The respondent/mother's failure to be present at the adjudicatory hearing did not relieve the trial court of its duty to find, based on competent evidence, that the allegations of neglect contained in the petition were supported by clear and convincing evidence; nor was the father's purported consent sufficient to support a finding of neglect. Thrift v. Buncombe County Dep't of Soc. Servs., 137 N.C. App. 559, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000).

In the absence of the father's presence, the mother's consent to the adjudication of neglect as to their daughter was insufficient to dispense with the requirement of an adjudicatory hearing. In re Shaw, 152 N.C. App. 126, 566 S.E.2d 744, 2002 N.C. App. LEXIS 863 (2002).

Trial court erred in entering a consent judgment finding that a mother had neglected her children; pursuant to G.S. 7B-902, consent by the father of a child was insufficient to bind the mother when the mother was not present at the hearing and did not consent to the judgment, and testimony by a social worker did not meet the clear and convincing evidence requirement of G.S. 7B-805. In re J.R., 163 N.C. App. 201, 592 S.E.2d 746, 2004 N.C. App. LEXIS 290 (2004).

§ 7B-903. Dispositional alternatives for abused, neglected, or dependent juvenile.

(a) The following alternatives for disposition shall be available to any court exercising jurisdiction, and the court may combine any of the applicable alternatives when the court finds the disposition to be in the best interests of the juvenile:

(1) The court may dismiss the case or continue the case in order to allow the parent, guardian, custodian, caretaker or others to take appropriate action.

(2) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the court may:

a. Require that the juvenile be supervised in the juvenile's own home by the department of social services in the juvenile's county, or by other personnel as may be available to the court, subject to conditions applicable to the parent, guardian, custodian, or caretaker as the court may specify; or

b. Place the juvenile in the custody of a parent, relative, private agency offering placement services, or some other suitable person; or

c. Place the juvenile in the custody of the department of social services in the county of the juvenile's residence, or in the case of a juvenile who has legal residence outside the State, in the physical custody of the department of social services in the county where the juvenile is found so that agency may return the juvenile to the responsible authorities in the juvenile's home state. The director may, unless otherwise ordered by the court, arrange for, provide, or consent to, needed routine or emergency medical or surgical care or treatment. In the case where the parent is unknown, unavailable, or unable to act on behalf of the juvenile, the director may, unless otherwise ordered by the court, arrange for, provide, or consent to any psychiatric, psychological, educational, or other remedial evaluations or treatment for the juvenile placed by a court or the court's designee in the custody or physical custody of a county department of social services under the authority of this or any other Chapter of the General Statutes. Prior to exercising this authority, the director shall make reasonable efforts to obtain consent from a parent or guardian of the affected juvenile. If the director cannot obtain such consent, the director shall promptly notify the parent or guardian that care or treatment has been provided and shall give the parent frequent status reports on the circumstances of the juvenile. Upon request of a parent or guardian of the affected juvenile, the results or records of the aforementioned evaluations, findings, or treatment shall be made available to such parent or guardian by the director unless prohibited by G.S. 122C-53(d). If a juvenile is removed from the home and placed in custody or placement responsibility of a county department of social services, the director shall not allow unsupervised visitation with, or return physical custody of the juvenile to, the parent, guardian, custodian, or caretaker without a hearing at which the court finds that the juvenile will receive proper care and supervision in a safe home.

In placing a juvenile in out-of-home care under this section, the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile. In placing a juvenile in out-of-home care under this section, the court shall also consider whether it is in the juvenile's best interest to remain in the juvenile's community of residence. Placement of a juvenile with a relative outside of this State must be in accordance with the Interstate Compact on the Placement of Children.

(3) In any case, the court may order that the juvenile be examined by a physician, psychiatrist, psychologist, or other qualified expert as may be needed for the court to determine the needs of the juvenile:

a. Upon completion of the examination, the court shall conduct a hearing to determine whether the juvenile is in need of medical, surgical, psychiatric, psychological, or other treatment and who should pay the cost of the treatment. The county manager, or such person who shall be designated by the chairman of the county commissioners, of the juvenile's residence shall be notified of the hearing, and allowed to be heard. If the court finds the juvenile to be in need of medical, surgical, psychiatric, psychological, or other treatment, the court shall permit the parent or other responsible persons to arrange for treatment. If the parent declines or is unable to make necessary arrangements, the court may order the needed treatment, surgery, or care, and the court may order the parent to pay the cost of the care pursuant to G.S. 7B-904. If the court finds the parent is unable to pay the cost of treatment, the court shall order the county to arrange for treatment of the juvenile and to pay for the cost of the treatment. The county department of social services shall recommend the facility that will provide the juvenile with treatment.

b. If the court believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is developmentally disabled, the court shall refer the juvenile to the area mental health, developmental disabilities, and substance abuse services director for appropriate action. A juvenile shall not be committed directly to a State hospital or mental retardation center; and orders purporting to commit a juvenile directly to a State hospital or mental retardation center except for an examination to determine capacity to proceed shall be void and of no effect. The area mental health, developmental disabilities, and substance abuse director shall be responsible for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet the juvenile's needs. If institutionalization is determined to be the best service for the juvenile, admission shall be with the voluntary consent of the parent or guardian. If the parent, guardian, custodian, or caretaker refuses to consent to a mental hospital or retardation center admission after such institutionalization is recommended by the area mental health, developmental disabilities, and substance abuse director, the signature and consent of the court may be substituted for that purpose. In all cases in which a regional mental hospital refuses admission to a juvenile referred for admission by a court and an area mental health, developmental disabilities, and substance abuse director or discharges a juvenile previously admitted on court referral prior to completion of treatment, the hospital shall submit to the court a written report setting out the reasons for denial of admission or discharge and setting out the juvenile's diagnosis, indications of mental illness, indications of need for treatment, and a statement as to the location of any facility known to have a treatment program for the juvenile in question.

(b) When the court has found that a juvenile has suffered physical abuse and that the individual responsible for the abuse has a history of violent behavior against people, the court shall consider the opinion of the mental health professional who performed an evaluation under G.S. 7B-503(b) before returning the juvenile to the custody of that individual.

(c) If the court determines that the juvenile shall be placed in the custody of an individual other than the parents, the court shall verify that the person receiving custody of the juvenile understands the legal significance of the placement and will have adequate resources to care appropriately for the juvenile. (1979, c. 815, s. 1; 1981, c. 469, s. 19; 1985, c. 589, s. 5; c. 777, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 2; 1991, c. 636, s. 19(a); 1995 (Reg. Sess., 1996), c. 609, s. 3; 1997-516, s. 1A; 1998-202, s. 6; 1998-229, ss. 6, 23; 1999-318, s. 6; 1999-456, s. 60; 2002-164, s. 4.8; 2003-140, s. 9(b).)

Legal Periodicals. — For note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

For note on community-based care for juvenile offenders, see 18 Wake Forest L. Rev. 610 (1982).

For article, "Coercive Governmental Intervention and the Family: A Comment on North Carolina's Proposed Standards," see 7 Campbell L. Rev. 145 (1984).

For comment, "The Child Abuse Amendments of 1984: Congress Is Calling North Carolina to Respond to the Baby Doe Dilemma," 20 Wake Forest L. Rev. 975 (1984).

For 1984 survey, "Termination of Parental Rights: Putting Love in Its Place," see 63 N.C.L. Rev. 1177 (1985).

For article, "Mental Health Care for Children: Before and During State Custody," see 13 Campbell L. Rev. 1 (1990).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

The medical evaluation of juveniles is of critical importance in proceedings involving allegations of abuse and neglect under the Juvenile Code. In re Hayden, 96 N.C. App. 77, 384 S.E.2d 558 (1989).

The provision in subsection (6) of former § 7A-286 that a juvenile judge may not commit a child directly to a mental

institution was clearly designed to prevent conflicts with various statutes under former Chapter 122. In re Mikels, 31 N.C. App. 470, 230 S.E.2d 155 (1976).

Former Chapter 122 was written to provide constitutional defense, procedural, and evidentiary rules. To allow juvenile judges to commit minors to mental institutions with a lesser standard than that set forth in former Chapter 122 would subject such commitments to constitutional challenge as a deprivation of liberty without due process of law. In re Mikels, 31 N.C. App. 470, 230 S.E.2d 155 (1976).

The determination of "best interest" under former § 7A-647(2)c. is a conclusion because it requires the exercise of judgment; appellate review of a trial court's conclusions of law is limited to whether they are supported by findings of fact. In re Helms, 127 N.C. App. 505, 491 S.E.2d 672 (1997).

If the trial court uses the best interest of the child standard to award custody of a child to a parent, any misapplication of the constitutional presumption that a biological parent is a fit and proper person to exercise custody of her minor children pursuant to Petersen v. Rogers, 337 N.C. 397, 445 S.E.2d 901 (1994), is without consequence. Rholetter v. Rholetter, 162 N.C. App. 653, 592 S.E.2d 237, 2004 N.C. App. LEXIS 251 (2004).

"Cost of care" does not include counsel fees for juvenile, which are governed by G.S. 7A-588 (see now G.S. 7B-603, 7B-2002). In re Wharton, 54 N.C. App. 447, 283 S.E.2d 528 (1981).

Disposition on Review of Custody Order. — During the review hearing of a trial placement pursuant to former G.S. 7A-657 (see now G.S. 7B-906), the trial court may, in its discretion, order the implementation of any dispositional alternative listed in former G.S. 7A-647. However, if the trial court does not dismiss the case or continue the case pursuant to former G.S. 7A-657(1), then G.S. 7A-657 (see now G.S. 7B-906) limits the trial court's options to entry of an order continuing the placement, or entry of an order restoring custody of the child to the parent(s) from whom custody was taken, whichever is deemed to be in the best interest of the child. In re Shue, 311 N.C. 586, 319 S.E.2d 567 (1984).

Participation of Parent in Assessment or Treatment. — Former section 7A-650(b1) (see now G.S. 7B-904, 7B-2702, 7B-2704) only authorizes the district court to order the parent of a juvenile adjudicated as delinquent, undisciplined, abused, neglected, or dependent to participate in medical, psychiatric, psychological or other treatment ordered for the juvenile pursuant to former G.S. 7A-647(3). Former section 7A-650(b1) does not authorize the court to order a juvenile's parent to otherwise submit to medical, psychiatric, psychological or other assessment or treatment. In re Badzinski, 79 N.C. App. 250, 339 S.E.2d 80, cert. denied, 317 N.C. 703, 347 S.E.2d 35 (1986).

Evidence of prior neglect which led to an adjudication of neglect shows circumstances as they were and therefore is relevant to whether a change of circumstances has occurred since the court's order. In re Brenner, 83 N.C. App. 242, 350 S.E.2d 140 (1986).

Standard of Proof for Termination and Removal Distinguished. — There is a substantive difference between the quantum of adequate proof of neglect and dependency for purposes of termination and for purposes of removal. The most significant difference is that while parental rights may not be terminated for threatened future harm, the Department of Social Services may obtain temporary custody of a child when there is a risk of neglect in the future. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

Authority to Place Child in Custody of DSS. — Under former G.S. 7A-647, once a minor is adjudicated neglected, a judge has the authority to place the child in the custody of the Department of Social Services. In re Devone, 86 N.C. App. 57, 356 S.E.2d 389 (1987); In re Kennedy, 103 N.C. App. 632, 406 S.E.2d 307 (1991).

Trial court did not err in placing the minor child in the custody of the county social services department despite the father's contention that the minor child could have been placed with relatives; no showing was made that suitable relatives existed, especially since the father's paternity was at issue, and thus placement with the paternal grandparents as suggested by the father might not be in the best interests of the minor child since the minor child might find that they were not the minor child's relatives after all. In re D.S.A., — N.C. App. —, 641 S.E.2d 18, 2007 N.C. App. LEXIS 375 (2007).

The task at the temporary custody or removal stage is to determine whether the child is exposed to a substantial risk of physical injury because the parent is unable to provide adequate protection. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

Court Must Consider Pertinent Factors Before Ordering Commitment. — Where the trial court's findings did not sufficiently address the needs of the juvenile, such as medical or psychological evaluation, school records, home evaluation, or a history of parental neglect, and the court's order did not contain sufficient findings as to community resources that might be appropriate as noncustodial alternatives to commitment, case would be remanded for further consideration of these pertinent factors. In re Cousin, 93 N.C. App. 224, 377 S.E.2d 275 (1989).

A finding of fact that mother was a fit and proper person to have custody of her child did not compel the conclusion that custody should be awarded to her, where the court also found that the best interests of the child required that custody remain in others with whom the child was placed following a finding of dependency. In re Yow, 40 N.C. App. 688, 253 S.E.2d 647, cert. denied, 297 N.C. 610, 257 S.E.2d 223 (1979).

Attempt to Teach Mentally Retarded Child at Home. — Trial court did not err in finding that 15 year old with an IQ of 41, who had been taken out of public school and was being taught at home by his father, was neglected, in granting legal custody to the Department of Social Services, and in ordering the child to be returned to public school. In re Devone, 86 N.C. App. 57, 356 S.E.2d 389 (1987).

Where neglected juvenile's custody changes to non-custodial parent, if a trial court determines such disposition to be in the best interests of the child, G.S. 7B-903, there is no burden of proof at the dispositional hearing; the trial court must only consider the best interests of the child. Rholetter v. Rholetter, 162 N.C. App. 653, 592 S.E.2d 237, 2004 N.C. App. LEXIS 251 (2004).

Removal of Child Upheld. — Evidence held sufficient to show that seven-year old child was exposed to a substantial risk of physical injury because of her mother's inability to maintain secure living arrangements for her, so as to permit the Department of Social Services to remove her from her mother's custody until such accommodations could be provided. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

It was in child's best interest to continue in the custody of DSS pending mother's compliance with reunification measures where the child had lived in an environment injurious to her welfare, and where mother failed to comply with DSS's efforts to prevent removal. In re Helms, 127 N.C. App. 505, 491 S.E.2d 672 (1997).

Modification Upheld. — Where court had previously deemed it in the best interest of minor children who had been adjudicated neglected that mother comply with certain orders of the court, the court acted with full statutory authority when it later conducted a hearing upon social worker's subsequent motion and determined that mother's refusal to cooperate with community-level services and orders applicable to her constituted a "change of circumstances" affecting the best interest of the children, sufficient to require modification of prior custody orders. In re Brenner, 83 N.C. App. 242, 350 S.E.2d 140 (1986).

Termination of Visitation. — Termination of a mother's visitation with a child was not an abuse of discretion under G.S. 7B-507, G.S. 7B-901, G.S. 7B-903, and G.S. 7B-905 and was supported by findings of the parents' unsuccessful parenting of a sibling and their lack of progress in working with a department of social services to parent the child. In re C.M., — N.C. App. —, 644 S.E.2d 588, 2007 N.C. App. LEXIS 1043 (2007).

Award of Custody to Foster Parents. — Having acquired subject matter jurisdiction, trial court, guided by the best interests of the child, had broad dispositional powers, including the power to award legal custody of child to its foster parents. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

Placement With Relatives. — When, in a dependency proceeding, a trial court placed a child's custody with the child's foster parents without finding it was contrary to the child's best interests to place her with willing relatives, pursuant to G.S. 7B-903(a)(2)c, this was error as: (1) this statutory requirement applied to the review hearing at which the trial court entered its custody order because G.S. 7B-906, which governed the hearing, incorporated dispositional alternatives in G.S. 7B-903, which gave priority to placing a child with a suitable relative; (2) 42 U.S.C.S. § 671(a)(19) required that, as a condition for receiving federal foster care funds, a state had to have a foster care plan that gave preference to placement with a relative; (3) G.S. 7B-505 required the trial court, in entering a nonsecure custody order, to first consider the child's placement with a relative, and G.S. 7B-506(h) continued this requirement at each hearing to determine the need for the child's continued custody outside of her home, so the general assembly intended to apply this requirement to reviews of custody placements; and (4) exempting review hearings from the requirement to first consider placement with relatives risked undermining the Interstate Compact on the Placement of Children (ICPC), G.S. 7B-3800, as home studies of out-of-state relatives required by the ICPC were often not completed until a review hearing was held. In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

Authority To Order Treatment. — The trial court acted within the scope of former G.S. 7A-647(3) when it ordered the County to pay the costs of a juvenile's care in an existing institution after considering all alternative programs presented to the court and their relative costs. In re D.R.D., 127 N.C. App. 296, 488 S.E.2d 842 (1997).

District Court Not Authorized to Require Creation of Foster Home. — The district court is not authorized to require a county department of social services, either by itself or in conjunction with another agency, to implement the creation of a foster home with appropriate staff, wherein juveniles might be permanently domiciled for program treatment and delivery of services. In re Wharton, 305 N.C. 565, 290 S.E.2d 688 (1982).

Dispositional Alternatives. — While a trial court had the authority under G.S. 7B-906 to issue a dispositional order in a child custody case, and while that court had had the authority under G.S. 7B-906(g) to place custody of the child with someone other than a parent, the court erred in giving physical custody to the mother but ordering the child's "physical placement" to be with her maternal grandfather. G.S. 7B-903(a) specified the dispositional alternatives that were available in a custody matter, a "physical placement" with someone who did not have custody was not a permissible alternative under G.S. 7B-903(a), and G.S. 7B-906(g) contemplated that the person with whom the child was to live was a person who had custody of the child. In re H.S.F., 177 N.C. App. 193, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

Finding of Proper Care and Supervision. — Before returning a child to the custody of a parent from whose custody the child is originally taken, a trial court must find that the child will receive from that parent the proper care and supervision in a safe home. In re H.S.F., 177 N.C. App. 193, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

Change of Custody Improper. — Given that the department of social services was prohibited under G.S. 7B-903(a)(2)(c) from returning physical custody of a child, to the parent from whom the child had been taken, without a hearing in which a court found that the child would receive proper care in a safe home, as defined in G.S. 7B-101(19), a trial court erred in changing custody of a child from a father to the mother because the court was required to find, but did not find, that the child would receive from the mother the necessary proper care and supervision in a safe home, particularly in light of prior evidence that domestic violence had occurred in the home. In re H.S.F., 177 N.C. App. 193, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

Insufficient Findings. — While a court had the power under G.S. 7B-903 to enter an order transferring the custody of a minor child from her father to her mother, there was no evidence in the record in a proceeding on the parties' cross-motions for contempt that supported the finding that transferring custody to the mother was in the child's best interests. It had been found in an earlier proceeding that the mother was abusing prescription drugs, that her husband had been physically abusing her, and that loaded weapons were kept in their home, yet in the contempt proceeding, the trial court made no findings addressing a prior adjudication in which it had been determined that the child was neglected, and no findings were made as to whether efforts to mend the mother's relationship with her husband had been resolved. In re H.S.F., 177 N.C. App. 193, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

Applied in In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

Cited in In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — *The opinions below were rendered prior to enactment of this Chapter.*

Conflicting Provisions. — Former G.S. 7A-647(2), as amended by Session Laws 1985, c. 777, appeared on its face to be in conflict with 20 U.S.C. § 1415 and with G.S. 115C-106 (repealed), 115C-114 (repealed), and former 115C-116 (repealed), to the extent that it authorizes the county director of social services to make educational decisions for a handicapped child in the custody of a department of social services. This apparent conflict should be resolved by giving full effect to 20 U.S.C. § 1415. See opinion of Attorney General to Mr. Johnnie Ellerbe, Consultant, Division for Exceptional Children, State Department of Public Instruction, 55 N.C.A.G. 94 (1986).

The provisions of Article 9, Chapter 115C should be considered as an exception to the provisions of former G.S. 7A-647(2)c to the extent those statutes are in conflict. See opinion of Attorney General to Mr. Johnnie Ellerbe, Consultant, Division for Exceptional Children, State Department of Public Instruction, 55 N.C.A.G. 94 (1986).

Duration of Child Custody by County Social Services Department. — See opinion of Attorney General to Mrs. Margaret H. Coman, 40 N.C.A.G. 311 (1970), rendered under former G.S. 7A-286.

Articles 4 and 5A of former Chapter 122 did not revoke the authority which subdivision (6) of former § 7A-286 vested in a district court judge exercising juvenile jurisdiction to secure placement of a juvenile needing residential care and treatment for mental impairment to an appropriate facility. See opinion of Attorney General to Mr. R. Patterson Webb, Division of Mental Health, Department of Human Resources, 43 N.C.A.G. 163 (1973), rendered under former G.S. 7A-286.

Section Does Not Authorize District Court Judge to Commit Juvenile to Center for Mentally Retarded. — See opinion of Attorney General to Dr. Ann F. Wolfe, Division of Mental Health Services, 44 N.C.A.G. 126 (1974), rendered under former G.S. 7A-286.

Educational Interests of Handicapped Child. — In those situations where the parents of a handicapped child are unavailable or unknown and the child is a ward of the State, the responsibility and authority for representing that child's educational interests rests with a surrogate parent, and not with the county director of social services. Further, former G.S. 115C-116(c) (repealed) and 20 U.S.C. § 1415(b)(1)(B) prohibit the county director of social services or any employee of a department of social services involved in the education or care of such child from serving as a surrogate parent in such circumstances. See opinion of Attorney General to Mr. Johnnie Ellerbe, Consultant, Division for Exceptional Children, State Department of Public Instruction, 55 N.C.A.G. 94 (1986).

§ 7B-904. Authority over parents of juvenile adjudicated as abused, neglected, or dependent.

(a) If the court orders medical, surgical, psychiatric, psychological, or other treatment pursuant to G.S. 7B-903, the court may order the parent or other responsible parties to pay the cost of the treatment or care ordered.

(b) At the dispositional hearing or a subsequent hearing if the court finds that it is in the best interests of the juvenile for the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care to be directly involved in the juvenile's treatment, the court may order the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care to participate in medical, psychiatric, psychological, or other treatment of the juvenile. The cost of the treatment shall be paid pursuant to G.S. 7B-903.

(c) At the dispositional hearing or a subsequent hearing the court may determine whether the best interests of the juvenile require that the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care undergo psychiatric, psychological, or other treatment or counseling directed toward remediating or remedying behaviors or conditions that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care. If the court finds that the best interests of the juvenile require the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care undergo treatment, it may order that individual to comply with a plan of treatment approved by the court or condition legal custody or physical placement of the juvenile with the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care upon that individual's compliance with the plan of treatment. The court may order the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care to pay the cost of treatment ordered pursuant to this subsection. In cases in which the court has conditioned legal custody or physical placement of the juvenile with the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care upon compliance with a plan of treatment, the court may charge the cost of the treatment to the county of the juvenile's residence if the court finds the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care is unable to pay the cost of the treatment. In all other cases, if the court finds the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care is unable to pay the cost of the treatment ordered pursuant to this subsection, the court may order that individual to receive treatment currently available from the area mental health program that serves the parent's catchment area.

(d) At the dispositional hearing or a subsequent hearing, when legal custody of a juvenile is vested in someone other than the juvenile's parent, if the court finds that the parent is able to do so, the court may order that the parent pay a reasonable sum that will cover, in whole or in part, the support of the juvenile after the order is entered. If the court requires the payment of child support, the amount of the payments shall be determined as provided in G.S. 50-13.4(c). If the court places a juvenile in the custody of a county department of social services and if the court finds that the parent is unable to pay the cost of the support required by the juvenile, the cost shall be paid by the county department of social services in whose custody the juvenile is placed, provided the juvenile is not receiving care in an institution owned or operated by the State or federal government or any subdivision thereof.

(d1) At the dispositional hearing or a subsequent hearing, the court may order the parent, guardian, custodian, or caretaker served with a copy of the summons pursuant to G.S. 7B-407 to do any of the following:

(1) Attend and participate in parental responsibility classes if those classes are available in the judicial district in which the parent, guardian, custodian, or caretaker resides.

(2) Provide, to the extent that person is able to do so, transportation for the juvenile to keep appointments for medical, psychiatric, psychological, or other treatment ordered by the court if the juvenile remains in or is returned to the home.

(3) Take appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent, guardian, custodian, or caretaker.

(e) Upon motion of a party or upon the court's own motion, the court may issue an order directing the parent, guardian, custodian, or caretaker served with a copy of the summons pursuant to G.S. 7B-407 to appear and show cause why the parent, guardian, custodian, or caretaker should not be found or held in civil or criminal contempt for willfully failing to comply with an order of the court. Chapter 5A of the General Statutes shall govern contempt proceedings initiated pursuant to this section. (1979, c. 815, s. 1; 1983, c. 837, ss. 2, 3; 1987, c. 598, s. 2; 1989, c. 218; c. 529, s. 7; 1995, c. 328, s. 2; 1995 (Reg. Sess., 1996), c. 609, s. 4; 1997-456, s. 1; 1998-202, s. 6; 1999-318, s. 7; 1999-456, s. 60; 2001-208, s. 3; 2001-487, s. 101.)

CASE NOTES

Editor's Note. — *Most of the following cases were decided prior to the enactment of this Chapter.*

Authority of the Court. — The trial court did not have authority, pursuant to this section, to order respondent to "secure and maintain safe, stable housing and employment" nor to contact a child support enforcement department. This section is the trial court's only source of authority over the parent of a juvenile adjudicated abused or neglected, and the trial court may not order a parent to undergo any course of conduct not provided for in the statute. In re Cogdill, 137 N.C. App. 504, 528 S.E.2d 600 (2000), 2000 N.C. App. LEXIS 425.

Pursuant to G.S. 7B-904(d1)(3), a trial court did not exceed its authority in ordering the mother to comply with its directive that the father not have any contact with the son, as the infant had suffered a severe head trauma while in the father's sole care, which could not have been attributed to the infant's having rolled off the couch, as the father claimed. In re J.A.G., 172 N.C. App. 708, 617 S.E.2d 325, 2005 N.C. App. LEXIS 1785 (2005).

Trial court erred in ordering a father to contact the Child Support Enforcement Agency and to pay child support for the benefit of the children as G.S. 7B-904(d) did not provide the trial court with authority to order the father to contact a child support enforcement authority. In re A.S., — N.C. App. —, 640 S.E.2d 817, 2007 N.C. App. LEXIS 378 (2007).

Participation of Parent in Assessment or Treatment. — Former G.S. 7A-650(b1) only authorizes the district court to order the parent of a juvenile adjudicated as delinquent, undisciplined, abused, neglected, or dependent to participate in medical, psychiatric, psychological or other treatment ordered for the juvenile pursuant to former G.S. 7A-647(3). Former G.S. 7A-650(b1) does not authorize the court to order a juvenile's parent to otherwise submit to medical, psychiatric, psychological or other assessment or treatment. In re Badzinski, 79 N.C. App. 250, 339 S.E.2d 80 (1986).

Former G.S. 7A-650(b1) of this section does not authorize a court to order a parent of a juvenile who has been adjudicated as dependent or neglected to submit to medical, psychiatric, psychological or other assessment or treatment. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

Trial court properly ordered a father to undergo a psychological evaluation, have a substance abuse assessment, and enroll in parenting classes, as it was in the children's best interest. In re A.S., — N.C. App. —, 640 S.E.2d 817, 2007 N.C. App. LEXIS 378 (2007).

The trial court properly ordered respondent to undergo a psychological evaluation and possible treatment where the evidence indicated that she knew that her daughter was being abused by her father and lied about it. In re Cogdill, 137 N.C. App. 504, 528 S.E.2d 600 (2000), 2000 N.C. App. LEXIS 425.

The determination of reunification requirements is a conclusion of law because it requires the application of legal principles pursuant to former G.S. 7A-650(b2); appellate review of a trial court's conclusions of law is limited to whether they are supported by findings of fact. In re Helms, 127 N.C. App. 505, 491 S.E.2d 672 (1997).

Support payments ordered pursuant to former § 7A-650(c) should be based on the interplay of the trial court's conclusions as to the amount of support necessary to meet the needs of the child and the ability of the parents to provide that amount. The court's conclusions should in turn be based on findings of fact sufficiently specific to show that the court gave due regard to the relevant factors in G.S. 50-13.4(c) and any other relevant factors of the particular case. When such findings are not made, the order should be vacated, because appellate courts have no means of determining whether the order is supported by the evidence and is based on the proper considerations. In re Botsford, 75 N.C. App. 72, 330 S.E.2d 23 (1985).

§ 7B-905. Dispositional order.

(a) The dispositional order shall be in writing, signed, and entered no later than 30 days from the completion of the hearing, and shall contain appropriate findings of fact and conclusions of law. The court shall state with particularity, both orally and in the written order of disposition, the precise terms of the disposition including the kind, duration, and the person who is responsible for carrying out the disposition and the person or agency in whom custody is vested.

(b) A dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker shall direct that the review hearing required by G.S. 7B-906 be held within 90 days from of the date of the dispositional hearing and, if practicable, shall set the date and time for the review hearing.

(c) Any dispositional order shall comply with the requirements of G.S. 7B-507. Any dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker, or under which the juvenile's placement is continued outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety. If the juvenile is placed in the custody or placement responsibility of a county department of social services, the court may order the director to arrange, facilitate, and supervise a visitation plan expressly approved by the court. If the director subsequently makes a good faith determination that the visitation plan may not be in the best interests of the juvenile or consistent with the juvenile's health and safety, the director may temporarily suspend all or part of the visitation plan. The director shall not be subjected to any motion to show cause for this suspension, but shall expeditiously file a motion for review.

(d) When a county department of social services having custody or placement responsibility of a juvenile intends to change the juvenile's placement, the department shall give the guardian ad litem for the juvenile notice of its intention unless precluded by emergency circumstances from doing so. Where emergency circumstances exist, the department of social services shall notify the guardian ad litem or the attorney advocate within 72 hours of the

placement change, unless local rules require notification within a shorter time period. (1979, c. 815, s. 1; 1987 (Reg. Sess., 1988), c. 1090, s. 10; 1991, c. 434, s. 1; 1997-390, s. 8; 1998-202, s. 6; 1998-229, s. 24; 1999-456, s. 60; 2001-208, ss. 4, 18; 2001-487, s. 101; 2005-398, s. 5.)

Editor's Note. — Subsection (d), added by Session Laws 2005-398, s. 5, effective October 1, 2005, is applicable to petitions or actions filed on or after that date.

CASE NOTES

Editor's Note. — *Some of the following cases were decided prior to the enactment of this Chapter.*

Procedural validity of a dispositional order would be evaluated in light of the North Carolina Rules of Civil Procedure, G.S. 1A-1, and this section. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Agency Had Standing Under Nonsecure Custody Order. — DSS had standing to file a termination of parental rights petition as it had been granted indefinite custody of a child under a nonsecure custody order issued under G.S. 7B-506(a), and G.S. 7B-1103(a)(3) did not limit standing to parties granted custody by an order entered pursuant to G.S. 7B-905, but required only that DSS be granted custody by a court of competent jurisdiction. In re T.M., — N.C. App. —, 643 S.E.2d 471, 2007 N.C. App. LEXIS 802 (2007).

Former § 7A-651 does not require the trial judge to announce his findings and conclusions in open court, mandating only that the terms of the disposition be stated in open court with "particularity." In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Late Filing of Adjudication and Disposition Orders Not Grounds for Reversal Where No Prejudice. — Court's failure to file child neglect adjudication and disposition orders within 30 days as required under respectively, G.S. 7B- 807(b) and G.S. 7B-905(a), was not grounds for reversal because the mother could not show how she was prejudiced by the late filing. In re E.N.S., 164 N.C. App. 146, 595 S.E.2d 167, 2004 N.C. App. LEXIS 706 (2004), cert. denied, 359 N.C. 189, 606 S.E.2d 903 (2004).

Mother did not establish that a trial court's late entry of an order under G.S. 7B-905(a) in a neglect and dependency proceeding prejudiced the mother, as the delay did not preclude the reunification of the children and the mother. In re T.S., 178 N.C. App. 110, 631 S.E.2d 19, 2006 N.C. App. LEXIS 1299 (2006).

Father failed to show prejudice from the completion of a dispositional hearing 84 days after the conclusion of the adjudication hearing and 54 days after the deadline established by G.S. 7B-901 as the delay was due in part to the father's failure to complete his psychological evaluation and the parents' joint motion for a continuance as: (1) the trial court continued the dispositional hearing under G.S. 7B-803 based on its need to review the father's psychological evaluation; (2) the parents requested a continuance of the case; (3) the adjudication hearing was conducted within the 60-day deadline established by G.S. 7B-801(c); (4) the dispositional order was entered less than 30 days after the dispositional hearing under G.S. 7B-905(a); and (5) reunification efforts were not ceased until the dispositional hearing. In re C.M., — N.C. App. —, 644 S.E.2d 588, 2007 N.C. App. LEXIS 1043 (2007).

Failure to Provide for Visitation. — Trial court erred in failing to provide for visitation between the mother and the mother's older two children who were placed with the father due to the mother's neglect; the trial court was required by statute to provide for appropriate visitation as would be in the best interests of the minor children, consistent with their health and safety, and the trial court's failure to so provide meant the trial court had to consider the issue of visitation upon remand of the case to it. In re C.P., — N.C. App. —, 641 S.E.2d 13, 2007 N.C. App. LEXIS 377 (2007).

Judge May Make Oral Entry of Order. — Under G.S. 1A-1, Rule 58, a judge may make an oral entry of a juvenile order, provided the order is subsequently reduced to written form as required by this section. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Written dispositional order entered by juvenile court, which conformed generally with oral announcement of the order in open court, was valid. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Implication of Separation as Pre-Condition to Reunification Deemed Error. — Although the court was authorized under former G.S. 7A-651(c)(2) to find that efforts to reunite a family would be futile or inconsistent with the juvenile's safety, the court's statements implying that separation of the parents was a pre-condition to the mother having a realistic chance to regain custody were prejudicial error, and the part of the court's order retaining jurisdiction was, therefore, vacated. In re McLean, 135 N.C. App. 387, 521 S.E.2d

121, 1999 N.C. App. LEXIS 1150 (1999).

Restitution Order Vacated. — Where although the record contained substantial evidence that victim suffered great damage to his mobile home, juveniles were charged only with breaking windows and damaging the doors of his property, and admitted only to throwing rocks through some of the windows in the mobile home and nothing further, and there was no evidence in the record as to the amount of damage caused by the rocks thrown by the juveniles, dispositional order ordering restitution in the amount of $3,000.00 would be vacated and the matter remanded for a new dispositional hearing, at which the court would determine the amount of damages caused to the mobile home by the rocks thrown through the windows by the juveniles. In re Hull, 89 N.C. App. 171, 365 S.E.2d 221 (1988).

Where custody changes from one parent to another, in the children's best interests, the trial was relieved of the duty to conduct periodic judicial reviews of the placement pursuant to G.S. 7B-905 and G.S. 7B-906(d). Rholetter v. Rholetter, 162 N.C. App. 653, 592 S.E.2d 237, 2004 N.C. App. LEXIS 251 (2004).

Denial of Visitation to Father. — Trial court did not err in ordering that there be no contact between a minor child and her father because the testimony presented at a hearing along with county department of social services reports offered as evidence before the trial court tended to show that the father beat the child two to three times a day with a belt, used his fist to hit the child in the mouth, stomped on the child's stomach and caused the child to sustain the injuries of a fractured finger and ruptured spleen; accordingly, no amount of contact between the father and the child could have been said to be in the best interest of the child or be in anyway consistent with the health and safety of the child. In re J.S., — N.C. App. —, 641 S.E.2d 395, 2007 N.C. App. LEXIS 494 (2007).

Child Properly Removed. — Because the trial court found that the Department of Social Services (DSS) made reasonable efforts to prevent or eliminate the need for placement with DSS, to reunify the family, and to implement a permanent plan for the minor child, and the conditions that led to the kinship placement of both minor children still existed, the child was properly removed. In re A.S., — N.C. App. —, 640 S.E.2d 817, 2007 N.C. App. LEXIS 378 (2007).

Improper Discretion As to Visitation At Discretion of Guardian Held Error. — Trial court erred in ordering visitation between mother and her child at the discretion of the guardian with whom the court vested the physical custody of the child because the court, at a review hearing, was to consider and make relevant findings of fact regarding an appropriate visitation plan under G.S. 7B-906(c)(6). In re E.C., 174 N.C. App. 517, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

In a proceeding where children had been adjudicated neglected and dependent, permitting the children's guardian to determine visitation with their mother under G.S. 7B-905 was an improper delegation of judicial function. In re T.T., — N.C. App. —, 641 S.E.2d 344, 2007 N.C. App. LEXIS 489 (2007).

Restriction on Visitation. — Trial court did not err in ordering that visitation between the minor child, who had been the subject of neglect proceedings in the trial court, and the parents be at the discretion of the county social services department, as the trial court had the authority to do so; however, a remand of the minor child's case to the trial court was necessary because the county social services department was required to submit a visitation plan for the trial court's approval. In re D.S.A., — N.C. App. —, 641 S.E.2d 18, 2007 N.C. App. LEXIS 375 (2007).

Termination of Visitation. — Termination of a mother's visitation with a child was not an abuse of discretion under G.S. 7B-507, G.S. 7B-901, G.S. 7B-903, and G.S. 7B-905 and was supported by findings of the parents' unsuccessful parenting of a sibling and their lack of progress in working with a department of social services to parent the child. In re C.M., — N.C. App. —, 644 S.E.2d 588, 2007 N.C. App. LEXIS 1043 (2007).

Applied in In re T.H.T., — N.C. App. —, 648 S.E.2d 519, 2007 N.C. App. LEXIS 1812 (2007).

Cited in In re B.N.H., 170 N.C. App. 157, 611 S.E.2d 888, 2005 N.C. App. LEXIS 885 (2005); In re L.E.B., 169 N.C. App. 375, 610 S.E.2d 424, 2005 N.C. App. LEXIS 598 (2005); In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639, 2005 N.C. App. LEXIS 797 (2005); In re As.L.G., 173 N.C. App. 551, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005); In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005); In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006); In re A.R.G., 178 N.C. App. 205, 631 S.E.2d 146, 2006 N.C. App. LEXIS 1335 (2006); Owen v. Keeter (In re C.L.K.), — N.C. App. —, 643 S.E.2d 458, 2007 N.C. App. LEXIS 804 (2007).

§ 7B-906. Review of custody order.

(a) In any case where custody is removed from a parent, guardian, custodian, or caretaker the court shall conduct a review hearing within 90 days from the date of the dispositional hearing and shall conduct a review hearing within six months thereafter. The director of social services shall make a timely request to the clerk to calendar each review at a session of court scheduled for the hearing of juvenile matters. The clerk shall give 15 days' notice of the review and its purpose to the parent, the juvenile, if 12 years of age or more, the guardian, any foster parent, relative, or preadoptive parent providing care for the child, the custodian or agency with custody, the guardian ad litem, and any other person or agency the court may specify, indicating the court's impending review. Nothing in this subsection shall be construed to make any foster parent, relative, or preadoptive parent a party to the proceeding solely based on receiving notice and the right to be heard.

(b) Notwithstanding other provisions of this Article, the court may waive the holding of review hearings required by subsection (a) of this section, may require written reports to the court by the agency or person holding custody in lieu of review hearings, or order that review hearings be held less often than every six months, if the court finds by clear, cogent, and convincing evidence that:

(1) The juvenile has resided with a relative or has been in the custody of another suitable person for a period of at least one year;
(2) The placement is stable and continuation of the placement is in the juvenile's best interests;
(3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months;
(4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion; and
(5) The court order has designated the relative or other suitable person as the juvenile's permanent caretaker or guardian of the person.

The court may not waive or refuse to conduct a review hearing if a party files a motion seeking the review. However, if a guardian of the person has been appointed for the juvenile and the court has also made findings in accordance with G.S. 7B-907 that guardianship is the permanent plan for the juvenile, the court shall proceed in accordance with G.S. 7B-600(b).

(c) At every review hearing, the court shall consider information from the parent, the juvenile, the guardian, any foster parent, relative, or preadoptive parent providing care for the child, the custodian or agency with custody, the guardian ad litem, and any other person or agency which will aid in its review. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.

In each case the court shall consider the following criteria and make written findings regarding those that are relevant:

(1) Services which have been offered to reunite the family, or whether efforts to reunite the family clearly would be futile or inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time.
(2) Where the juvenile's return home is unlikely, the efforts which have been made to evaluate or plan for other methods of care.
(3) Goals of the foster care placement and the appropriateness of the foster care plan.
(4) A new foster care plan, if continuation of care is sought, that addresses the role the current foster parent will play in the planning for the juvenile.
(5) Reports on the placements the juvenile has had and any services offered to the juvenile and the parent, guardian, custodian, or caretaker.

(6) An appropriate visitation plan.

(7) If the juvenile is 16 or 17 years of age, a report on an independent living assessment of the juvenile and, if appropriate, an independent living plan developed for the juvenile.

(8) When and if termination of parental rights should be considered.

(9) Any other criteria the court deems necessary.

(d) The court, after making findings of fact, may appoint a guardian of the person for the juvenile pursuant to G.S. 7B-600 or may make any disposition authorized by G.S. 7B-903, including the authority to place the juvenile in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the best interests of the juvenile. The court may enter an order continuing the placement under review or providing for a different placement as is deemed to be in the best interests of the juvenile. The order must be reduced to writing, signed, and entered within 30 days of the completion of the hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection.

If at any time custody is restored to a parent, guardian, custodian, or caretaker the court shall be relieved of the duty to conduct periodic judicial reviews of the placement.

(e) Reserved.

(f) The provisions of G.S. 7B-507 shall apply to any order entered under this section.

(g) If the court determines that the juvenile shall be placed in the custody of an individual other than the parents or appoints an individual guardian of the person pursuant to G.S. 7B-600, the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile. (1979, c. 815, s. 1; 1987, c. 810; 1987 (Reg. Sess., 1988), c. 1090, s. 11; 1989, c. 152, s. 1; 1997-390, s. 9; 1998-202, s. 6; 1998-229, ss. 8, 25; 1999-456, s. 60; 2000-124, s. 2; 2001-208, s. 19; 2001-487, s. 101; 2003-62, s. 2; 2003-140, s. 9(c); 2005-398, s. 6; 2007-276, s. 3.)

Editor's Note. — Subdivisions (c)(6) and (c)(7) were originally enacted as subdivisions (c)(5a) and (c)(5b). The subdivisions have been renumbered at the direction of the Revisor of Statutes.

Subsection (d), as rewritten by Session Laws 2005-398, s. 6, effective October 1, 2005, is applicable to petitions or actions filed on or after that date.

Effect of Amendments. — Session Laws 2007-276, s. 3, effective October 1, 2007, substituted "the right" for "an opportunity" near the end of subsection (a).

Legal Periodicals. — For article, "Coercive Governmental Intervention and the Family: A Comment on North Carolina's Proposed Standards," see 7 Campbell L. Rev. 145 (1984).

For 1984 survey, "Termination of Parental Rights: Putting Love in Its Place," see 63 N.C.L. Rev. 1177 (1985).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

The common thread running throughout the Juvenile Code is that the court must consider the child's best interests in making all placements whether at the dispositional hearing or the review hearing. In re Shue, 63 N.C. App. 76, 303 S.E.2d 636 (1983), modified, 311 N.C. 586, 319 S.E.2d 567 (1984).

Applicability. — Amended G.S. 7B-906(b) and G.S. 7B-600(b) applied to a review conducted in October 2002 because the amended statutes applied to reviews that were commenced after October 1, 2000. In re J.D.C., 174 N.C. App. 157, 620 S.E.2d 49, 2005 N.C. App. LEXIS 2250 (2005).

Construction with Other Sections. — It is not necessary for there to be evidence of mental retardation, mental illness, organic brain syndrome, or some other degenerative mental condition, which would be required in a termination of parental rights determination pursuant to former7A-289.32(7) (see now G.S. 7B-1111), for the evidence to be sufficient in a review hearing under former G.S. 7A-657 to evince a lack of ability to perform mentally that impedes a parent's child care decisions. In re Reinhardt, 121 N.C. App. 201, 464 S.E.2d 698 (1995), overruled in part, 347 N.C. 339, 493 S.E.2d 418 (1997).

Appropriate Visitation Plan. — Trial court erred in failing to provide for visitation between the mother and the mother's older two children who were placed with the father due to the mother's neglect; the trial court was required by statute to provide for appropriate visitation as would be in the best interests of the minor children, consistent with their health and safety, and the trial court's failure to so provide meant the trial court had to consider the issue of visitation upon remand of the case to it. In re C.P., — N.C. App. —, 641 S.E.2d 13, 2007 N.C. App. LEXIS 377 (2007).

Evidence of strong emotional bonding between father and child is critically important. It is not, however, determinative. It is but one factor which the trial court must consider in determining what is in the best interest of the child. In re Shue, 63 N.C. App. 76, 303 S.E.2d 636 (1983), modified, 311 N.C. 586, 319 S.E.2d 567 (1984).

Former § 7A-657 contemplates that a child will be returned to the parent from whose custody it was taken if the trial court finds sufficient facts to show that the child will receive proper care and supervision from that parent. In re Shue, 63 N.C. App. 76, 303 S.E.2d 636 (1983), modified, 311 N.C. 586, 319 S.E.2d 567 (1984).

Former G.S. 7A-657 contemplates that a child may be returned to the parent(s) from whose custody it was taken if the trial court finds sufficient facts to show that the child will receive proper care and supervision from the parent(s). However, before custody is restored to that parent, the trial court also must find that such placement is deemed to be in the best interest of the child. In re Shue, 311 N.C. 586, 319 S.E.2d 567 (1984); In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

It is clear from the statutory framework of the Juvenile Code that one of the essential aims, if not the essential aim, of the dispositional hearing and the review hearing is to reunite the parent(s) and the child after the child has been taken from the custody of the parent(s). In re Shue, 311 N.C. 586, 319 S.E.2d 567 (1984).

Return of Custody. — Former G.S. 7A-657 contemplates that a child may be returned to the parent from whom custody was taken if the trial court finds sufficient facts to show that the child "will receive proper care and supervision" from the parent, and such placement is deemed in the best interest of the child. In re Isenhour, 101 N.C. App. 550, 400 S.E.2d 71 (1991).

The cessation of reunification efforts is a natural and appropriate result of a court's order initiating a termination of parental rights. In re Brake, 347 N.C. 339, 493 S.E.2d 418 (1997).

Nothing in the North Carolina Juvenile Code precluded the trial court from specifying in its order that the County Department of Social Services (DSS) "may" cease reconciliation efforts to reunite the juvenile with his mother while DSS was pursuing efforts to terminate the mother's parental rights. In re Brake, 347 N.C. 339, 493 S.E.2d 418 (1997).

Removal from one parent to another parent, simply put, does not fit neatly into the language in the first paragraph of former G.S. 7A-657. Consequently, the court must stress the significance of that portion of this section requiring the trial court to enter an order continuing the placement under review or providing for a different placement as is deemed to be in the best interest of the child. In re Shue, 63 N.C. App. 76, 303 S.E.2d 636 (1983), modified, 311 N.C. 586, 319 S.E.2d 567 (1984).

Where custody changes from one parent to another, in the children's best interests, the trial court was relieved of the duty to conduct periodic judicial reviews of the placement pursuant to G.S. 7B-905 and G.S. 7B-906(d). Rholetter v. Rholetter, 162 N.C. App. 653, 592 S.E.2d 237, 2004 N.C. App. LEXIS 251 (2004).

Notice. — Under G.S. 7B-906(c), a trial court in a custody review hearing was required, if relevant, to make findings of fact regarding a plan of visitation; thus, so notice of a custody review hearing was notice the trial court would consider issues related to visitation. In re Padgett, 156 N.C. App. 644, 577 S.E.2d 337, 2003 N.C. App. LEXIS 324 (2003).

Lack of Timeliness. — Where the review hearing of the neglect disposition was not held within the time period provided in G.S. 7B-906(a) and where the permanency planning orders were late under G.S. 7B-907(c), the mother was not entitled to relief, as the mother made no attempt to demonstrate the prejudice required for reversal. In re C.L.C., 171 N.C. App. 438, 615 S.E.2d 704, 2005 N.C. App. LEXIS 1316 (2005), aff'd, 360 N.C. 475, 628 S.E.2d 760 (2006).

Mother was not prejudiced by a trial court's delay in entering its order in a child neglect and pendency proceeding because neither the pendency of the trial court's order, nor an appeal, deprived the mother of reunification with her children; if the mother had complied with the trial court's order, she could have requested a review hearing and sought custody of her children. In re T.S., 178 N.C. App. 110, 631 S.E.2d 19, 2006 N.C. App. LEXIS 1299 (2006).

Consideration of Cost. — Neither G.S. 7B-906 nor G.S. 7B-907 barred consideration of the cost of providing the services deemed necessary for reunification when making a change to the permanency plan. In re J.J., — N.C. App. —, 637 S.E.2d 258, 2006 N.C. App. LEXIS 2412 (2006).

Disposition on Review of Custody Order. — During the review hearing of a trial placement pursuant to former G.S. 7A-657, the trial court may, in its discretion, order the implementation of any dispositional alternative listed in former G.S. 7A-647 (see now G.S. 7B-903). However, if the trial court does not dismiss the case or continue the case pursuant to former G.S. 7A-647(1) (see now G.S. 7B-903), then this section limits the trial court's options to entry of an order continuing the placement, or entry of an order restoring custody of the child to the parent(s) from whom custody was taken, whichever is deemed to be in the best interest of the child. In re Shue, 311 N.C. 586, 319 S.E.2d 567 (1984).

When, in a dependency proceeding, a trial court placed a child's custody with the child's foster parents without finding it was contrary to the child's best interests to place her with willing relatives, pursuant to G.S. 7B-903(a)(2)c, this was error because, inter alia, this statutory requirement applied to the review hearing at which the trial court entered its custody order because G.S. 7B-906, which governed the hearing, incorporated dispositional alternatives in G.S. 7B-903, which gave priority to placing a child with a suitable relative. In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

Written Custody Review Order. — As of January 1, 2002, G.S. 7B-906(d) requires any order from a custody review hearing to be reduced to writing, signed, and entered within 30 days of the completion of the hearing. In re Padgett, 156 N.C. App. 644, 577 S.E.2d 337, 2003 N.C. App. LEXIS 324 (2003).

When, in a dependency proceeding, a trial court's order transferring custody of a child from a department of social services to foster parents but requiring the department to continue to work towards reunification of the child with her parents was not entered until nine months after the hearing, contrary to the requirement of G.S. 7B-906(d) that an order be entered within 30 days of a hearing, (1) the department of social services and the child's parents, who sought to appeal the order, were prejudiced, because they could not perfect their appeal; (2) the child was prejudiced, because, while her permanency plan was reunification with her parents, nothing required her foster parents to cooperate with that plan, and, in fact, they sought termination of her parents' parental rights, causing confusion as to what the child's plan actually was; and (3) the permanency planning process was prejudiced, for the aforementioned reasons. In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

Written Findings Were Not Made. — Trial court failed to make findings with respect to G.S. 7B-906(b)(1) where it found that a child continued to reside with two custodians who had been designated as his guardians, but did not expressly find that the child with in the custody of a relative or suitable person for at least one year. In re L.B., — N.C. App. —, 646 S.E.2d 411, 2007 N.C. App. LEXIS 1476 (2007).

Trial court failed to make findings with respect to G.S. 7B-906(b)(3) where although it made several written findings with respect to a child's mother and her relationship with the child, it failed to make a written finding that neither the child's best interests nor the rights of any other party, including his mother, required the continued holding of review hearings every six months. In re L.B., — N.C. App. —, 646 S.E.2d 411, 2007 N.C. App. LEXIS 1476 (2007).

Trial court failed to make findings with respect to G.S. 7B-906(b)(4) where it failed to make any findings that the mother was aware that she was entitled to another review hearing by filing a motion for review. In re L.B., — N.C. App. —, 646 S.E.2d 411, 2007 N.C. App. LEXIS 1476 (2007).

Written Findings of Fact Required. — Trial court must make written findings of fact satisfying each of the enumerated criteria in G.S. 7B-906(b). In re L.B., — N.C. App. —, 646 S.E.2d 411, 2007 N.C. App. LEXIS 1476 (2007).

What Evidence Must Be Considered. — Whenever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court, subject to the discretionary powers of the trial court to exclude cumulative testimony. Without hearing and considering such evidence, the trial court cannot make an informed and intelligent decision concerning the best interest of the child. In re Shue, 311 N.C. 586, 319 S.E.2d 567 (1984).

In order to have custody restored, former G.S. 7A-657 requires the mother to show only that child will receive proper care and supervision and that such placement is deemed to be in the best interest of the child. Consequently, evidence of the mother's own changed circumstances and evidence that the child's welfare is being adversely affected by the child's present environment are both factors in the equation. In re Shue, 311 N.C. 586, 319 S.E.2d 567 (1984).

Written Findings Were Supported by Competent Evidence. — Trial court complied with G.S. 7B-906(b)(2) where it found, in writing, that the best interest of permanence for the child was to stay with the fit and proper custodians and those findings were supported by the guardian ad litem's report and a report from the Wayne County department of social services. In re L.B., — N.C. App. —, 646 S.E.2d 411, 2007 N.C. App. LEXIS 1476 (2007).

Trial court complied with G.S. 7B-906(b)(5) where it found, in writing, that two people were the child's custodians and that they had been designated as guardians. In re L.B., — N.C. App. —, 646 S.E.2d 411, 2007 N.C. App. LEXIS 1476 (2007).

Burden on Parents and Department. — The language of former G.S. 7A-640 and 7A-657 does not place any burden of proof upon either the parent(s) or department of social services during the dispositional hearing or the review hearing. The essential requirement, at the dispositional hearing and the review hearing, is that sufficient evidence be presented to the trial court so that it can determine what is in the best interest of the child. In re Shue, 311 N.C. 586, 319 S.E.2d 567 (1984).

Trial court's denial of a mother's request to regain legal and physical custody of her minor child, who was in the legal custody of the county department of social services and under the guardianship of the child's grandparents, was reversed and remanded because while the court held multiple proceedings pursuant to G.S. 7B-906, there was never a finding made that guardianship was the permanent plan under G.S. 7B-907; therefore, G.S. 7B-600(b) was inapplicable, and the trial court erred by imposing the burden of proof upon the mother. In re J.D.C., 174 N.C. App. 157, 620 S.E.2d 49, 2005 N.C. App. LEXIS 2250 (2005).

Periodic Review by Judge. — By this section, the judge is required to conduct a review within six months of the date the order was entered and annually thereafter. In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

Trial court made the findings required by G.S. 7B-906, which were supported by competent evidence, when it ordered a cease reunification efforts. The trial court was not conducting, nor was it required to conduct, a permanency planning hearing as specified in G.S. 7B-907, rather the trial court was conducting a review hearing as required by G.S. 7B-906. In re H. W., 163 N.C. App. 438, 594 S.E.2d 211, 2004 N.C. App. LEXIS 414 (2004).

Trial court's custody review order did not comply with G.S. 7B-906(c)(3) and (4) because it did not address the goals of a child's foster care placement or the role her foster parents were to play in her future planning, because the foster parents were foster parents, as they were providing foster care, as defined by G.S. 131D-10.2(9). In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

Parent's Lack of Ability to Perform Mentally. — Evidence that mother was vulnerable to the influence of others and that she continued to live in a trailer that had the smell of kerosene, the problem that gave rise to the original removal of her minor child from the home, supported a finding that the mother had a diminished capacity inhibiting her from making appropriate decisions for her child's care, which was sufficient in a review hearing under this section to evince a lack of ability to perform mentally that impeded her child care decisions. In re Reinhardt, 121 N.C. App. 201, 464 S.E.2d 698 (1995), overruled in part, 347 N.C. 339, 493 S.E.2d 418 (1997).

Failure to Make Relevant Findings of Fact Regarding Appropriate Visitation Plan Held Error. — Trial court erred in ordering visitation between mother and her child at the discretion of the guardian with whom the court vested the physical custody of the child because the court, at a review hearing, was to consider and make relevant findings of fact regarding an appropriate visitation plan under G. S. 7B-906(c)(6). In re E.C., 174 N.C. App. 517, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

Contemplation of Custody With Whom Child Resides. — While a trial court had the authority under G.S. 7B-906 to issue a dispositional order in a child custody case, and while that court had had the authority under G.S. 7B-906(g) to place custody of the child with someone other than a parent, the court erred in giving physical custody to the mother but ordering the child's "physical placement" to be with her maternal grandfather. G.S. 703(a) specified the dispositional alternatives that were available in a custody matter, a "physical placement" with someone who did not have custody was not a permissible alternative under G.S. 703(a), and G.S. 7B-906(g) contemplated that the person with whom the child was to live was a person who had custody of the child. In re H.S.F., 177 N.C. App. 193, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

Although a trial court in a custody dispute ended the custody of a county department of social services, the court did not err in retaining jurisdiction to conduct period review hearings, despite a father's claim that the court, under G.S. 7B-906(d), the court was relieved of the duty to conduct such reviews after custody was awarded to the father; in deciding a custody case under G.S. 7A-657, the almost-identical predecessor to G.S. 7B-906, the state's supreme court had already ruled that the relevant statutory language meant only that a trial court had a right to terminate its jurisdiction, but a trial court was not required to do so. Further, in the context of the Juvenile Code, North Carolina, G.S. 7B-201 provided that once a court obtained jurisdiction over a juvenile, that jurisdiction continued until terminated by a court order or until the juvenile reached the age of 18 years or was otherwise emancipated, and the parties' child was not yet 18 or emancipated. In re H.S.F., 177 N.C. App. 193, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

Trial Court Erred in Holding That There Would Be No Further Hearings. — Trial court erred in relieving all parties and attorneys of further responsibility and stating that there would be no further hearings held in the matter as the general rule under G.S. 7B-907(a) was that following a permanency planning hearing, subsequent permanency planning hearings were to be held at least every six months thereafter, and that the hearings could be combined with review hearings under G.S. 7B-906; while the hearings could be dispensed with under certain circumstances, the trial court failed to find all the criteria under G.S. 7B-906(b) before doing so. In re R.A.H., — N.C. App. —, 641 S.E.2d 404, 2007 N.C. App. LEXIS 498 (2007).

Trial Court Erred in Denying Mother's Request for Review Hearings. — Termination order was improper because the trial court erred in denying the mother's request for a review hearing under G.S. 7B-906(a) and by proceeding with the termination hearing before complying with the appellate mandate vacating permanency planning order that changed the permanent plan from reunification to termination. Garrison v. R.V.P. (In re P.P.), — N.C. App. —, 645 S.E.2d 398, 2007 N.C. App. LEXIS 1154 (2007).

Cited in In re B.N.H., 170 N.C. App. 157, 611 S.E.2d 888, 2005 N.C. App. LEXIS 885 (2005); In re L.M.C., 170 N.C. App. 676, 613 S.E.2d 256, 2005 N.C. App. LEXIS 1089 (2005); In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005); In re K.T.L., 177 N.C. App. 365, 629 S.E.2d 152, 2006 N.C. App. LEXIS 965 (2006); In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006); In re T.R.P., 360 N.C. 588, 636 S.E.2d 787, 2006 N.C. LEXIS 1193 (2006).

Applied in In re A.R.G., 178 N.C. App. 205, 631 S.E.2d 146, 2006 N.C. App. LEXIS 1335 (2006).

§ 7B-907. Permanency planning hearing.

(a) In any case where custody is removed from a parent, guardian, custodian, or caretaker, the judge shall conduct a review hearing designated as a permanency planning hearing within 12 months after the date of the initial order removing custody, and the hearing may be combined, if appropriate, with a review hearing required by G.S. 7B-906. The purpose of the permanency planning hearing shall be to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time. Subsequent permanency planning hearings shall be held at least every six months thereafter, or earlier as set by the court, to review the progress made in finalizing the permanent plan for the juvenile, or if necessary, to make a new permanent plan for the juvenile. The Director of Social Services shall make a timely request to the clerk to calendar each permanency planning hearing at a session of court scheduled for the hearing of juvenile matters. The clerk shall give 15 days' notice of the hearing and its purpose to the parent, the juvenile if 12 years of age or more, the guardian, any foster parent, relative, or preadoptive parent providing care for the child, the custodian or agency with custody, the guardian ad litem, and any other person or agency the court may specify, indicating the court's impending review. Nothing in this provision shall be construed to make any foster parent, relative, or preadoptive parent a party to the proceeding solely based on receiving notice and the right to be heard.

(b) At any permanency planning review, the court shall consider information from the parent, the juvenile, the guardian, any foster parent, relative or preadoptive parent providing care for the child, the custodian or agency with custody, the guardian ad litem, and any other person or agency which will aid it in the court's review. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition. At the conclusion of the hearing, if the juvenile is not returned home, the court shall consider the following criteria and make written findings regarding those that are relevant:

(1) Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home;

(2) Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents;

(3) Where the juvenile's return home is unlikely within six months, whether adoption should be pursued and if so, any barriers to the juvenile's adoption;

(4) Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why;

(5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile;

(6) Any other criteria the court deems necessary.

(c) At the conclusion of the hearing, the judge shall make specific findings as to the best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time. The judge may appoint a guardian of the person for the juvenile pursuant to G.S. 7B-600 or make any disposition authorized by G.S. 7B-903 including the authority to place the child in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the best interest of the juvenile. If the juvenile is not returned home, the court shall enter an order consistent with its findings that directs the department of social services to make reasonable efforts to place the juvenile in a timely manner in accordance with the permanent plan, to complete whatever steps are necessary to finalize the permanent placement of the juvenile, and to document such steps in the juvenile's case plan. Any order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection.

If at any time custody is restored to a parent, or findings are made in accordance with G.S. 7B-906(b), the court shall be relieved of the duty to conduct periodic judicial reviews of the placement.

If the court continues the juvenile's placement in the custody or placement responsibility of a county department of social services, the provisions of G.S. 7B-507 shall apply to any order entered under this section.

(d) In the case of a juvenile who is in the custody or placement responsibility of a county department of social services, and has been in placement outside the home for 12 of the most recent 22 months; or a court of competent jurisdiction has determined that the parent has abandoned the child; or has committed murder or voluntary manslaughter of another child of the parent; or has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent, the director of the department of social services shall initiate a proceeding to terminate the parental rights of the parent unless the court finds:

(1) The permanent plan for the juvenile is guardianship or custody with a relative or some other suitable person;

(2) The court makes specific findings why the filing of a petition for termination of parental rights is not in the best interests of the child; or

(3) The department of social services has not provided the juvenile's family with such services as the department deems necessary, when reasonable efforts are still required to enable the juvenile's return to a safe home.

(e) If a proceeding to terminate the parental rights of the juvenile's parents is necessary in order to perfect the permanent plan for the juvenile, the director of the department of social services shall file a petition to terminate parental rights within 60 calendar days from the date of the permanency planning hearing unless the court makes written findings why the petition cannot be filed within 60 days. If the court makes findings to the contrary, the court shall specify the time frame in which any needed petition to terminate parental rights shall be filed.

(f) If the court determines that the juvenile shall be placed in the custody of an individual other than the parents or appoints an individual guardian of the person pursuant to G.S. 7B-600, the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile. (1998-229, ss. 8.1, 25.1; 1999-456, s. 60; 2001-208, ss. 5, 20; 2001-487, s. 101; 2003-62, s. 3; 2003-140, s. 9(d); 2005-398, s. 7; 2007-276, s. 4.)

Editor's Note. — This section was originally enacted by Session Laws 1998-229, s. 8.1 as 7A-657.1 and was then amended and recodified by s. 25.1 of that act as 7B-906.1. It has been renumbered as 7B-907 at the direction of the Revisor of Statutes.

Subsection (c), as rewritten by Session Laws 2005-398, s. 7, effective October 1, 2005, is applicable to petitions or actions filed on or after that date.

Effect of Amendments. — Session Laws 2007-276, s. 4, effective October 1, 2007, substituted "the right" for "an opportunity" near the end of subsection (a).

CASE NOTES

Findings of Fact. — Remand was necessary where, although the trial court's findings of fact in a permanency planning review order were sufficient to support an order ceasing all efforts to reunify respondent with her children, the court failed to make required findings of fact under the specific criteria provided in G.S. 7B-907(b). In re Harton, 156 N.C. App. 655, 577 S.E.2d 334, 2003 N.C. App. LEXIS 207 (2003).

In a hearing held to determine if a mother was fit to retain custody of her child, the trial court's findings that the mother willfully and intentionally violated the court's orders to transfer all child support and social security payments she received to a friend who had temporary custody of her child, and to stay a specified distance away from the friend, did not explain why it was not in child's best interests that he be returned to his mother, and because the trial court did not make the findings required by subdivision (b)(1) of this section, the appellate court reversed the trial court's judgment and remanded the case for further proceedings. Buncombe County Dep't of Soc. Servs. v. Ledbetter (In re Ledbetter), 158 N.C. App. 281, 580 S.E.2d 392, 2003 N.C. App. LEXIS 1051 (2003).

Trial court's order which changed a mother's permanency planning order from reunification efforts with her two minor children to termination of her parental rights was based on findings of fact which were deemed insufficient to support the conclusions of law, and accordingly, there was no compliance with the requirement of G.S. 7B-507(b), and the order was reversed; the trial court failed to make specific factual findings that efforts towards reunification with the mother would be futile or that such efforts were inconsistent with the children's health, safety, and need for a permanent home, and the findings listed were actually conclusions of law. In re Weiler, 158 N.C. App. 473, 581 S.E.2d 134, 2003 N.C. App. LEXIS 1185 (2003).

Even though the trial court did not specifically identify the various statutory factors it considered in authorizing a change in permanency planning from reunification to adoption, it was clear from the record that all of them had been taken into account; moreover, since there was competent evidence in the record to support the conclusion that adoption was in the best interest of the children (where one child had become pregnant while staying in the parental home and the other expressed a longing to be adopted by the foster parents), the appeals court would not disturb the order. In re

J.C.S., 164 N.C. App. 96, 595 S.E.2d 155, 2004 N.C. App. LEXIS 746 (2004).

In a case involving G.S. 7B-507(a) and G.S. 7B-907(c), the trial court did not err in granting guardianship of the mother's three older children to the maternal aunt because the best interests of the children were paramount, and the trial court had no assurances the mother had made sufficient progress for the children to be returned to the mother's care. In re T.K., 171 N.C. App. 35, 613 S.E.2d 739, 2005 N.C. App. LEXIS 1191 (2005).

Trial court's reunification finding under G.S. 7B-907(b) in support of its order modifying a permanent plan from termination to guardianship and granting guardianship to a child's foster parents was supported by sufficient evidence that there were risks associated with the child returning home, that earlier attempts at home placement had failed, and that the mother had failed even to contact the social worker associated with her case since the last review. In re R.A.H., — N.C. App. —, 641 S.E.2d 404, 2007 N.C. App. LEXIS 498 (2007).

Trial court's best interest finding under G.S. 7B-907(b) in support of its order modifying a permanent plan from termination to guardianship and granting guardianship to a child's foster parents was supported by sufficient evidence based on the length of time that the child had waited for permanence and the other findings of fact. In re R.A.H., — N.C. App. —, 641 S.E.2d 404, 2007 N.C. App. LEXIS 498 (2007).

Trial court's finding that the foster parents understood the legal significance of the appointment of guardianship and that they had adequate resources to care appropriately for a child in support of its order modifying a permanent plan from termination to guardianship and granting guardianship to the foster parents under G.S. 7B-907(b) was supported by sufficient evidence that the foster parents had been raising the child for six years. In re R.A.H., — N.C. App. —, 641 S.E.2d 404, 2007 N.C. App. LEXIS 498 (2007).

Trial court's finding under G.S. 7B-907(b) that the best plan of care to achieve a safe, permanent home for a child was to grant legal guardianship to the foster parents was a conclusion of law, but it was supported by the findings of fact; its mislabeling was inconsequential. In re R.A.H., — N.C. App. —, 641 S.E.2d 404, 2007 N.C. App. LEXIS 498 (2007).

Finding under G.S. 7B-907(b) supporting a modification of a permanent plan from termination to guardianship and a grant of guardianship to a child's foster parents that the child's lack of permanence was resulting in developmental disabilities and that that situation continued was based on competent evidence as the trial court did not err in taking judicial notice of a pre-adoption review order that stated that the child's emotional health had continued to deteriorate, and that permanency for the child was not being achieved in a timely matter; at the time of the finding, it was clear that permanency had not been achieved. In re R.A.H., — N.C. App. —, 641 S.E.2d 404, 2007 N.C. App. LEXIS 498 (2007).

Permanency plan placing a juvenile with her paternal grandparents was upheld on appeal where the trial court's findings as to the mother's failure to undergo an ordered a psychological evaluation, her failure to conquer her anger problems, the mother's placement of her boyfriend, who was a sexual offender, above the child, and the child's lack of interest in visiting with the mother met the requirements of G.S. 7B-907(b). In re L.B., — N.C. App. —, 639 S.E.2d 23, 2007 N.C. App. LEXIS 84 (2007).

Trial court erred in entering a permanency planning order as: (1) no findings were made as to the best plan of care for the children as required by G.S. 7B-907(c); (2) although there was a finding that there were no barriers to the children's adoption, there was not finding as to whether adoption should be pursued as required by G.S. 7B-907(b)(3); (3) there was no finding as to whether the children should remain in the current placement or be placed in another permanent living arrangement and why as required by § 7B-907(b)(4); and (4) the only report specifically discussing the children submitted for the permanency planning hearing was the guardian ad litem's report, and it was not incorporated in the findings of fact. In re Z.J.T.B., — N.C. App. —, 645 S.E.2d 206, 2007 N.C. App. LEXIS 1161 (2007).

Order ceasing reunification efforts contained the findings required by G.S. 7B-907(b); among other things, the mother failed to attend all the meetings required by the substance abuse program, failed to continue individual therapy sessions, failed to safe secure housing and income, and had unprotected sex resulting in numerous unplanned pregnancies that strained the mother's already limited resources, including the time and money she could devote to caring for the child. In re K.S, — N.C. App. —, 646 S.E.2d 541, 2007 N.C. App. LEXIS 1164 (2007).

Failure to Make Required Findings of Fact. — Trial court erred in entering a permanency order relieving an agency from reunification efforts between a father and his children; the court failed to make required findings of fact pursuant to G.S. 7B-507(b) and G.S. 7B-907(b), and the evidence did not show that reunification was futile. In re Everett, 161 N.C. App. 475, 588 S.E.2d 579, 2003 N.C. App. LEXIS 2201 (2003).

Permanency planning order did not comply with the statutory requirements of G.S. 7B-907 because the issue of the child's possible placement with her paternal grandmother was relevant and not addressed in the order. In re

M.R.D.C., 166 N.C. App. 693, 603 S.E.2d 890, 2004 N.C. App. LEXIS 2030 (2004), cert. denied, 359 N.C. 321, 611 S.E.2d 413 (2005).

Trial court erred in failing to make written findings under G.S. 7B-907(b) on the rights and responsibilities that would remain with the mother after a guardianship was granted to a child's foster parents; the trial court also erred in stating orally at the hearing that visitation would be up to the guardian as the awarding of visitation was a judicial function that could not be delegated to the child's custodian. In re R.A.H., — N.C. App. —, 641 S.E.2d 404, 2007 N.C. App. LEXIS 498 (2007).

Trial court erred in appointing permanent legal guardians in its disposition order where the mother did not have statutorily required notice that a permanent plan was being considered and the trial court did not make the findings mandated by G.S. 7B-907(b), (c), and (f). In re D.C., — N.C. App. —, 644 S.E.2d 640, 2007 N.C. App. LEXIS 1168 (2007).

Burden of proof. — Trial court's denial of a mother's request to regain legal and physical custody of her minor child, who was in the legal custody of the county department of social services and under the guardianship of the child's grandparents, was reversed and remanded because while the court held multiple proceedings pursuant to G.S. 7B-906, there was never a finding made that guardianship was the permanent plan under G.S. 7B-907; therefore, G.S. 7B-600(b) was inapplicable, and the trial court erred by imposing the burden of proof upon the mother. In re J.D.C., 174 N.C. App. 157, 620 S.E.2d 49, 2005 N.C. App. LEXIS 2250 (2005).

Failure to Timely File Termination Petition Did Not Prejudice the Mother. — Although the Department of Social Services' failure to file its termination petition with 60 days violated G.S. 7B-907(e), the mother was not prejudiced; the mother failed to attend the termination hearing and did not assert that she would have attended hearing if the petition had been timely filed. In re As.L.G., 173 N.C. App. 551, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005).

Trial court was not divested of subject matter jurisdiction over a termination of parental rights matter, even though the petition was not timely filed under G.S. 7B-907, since a mother failed to present any argument as to how the delay prejudiced her or any other party to the matter. In re W.L.M., — N.C. App. —, 640 S.E.2d 439, 2007 N.C. App. LEXIS 250 (2007).

The trial court's Permanency Planning order was reversed where it neither directed DSS to initiate termination of parental rights proceedings against respondent mother nor made findings as permitted by subdivisions (d)(1) to (d)(3). In re Dula, 143 N.C. App. 16, 544 S.E.2d 591, 2001 N.C. App. LEXIS 226 (2001), aff'd, 354 N.C. 356, 554 S.E.2d 336 (2001).

Where a natural father, as a potential candidate for custody, was dismissed because of his late appearance, the trial court should have considered whether the father was a candidate for custody of a minor child and should have had required interviews by the guardian ad litem and Department of Social Services to further investigate the child's placement with her other natural parent. In re Eckard, 148 N.C. App. 541, 559 S.E.2d 233, 2002 N.C. App. LEXIS 23 (2002), cert. denied, 356 N.C. 163, 568 S.E.2d 192 (2002).

Award of Custody to Great-grandmother. — Termination of aunt's parental rights and award of permanent custody to the child's maternal great-grandmother was supported by substantial, competent evidence and affirmed, even though they had a pending G.S. ch. 50 custody action, where evidence at the G.S. 7B-907 hearing indicated that the child's aunt, who had been awarded temporary custody, failed to: (1) comply with court orders, including drug testing; (2) make reasonable and timely progress towards permanency, including providing suitable living conditions; (3) prove that it was possible for the child to return to her home within six months; and (4) prove it was in the child's best interests to live with her. In re C.E.L., 171 N.C. App. 468, 615 S.E.2d 427, 2005 N.C. App. LEXIS 1361 (2005).

Court erred in ordering an infant placed in guardianship because homelessness and joblessness did not per se support an abuse or neglect finding; but the court committed no error in admitting social services and guardian ad litem reports or alleged hearsay where the objection to the hearsay was unpreserved. In re Ivey, 156 N.C. App. 398, 576 S.E.2d 386, 2003 N.C. App. LEXIS 123 (2003).

Trial Court Erred in Holding That There Would Be No Further Hearings. — Trial court erred in relieving all parties and attorneys of further responsibility and stating that there would be no further hearings held in the matter as the general rule under G.S. 7B-907(a) was that following a permanency planning hearing, subsequent permanency planning hearings were to be held at least every six months thereafter, and that the hearings could be combined with review hearings under G.S. 7B-906; while the hearings could be dispensed with under certain circumstances, the trial court failed to find all the criteria under G.S. 7B-906(b) before doing so. In re R.A.H., — N.C. App. —, 641 S.E.2d 404, 2007 N.C. App. LEXIS 498 (2007).

Continuing Duty to Consider Child's Best Interest Made Res Judicata Inapplicable. — Order that deferred to a G.S. ch. 50 custody action but required agency to develop a permanency plan and the child's aunt to take specific steps to comply with it was not a final order; since the trial court also had a continuing G.S. 7B-907 duty to consider evidence regarding the child's best interests, res judicata did not bar it from terminating the aunt's parental rights. In re C.E.L., 171 N.C. App. 468, 615 S.E.2d 427, 2005 N.C. App. LEXIS 1361 (2005).

Time Limitations. — Mother was not entitled to relief from the parental rights termination where the termination petitions were filed more than three months after the limitations period under G.S. 7B-907(e), which was directory rather than mandatory, had run; the mother failed to show that she was prejudiced by the period of delay, as the mother did not take advantage of visitation and did not have contact with the petitioning agency, and the mother, pursuant to G.S. 7B-1001, could have appealed from either the review hearing ceasing efforts to reunify the family or from the permanency planning order that changed the permanency plan to termination of parental rights. In re C.L.C., 171 N.C. App. 438, 615 S.E.2d 704, 2005 N.C. App. LEXIS 1316 (2005), aff'd, 360 N.C. 475, 628 S.E.2d 760 (2006).

Where the review hearing of the neglect disposition was not held within the time period provided in G.S. 7B-906(a) and where the permanency planning orders were late under G.S. 7B-907(c), the mother was not entitled to relief, as the mother made no attempt to demonstrate the prejudice required for reversal. In re C.L.C., 171 N.C. App. 438, 615 S.E.2d 704, 2005 N.C. App. LEXIS 1316 (2005), aff'd, 360 N.C. 475, 628 S.E.2d 760 (2006).

Where the lapse between completion of the hearing and the entry of the order was approximately three and 1/2 months, because the order reduced the mother's visitation rights, any delay in the entry of the order actually benefitted the mother in that the reduction of her visitation was delayed; thus, there was no prejudice to the mother. In re J.J., — N.C. App. —, 637 S.E.2d 258, 2006 N.C. App. LEXIS 2412 (2006).

In order to warrant reversal of a trial court's permanency planning order for a violation of G.S. 7B-907(a), an appellant must demonstrate prejudice. In re L.B., — N.C. App. —, 639 S.E.2d 23, 2007 N.C. App. LEXIS 84 (2007).

Department of social services' failure to file a termination of parental rights petition within 60 calendar days of a permanency planning hearing as required by G.S. 7B-907(e) was not fatal, as the time limitation was directory and was not jurisdictional; further, the father did not show any prejudice resulting from the delay. In re T.M., — N.C. App. —, 643 S.E.2d 471, 2007 N.C. App. LEXIS 802 (2007).

Appeals. — Appellate court dismissed a mother's appeal from the trial court's order which found that her child was neglected and set adoption as the permanent plan for the child because the appeal became moot when the trial court entered a subsequent order terminating the mother's parental rights. In re V.L.B., 164 N.C. App. 743, 596 S.E.2d 896, 2004 N.C. App. LEXIS 1143 (2004).

Allowing the mother to stay the termination proceedings pending an appeal of a custody review order would have precluded compliance with the termination timeline mandated under G.S. 7B-907, G.S. 7B-1109, and G.S. 7B-1110, and this would have been improper. In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

Consideration of Cost. — Neither G.S. 7B-906 nor G.S. 7B-907 barred consideration of the cost of providing the services deemed necessary for reunification when making a change to the permanency plan. In re J.J., — N.C. App. —, 637 S.E.2d 258, 2006 N.C. App. LEXIS 2412 (2006).

Consideration of Home Study Reports Supported Guardianship Order. — Based on its consideration of reports from a home study conducted by a county department of social services in Virginia, a trial court adequately complied with G.S. 7B-600(c) and G.S. 7B-907(f) in placing children in the guardianship of their maternal grandparents. In re J.E., — N.C. App. —, 643 S.E.2d 70, 2007 N.C. App. LEXIS 801 (2007).

Concurrent Permanent Placement Plan of Reunification and Adoption Held Proper. — Concurrent permanent placement plan of reunification and adoption as allowed by G.S. 7B-507(d) did not conflict with the requirement of G.S. 7B-907(a) to obtain permanent placement within a reasonable period of time; concurrent plans leading to adoption of children by their foster parents and reunification with their mother were proper. In re J.J.L., 170 N.C. App. 368, 612 S.E.2d 404, 2005 N.C. App. LEXIS 1010 (2005).

Applied in In re H. W., 163 N.C. App. 438, 594 S.E.2d 211, 2004 N.C. App. LEXIS 414 (2004); In re B.M., 168 N.C. App. 350, 607 S.E.2d 698, 2005 N.C. App. LEXIS 252 (2005).

Cited in In re Eckard, 144 N.C. App. 187, 547 S.E.2d 835, 2001 N.C. App. LEXIS 449 (2001); In re J.B., 164 N.C. App. 394, 595 S.E.2d 794, 2004 N.C. App. LEXIS 820 (2004); In re L.M.C., 170 N.C. App. 676, 613 S.E.2d 256, 2005 N.C. App. LEXIS 1089 (2005); In re L.E.B., 169 N.C. App. 375, 610 S.E.2d 424, 2005 N.C. App. LEXIS 598 (2005); In re B.N.H., 170 N.C. App. 157, 611 S.E.2d 888, 2005 N.C. App. LEXIS 885 (2005); In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005); In re J.S.L., 177 N.C. App. 151, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006); In re B.M., — N.C. App. —, 643 S.E.2d 644, 2007 N.C. App. LEXIS 833 (2007); In re T.H.T., — N.C. App. —, 648 S.E.2d 519, 2007 N.C. App. LEXIS 1812 (2007).

§ 7B-908. Post termination of parental rights' placement court review.

(a) The purpose of each placement review is to ensure that every reasonable effort is being made to provide for a permanent placement plan for the juvenile who has been placed in the custody of a county director or licensed child-placing agency, which is consistent with the juvenile's best interests. At each review hearing the court may consider information from the department of social services, the licensed child-placing agency, the guardian ad litem, the child, any foster parent, relative, or preadoptive parent providing care for the child, and any other person or agency the court determines is likely to aid in the review. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.

(b) The court shall conduct a placement review not later than six months from the date of the termination hearing when parental rights have been terminated by a petition brought by any person or agency designated in G.S. 7B-1103(2) through (5) and a county director or licensed child-placing agency has custody of the juvenile. The court shall conduct reviews every six months thereafter until the juvenile is the subject of a decree of adoption:

(1) No more than 30 days and no less than 15 days prior to each review, the clerk shall give notice of the review to the juvenile if the juvenile is at least 12 years of age, the legal custodian of the juvenile, any foster parent, relative, or preadoptive parent providing care for the juvenile, the guardian ad litem, if any, and any other person or agency the court may specify. Only the juvenile, if the juvenile is at least 12 years of age, the legal custodian of the juvenile, any foster parent, relative, or preadoptive parent providing care for the juvenile, and the guardian ad litem shall attend the review hearings, except as otherwise directed by the court. Nothing in this subdivision shall be construed to make any foster parent, relative, or preadoptive parent a party to the proceeding solely based on receiving notice and the right to be heard. Any individual whose parental rights have been terminated shall not be considered a party to the proceeding unless an appeal of the order terminating parental rights is pending, and a court has stayed the order pending the appeal.

(2) If a guardian ad litem for the juvenile has not been appointed previously by the court in the termination proceeding, the court, at the initial six-month review hearing, may appoint a guardian ad litem to represent the juvenile. The court may continue the case for such time as is necessary for the guardian ad litem to become familiar with the facts of the case.

(c) The court shall consider at least the following in its review:

(1) The adequacy of the plan developed by the county department of social services or a licensed child-placing agency for a permanent placement relative to the juvenile's best interests and the efforts of the department or agency to implement such plan;

(2) Whether the juvenile has been listed for adoptive placement with the North Carolina Adoption Resource Exchange, the North Carolina Photo Adoption Listing Service (PALS), or any other specialized adoption agency; and

(3) The efforts previously made by the department or agency to find a permanent home for the juvenile.

(d) The court, after making findings of fact, shall affirm the county department's or child-placing agency's plans or require specific additional steps which are necessary to accomplish a permanent placement which is in the best interests of the juvenile.

(e) If the juvenile is the subject of a decree of adoption prior to the date scheduled for the review, written notice of the issuance of the decree of adoption shall be given to the clerk to be placed in the court file, and the review hearing shall be cancelled with notice of said cancellation given by the clerk to all persons previously notified.

(f) The process of selection of specific adoptive parents shall be the responsibility of and within the discretion of the county department of social services or licensed child-placing agency. The guardian ad litem may request information from and consult with the county department or child-placing agency concerning the selection process. If the guardian ad litem requests information about the selection process, the county shall provide the information within five days. Any issue of abuse of discretion by the county department or child-placing agency in the selection process must be raised by the guardian ad litem within 10 days following the date the agency notifies the court and the guardian ad litem in writing of the filing of the adoption petition. (1983, c. 607, s. 1; 1993, c. 537, s. 2; 1998-202, s. 6; 1998-229, ss. 9, 26; 1999-456, s. 60; 2003-62, s. 4; 2005-398, s. 8; 2007-276, s. 5.)

Editor's Note. — This section was originally enacted as G.S. 7B-907. It has been renumbered as this section at the direction of the Revisor of Statutes.

Subdivision (b)(1), as rewritten by Session Laws 2005-398, s. 8, effective October 1, 2005, is applicable to petitions or actions filed on or after that date.

Effect of Amendments. — Session Laws 2007-276, s. 5, effective October 1, 2007, substituted "the subject of a decree of adoption:" for "placed for adoption and the adoption petition is filed by the adoptive parents:" at the end of the introductory paragraph of subsection (b); substituted "the right" for "an opportunity" in the next to last sentence in subdivision (b)(1); in subsection (e), substituted "is the subject of a decree of" for "has been placed for" and substituted "the issuance of the decree of adoption" for "said placement."

Legal Periodicals. — For comment, "Termination of Parental Rights," see 21 Wake Forest L. Rev. 431 (1986).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

Foster Parents May Not Bring Custody Action. — Nothing in the language of G.S. 48-9.1(1) gives foster parents standing to contest the department's or agency's exercise of its rights as legal custodian; therefore, foster parents are without standing to bring an action seeking custody of minor child placed in their home by defendant. Oxendine v. Department of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981); In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

The case of Oxendine v. Department of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981) does not prohibit the transfer of legal care, custody and control of a foster child to its foster parents. Oxendine stands for the proposition that foster parents have no standing to bring a custody action pursuant to G.S. 50-13.2 et seq. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

But Foster Parents Have Right to Be Heard. — At the very least, foster parents have the right for an opportunity to be heard, a right which derives from the child's right to have his or her best interests protected. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

This section recognizes the right of foster parents to participate in review proceedings concerning the placement and care of their foster child after termination of parental rights. In re Scearce, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

This section requires that notice of review be given to foster parents and requires the foster parents to attend the review proceedings. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

Intervention by Foster Parents in Custody Proceeding. — In a proceeding brought by DSS, in which custody was put in issue by guardian ad litem and natural father, trial court did not err in permitting child's foster parents to intervene. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C.

415, 349 S.E.2d 589 (1986), distinguishing Oxendine v. Department of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

Power of Court to Award Custody to Foster Parents. — Having acquired subject matter jurisdiction, trial court, guided by the best interests of the child, had broad dispositional powers, including the power to award legal custody of child to its foster parents. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

Responsibility of Guardian ad Litem in Adoption Process. — The legislature charged the county department of social services or other licensed child-placing agency with the responsibility of selecting adoptive parents. The guardian ad litem's responsibility during this process is to raise any issue of the agency's abuse of discretion within ten days after she receives written notice of the filing of the adoption petition. The legislature provided no other responsibility for the guardian ad litem once a petition for adoption is filed and none seems appropriate. In re James S., 86 N.C. App. 364, 357 S.E.2d 430 (1987).

Under G.S. 48-16(a), the legislature clearly vested the Department of Social Services with the duty and responsibility to make investigations regarding adoptions. Thus, absent any responsibilities or duties to perform, the guardian ad litem is superfluous to an adoption proceeding. In re James S., 86 N.C. App. 364, 357 S.E.2d 430 (1987).

The guardian ad litem is empowered under former G.S. 7A-659(f) (see now this section) to request information about and be consulted concerning the adoption selection process. This includes confidential adoption information regarding adoptive parents. In re N.C.L., 89 N.C. App. 79, 365 S.E.2d 213, cert. denied, 322 N.C. 481, 370 S.E.2d 226 (1988).

It was the duty and right of guardian ad litem to inquire into Department of Social Services' handling of child's adoption, and it was within the district court's jurisdiction to order DSS to turn over requested information, despite its confidential nature. In re N.C.L., 89 N.C. App. 79, 365 S.E.2d 213, cert. denied, 322 N.C. 481, 370 S.E.2d 226 (1988).

Guardian ad litem's responsibility to child is intact for the 10-day period after he receives written notice of filing of adoption petition for the purpose of raising any issue of abuse of discretion. In re N.C.L., 89 N.C. App. 79, 365 S.E.2d 213, cert. denied, 322 N.C. 481, 370 S.E.2d 226 (1988).

Guardian ad litem who first made a motion to the court for information five days before receiving written notice that an adoption petition had been filed still had a responsibility and a duty, pursuant to former G.S. 7A-659(f) (see now this section), at the time he received notice of the adoption petition to raise any issue of abuse of discretion. In re N.C.L., 89 N.C. App. 79, 365 S.E.2d 213, cert. denied, 322 N.C. 481, 370 S.E.2d 226 (1988).

District Court Jurisdiction Not Ended by Notice of Adoption Petition. — District court jurisdiction attached on March 25, 1987, when guardian ad litem filed a motion in district court to compel Department of Social Services (DSS) to grant his requests to visit child and to obtain information on any prospective adoptive parents, and subsequent notice received on March 31, 1987, to the effect that a petition for adoption had been filed, did not end the district court's jurisdiction. In re N.C.L., 89 N.C. App. 79, 365 S.E.2d 213, cert. denied, 322 N.C. 481, 370 S.E.2d 226 (1988).

Filing of Motion Alleging Abuse in Adoption Process. — In view of G.S. 48-12, which provides that adoption proceeding shall be before the clerk of superior court, any motion alleging abuse of discretion in the adoption process should be filed with the clerk of superior court within the 10-day period provided for in former G.S. 7A-659(f) (see now this section). In re N.C.L., 89 N.C. App. 79, 365 S.E.2d 213, cert. denied, 322 N.C. 481, 370 S.E.2d 226 (1988).

Cited in In re B.N.H., 170 N.C. App. 157, 611 S.E.2d 888, 2005 N.C. App. LEXIS 885 (2005).

§ 7B-909. Review of agency's plan for placement.

(a) The director of social services or the director of the licensed private child-placing agency shall promptly notify the clerk to calendar the case for review of the department's or agency's plan for the juvenile at a session of court scheduled for the hearing of juvenile matters in any case where:

(1) One parent has surrendered a juvenile for adoption under the provisions of Part 7 of Article 3 of Chapter 48 of the General Statutes and the termination of parental rights proceedings have not been instituted against the nonsurrendering parent within six months of the surrender by the other parent, or

(2) Both parents have surrendered a juvenile for adoption under the provisions of Part 7 of Article 3 of Chapter 48 of the General Statutes

and that juvenile has not been placed for adoption within six months from the date of the more recent parental surrender.

(b) Repealed by 2007-276, s. 6, effective October 1, 2007.

(c) Notification of the court under this section shall be by a petition for review. The petition shall set forth the circumstances necessitating the review under subsection (a) of this section. The review shall be conducted within 30 days following the filing of the petition for review unless the court shall otherwise direct. The court shall conduct reviews every six months until the juvenile is the subject of a decree of adoption. The initial review and all subsequent reviews shall be conducted pursuant to G.S. 7B-908. Any individual whose parental rights have been terminated shall not be considered a party to the review unless an appeal of the order terminating parental rights is pending, and a court has stayed the order pending the appeal. (1983, c. 607, s. 2; 1993, c. 537, s. 4; 1995, c. 457, s. 6; 1998-202, s. 6; 1998-229, s. 9; 1999-456, s. 60; 2005-398, s. 9; 2007-276, s. 6.)

Editor's Note. — This section was originally enacted as G.S. 7B-908. It has been renumbered at the direction of the Revisor of Statutes.

Subsection (c), as rewritten by Session Laws 2005-398, s. 9, effective October 1, 2005, is applicable to petitions or actions filed on or after that date.

Effect of Amendments. — Session Laws 2007-276, s. 6, effective October 1, 2007, deleted subsection (b), regarding cases where adoption is dismissed or withdrawn; in subsection (c), substituted "under this section" for "required under subsection (a) or (b) of this section" in the first sentence, deleted "or (b)" in the second sentence, and substituted "the subject of a decree of adoption" for "placed for adoption and the adoption petition is filed by the adoptive parents" in the fourth sentence.

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Jurisdiction over Adoption Proceedings. — Chapter 7A specifically directs the district court to conduct periodic reviews of the juvenile's case before an adoption petition is filed. However, jurisdiction over adoption proceedings is vested solely in superior court. Thus, the district court has no jurisdiction to act once a petition for adoption is filed, and its jurisdiction is in abeyance once the petition is filed. Only when an adoption petition is withdrawn or dismissed does the district court recommence its supervision. In re James S., 86 N.C. App. 364, 357 S.E.2d 430 (1987).

Responsibility of Guardian ad Litem in Adoption Process. — Under G.S. 48-16(a), the legislature clearly vested the Department of Social Services with the duty and responsibility to make investigations regarding adoptions. Thus, absent any responsibilities or duties to perform, the guardian ad litem is superfluous to an adoption proceeding. In re James S., 86 N.C. App. 364, 357 S.E.2d 430 (1987).

§ 7B-910. Review of voluntary foster care placements.

(a) The court shall review the placement of any juvenile in foster care made pursuant to a voluntary agreement between the juvenile's parents or guardian and a county department of social services and shall make findings from evidence presented at a review hearing with regard to:

(1) The voluntariness of the placement;
(2) The appropriateness of the placement;
(3) Whether the placement is in the best interests of the juvenile; and
(4) The services that have been or should be provided to the parents, guardian, foster parents, and juvenile, as the case may be, either (i) to improve the placement or (ii) to eliminate the need for the placement.

(b) The court may approve the continued placement of the juvenile in foster care on a voluntary agreement basis, disapprove the continuation of the voluntary placement, or direct the department of social services to petition the court for legal custody if the placement is to continue.

(c) An initial review hearing shall be held not more than 90 days after the juvenile's placement and shall be calendared by the clerk for hearing within such period upon timely request by the director of social services. An additional review hearing shall be held 90 days thereafter and any review hearings at such times as the court shall deem appropriate and shall direct, either upon its own motion or upon written request of the parents, guardian, foster parents, or director of social services. A juvenile placed under a voluntary agreement between the juvenile's parent or guardian and the county department of social services shall not remain in placement more than six months without the filing of a petition alleging abuse, neglect, or dependency.

(d) The clerk shall give at least 15 days' advance written notice of the initial and subsequent review hearings to the parents or guardian of the juvenile, to the juvenile if 12 or more years of age, to the director of social services, and to any other persons whom the court may specify. (1983, c. 607, s. 2; 1993, c. 537, s. 4; 1995, c. 457, s. 6; 1998-202, s. 6; 1999-456, s. 60; 2001-208, s. 21; 2001-487, s. 101.)

Editor's Note. — This section was originally enacted as G.S. 7B-909. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 7B-911. Civil child-custody order.

(a) After making proper findings at a dispositional hearing or any subsequent hearing, the court on its own motion or the motion of a party may award custody of the juvenile to a parent or other appropriate person pursuant to G.S. 50-13.1, 50-13.2, 50-13.5, and 50-13.7, as provided in this section, and terminate the court's jurisdiction in the juvenile proceeding.

(b) When the court enters a custody order under this section, the court shall either cause the order to be filed in an existing civil action relating to the custody of the juvenile or, if there is no other civil action, instruct the clerk to treat the order as the initiation of a civil action for custody.

If the order is filed in an existing civil action and the person to whom the court is awarding custody is not a party to that action, the court shall order that the person be joined as a party and that the caption of the case be changed accordingly. The order shall resolve any pending claim for custody and shall constitute a modification of any custody order previously entered in the action.

If the court's order initiates a civil action, the court shall designate the parties to the action and determine the most appropriate caption for the case. The civil filing fee is waived unless the court orders one or more of the parties to pay the filing fee for a civil action into the office of the clerk of superior court. The order shall constitute a custody determination, and any motion to enforce or modify the custody order shall be filed in the newly created civil action in accordance with the provisions of Chapter 50 of the General Statutes. The Administrative Office of the Courts may adopt rules and shall develop and make available appropriate forms for establishing a civil file to implement this section.

(c) The court may enter a civil custody order under this section and terminate the court's jurisdiction in the juvenile proceeding only if:

(1) In the civil custody order the court makes findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes or, if the juvenile is already the subject of a custody order entered pursuant to Chapter 50, makes findings and conclusions that support modification of that order pursuant to G.S. 50-13.7; and

(2) In a separate order terminating the juvenile court's jurisdiction in the juvenile proceeding, the court finds:

a. That there is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding; and

b. That at least six months have passed since the court made a determination that the juvenile's placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is not required if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed. (2005-320, s. 4.)

Editor's Note. — Session Laws 2005-320, s. 6, made this section effective October 1, 2005, and applicable to juvenile proceedings and civil actions pending or filed on or after that date.

CASE NOTES

Proper Entry of Order. — There was no requirement that the trial court enter two different orders in a neglect action; the trial court could enter one order for placement in both the juvenile file and the civil file as long as the order was sufficient to support termination of juvenile court jurisdiction and modification of custody. In re A.S., — N.C. App. —, 641 S.E.2d 400, 2007 N.C. App. LEXIS 484 (2007).

Trial court's order stating that it resolved any pending claim for custody complied with G.S. 7B-911 because it contained findings of fact which were relevant to the issue of the child's best interest and welfare, and contained findings which established that the mother failed to seek medical attention for the child, yet the father took appropriate action. In re T.H.T., — N.C. App. —, 648 S.E.2d 519, 2007 N.C. App. LEXIS 1812 (2007).

Appellate Court Lacked Jurisdiction. — Appellate court lacked jurisdiction to hear a mother's claim of an alleged violation of G.S. 7B-911(c) as the mother failed to appeal a civil custody order, and § 7B-911(c) applied to civil custody orders, but not to review orders; without proper notice of appeal, the appellate court did not acquire jurisdiction, and neither the court nor the parties could waive the jurisdictional requirements even for good cause shown under N.C. R. App. P. 2. In re H.S.F., — N.C. App. —, 645 S.E.2d 383, 2007 N.C. App. LEXIS 748 (2007).

ARTICLE 10.

Modification and Enforcement of Dispositional Orders; Appeals.

§ 7B-1000. Authority to modify or vacate.

(a) Upon motion in the cause or petition, and after notice, the court may conduct a review hearing to determine whether the order of the court is in the best interests of the juvenile, and the court may modify or vacate the order in light of changes in circumstances or the needs of the juvenile. Notwithstanding the provision of this subsection, if a guardian of the person has been appointed for the juvenile and the court has also made findings in accordance with G.S. 7B-907 that guardianship is the permanent plan for the juvenile, the court shall proceed in accordance with G.S. 7B-600(b).

(b) In any case where the court finds the juvenile to be abused, neglected, or dependent, the jurisdiction of the court to modify any order or disposition made in the case shall continue during the minority of the juvenile, until terminated by order of the court, or until the juvenile is otherwise emancipated. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-456, s. 60; 2000-124, s. 3.)

Editor's Note. — Articles 1-11, of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

Section 5 of Session Laws 1998-202, also effective July 1, 1999, repealed the former North Carolina Juvenile Code, Articles 41 through 59 of Chapter 7A, along with additional related provisions.

Where applicable, historical citations and case annotations to former sections have been added to the corresponding sections in new Chapter 7B.

At the end of new Chapter 7B are tables showing comparable sections and their disposition of new Chapter 7B.

Session Laws 1998-202, s. 36, contains a severability clause.

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

Finding of Changed Conditions Required. — It is fundamental that before an order may be entered modifying a custody decree, there must be a finding of fact of changed conditions. In re Williamson, 77 N.C. App. 53, 334 S.E.2d 428, cert. denied, 316 N.C. 194, 341 S.E.2d 584 (1986).

A decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. In re Williamson, 77 N.C. App. 53, 334 S.E.2d 428, cert. denied, 316 N.C. 194, 341 S.E.2d 584 (1986).

For case in which the court found no change in the needs of juvenile requiring that her custody be returned to her parents, see In re Botsford, 75 N.C. App. 72, 330 S.E.2d 23 (1985).

Evidence of prior neglect which led to an adjudication of neglect shows circumstances as they were and therefore is relevant to whether a change of circumstances has occurred since the court's order. In re Brenner, 83 N.C. App. 242, 350 S.E.2d 140 (1986).

Modification Upheld. — Where court had previously deemed it in the best interest of minor children who had been adjudicated neglected that mother comply with certain orders of the court, the court acted with full statutory authority when it later conducted a hearing upon social worker's subsequent motion and determined that mother's refusal to cooperate with community-level services and orders applicable to her constituted a "change of circumstances" affecting the best interest of the children, sufficient to require modification of prior custody orders. In re Brenner, 83 N.C. App. 242, 350 S.E.2d 140 (1986).

Applied in In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

Cited in In re H.S.F., 177 N.C. App. 193, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

§ 7B-1001. Right to appeal.

(a) In a juvenile matter under this Subchapter, appeal of a final order of the court in a juvenile matter shall be made directly to the Court of Appeals. Only the following juvenile matters may be appealed:

(1) Any order finding absence of jurisdiction.
(2) Any order, including the involuntary dismissal of a petition, which in effect determines the action and prevents a judgment from which appeal might be taken.
(3) Any initial order of disposition and the adjudication order upon which it is based.
(4) Any order, other than a nonsecure custody order, that changes legal custody of a juvenile.
(5) An order entered under G.S. 7B-507(c) with rights to appeal properly preserved as provided in that subsection, as follows:
  a. The Court of Appeals shall review the order to cease reunification together with an appeal of the termination of parental rights order if all of the following apply:
    1. A motion or petition to terminate the parent's rights is heard and granted.
    2. The order terminating parental rights is appealed in a proper and timely manner.
    3. The order to cease reunification is assigned as an error in the record on appeal of the termination of parental rights.

b. A party who is a parent shall have the right to appeal the order if no termination of parental rights petition or motion is filed within 180 days of the order.

c. A party who is a custodian or guardian shall have the right to immediately appeal the order.

(6) Any order that terminates parental rights or denies a petition or motion to terminate parental rights.

(b) Except for orders covered in subdivision (a)(5) of this section, notice of appeal shall be given in writing by a proper party as defined in G.S. 7B-1002 and shall be made within 30 days after entry and service of the order in accordance with G.S. 1A-1, Rule 58. Notice of appeal for orders covered in subdivision (a)(5) of this section shall be given in writing by a proper party as defined in G.S. 7B-1002.

(c) Notice of appeal shall be signed by counsel for the appealing party, if any, and shall be taken only by following direct instruction of the appealing party after the conclusion of the proceeding. In the case of an appeal by a juvenile, notice of appeal shall be signed by the guardian ad litem attorney advocate. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-456, s. 60; 2001-208, s. 25; 2001-487, s. 101; 2005-398, s. 10.)

Editor's Note. — This section, as rewritten by Session Laws 2005-398, s. 1, effective October 1, 2005, is applicable to petitions or actions filed on or after that date.

CASE NOTES

Editor's Note. — *Some of the following cases were decided prior to the enactment of this Chapter.*

Former Provisions. — N.C. R. App. P. 3(b) provides that the time to take appeals in juvenile matters is governed by G.S. 7A-666, and appeals in termination of parental rights cases are governed by G.S. § 7A-289.34, but both referenced sections have been repealed and replaced by other provisions; appeals in child custody cases are now governed by G.S. 7B-1001, and appeals in termination of parental rights cases are governed by G.S. 7B-1113. In re Padgett, 156 N.C. App. 644, 577 S.E.2d 337, 2003 N.C. App. LEXIS 324 (2003).

Immediate Direct Appeal. — Former G.S. 7A-666 (see now this section) authorizes an immediate direct appeal to the Court of Appeals of a juvenile transfer order. State v. T.D.R., 347 N.C. App. 489, 495 S.E.2d 700 (1998).

Mother was not entitled to relief from the parental rights termination where the termination petitions were filed more than three months after the limitations period under G.S. 7B-907(e), which was directory rather than mandatory, had run; the mother failed to show that she was prejudiced by the period of delay, as the mother did not take advantage of visitation and did not have contact with the petitioning agency, and the mother, pursuant to G.S. 7B-1001, could have appealed from either the review hearing ceasing efforts to reunify the family or from the permanency planning order that changed the permanency plan to termination of parental rights. In re C.L.C., 171 N.C. App. 438, 615 S.E.2d 704, 2005 N.C. App. LEXIS 1316 (2005), aff'd, 360 N.C. 475, 628 S.E.2d 760 (2006).

Time For Appeal. — G.S. 7B-1001 requires a notice of appeal within 10 days of any order of disposition following an order adjudicating a juvenile as neglected. In re Padgett, 156 N.C. App. 644, 577 S.E.2d 337, 2003 N.C. App. LEXIS 324 (2003).

Any challenge to the neglect adjudication was not properly before the appellate court because the mother did not appeal within 10 days pursuant to G.S. 7B-1001. In re C.L.C., 171 N.C. App. 438, 615 S.E.2d 704, 2005 N.C. App. LEXIS 1316 (2005), aff'd, 360 N.C. 475, 628 S.E.2d 760 (2006).

Father's appeal of a trial court's order that a county agency pursue the adoption of the father's child and terminate the father's parental rights was dismissed because the order on appeal was not a final order for purposes of appeal as none of the provisions of G.S. 7B-1001 applied. In re A.R.G., 178 N.C. App. 205, 631 S.E.2d 146, 2006 N.C. App. LEXIS 1335 (2006).

Although a mother's oral notice of appeal in a termination case was timely under N.C. R. App. P. 3, and thus the trial court used invalid grounds for its order dismissing the mother's appeal, because valid grounds existed on which the trial court's order could have been based, N.C. R. App. P. 25(a) authorized the trial court's actions, and the error was harmless. In re J.L.,

— N.C. App. —, 646 S.E.2d 861, 2007 N.C. App. LEXIS 1598 (2007).

Finding of Probable Cause Not Final Order. — A finding of probable cause in a juvenile proceeding was not an appealable "final order" under this section, and evidentiary rulings of the trial court in conducting the probable cause hearing were not properly before the Court of Appeals for review. In re Ford, 49 N.C. App. 680, 272 S.E.2d 157 (1980).

Temporary Dispositional Finding of Neglect Not Final Order. — Mother's appeal from the adjudication and temporary dispositional order finding her children to be neglected was not an appeal from a final order as required by G.S. 7B-1001, and was premature; accordingly, the appellate court denied certiorari as the final disposition would remain in effect since it was not before the court on appeal. In re Laney, 156 N.C. App. 639, 577 S.E.2d 377, 2003 N.C. App. LEXIS 191 (2003), cert. denied, 357 N.C. 459, 585 S.E.2d 762 (2003).

Father was not entitled to appeal a temporary dispositional order of neglect under G.S. 7B-1001(a) as it was not final. In re C.M., — N.C. App. —, 644 S.E.2d 588, 2007 N.C. App. LEXIS 1043 (2007).

Initial permanency planning order is not a final order under G.S. 7B-1001, and is not subject to an appeal. In re B.N.H., 170 N.C. App. 157, 611 S.E.2d 888, 2005 N.C. App. LEXIS 885 (2005).

Initial permanency planning order directing adoption for a mother's minor son was not a final order under G.S. 7B-1001 and, therefore, her appeal of that order was dismissed; the initial permanency planning order directing adoption did not change the mother's custodial rights or interest in the proceeding and was not immediately appealable. In re B.N.H., 170 N.C. App. 157, 611 S.E.2d 888, 2005 N.C. App. LEXIS 885 (2005).

Permanency planning order which continued a child's custody with the department and stated that the permanent plan would be adoption did not change the status quo since custody was given to the department by a previous order, thus the order appealed from did not alter the child's disposition; this was not an order from which the mother was allowed to appeal. In re C.L.S., 175 N.C. App. 240, 623 S.E.2d 61, 2005 N.C. App. LEXIS 2750 (2005).

Change in Permanency Plan Order Was Dispositional and Hence, Appealable. — Trial court's order, which changed the mother's permanency plan with her minor children from one of reunification to one of termination of parental rights, was a dispositional order that was appealable as a final order. In re Weiler, 158 N.C. App. 473, 581 S.E.2d 134, 2003 N.C. App. LEXIS 1185 (2003).

An adjudication of delinquency is not a final order. No appeal may be taken from such order unless no disposition is made within 60 days of the adjudication of delinquency. In re Taylor, 57 N.C. App. 213, 290 S.E.2d 797 (1982).

Oral Notice of Appeal from Final Order. — When the second sentence of former G.S. 7A-666 permitting oral notice of appeal at the hearing, was read in conjunction with the first sentence providing for appellate review only upon any "final order," it appeared that oral notice of appeal given at the time of the hearing must be from a final order. In re Hawkins, 120 N.C. App. 585, 463 S.E.2d 268 (1995).

Trial court lacked jurisdiction under G.S. 7B-1003 to enter an order terminating a father's parental rights while the father's appeal from the court's permanency planning review order was pending before the Court of Appeals of North Carolina. In re Hopkins, 163 N.C. App. 38, 592 S.E.2d 22, 2004 N.C. App. LEXIS 266 (2004), cert. denied, 359 N.C. 632, 616 S.E.2d 230 (2005).

Temporary Caregiver. — Paternal step-grandfather has no standing to appeal under G.S. 7B-1002; the fact that paternal step-grandfather was listed on the county's petition for neglect did not make him a party to the action because he was not deemed a custodian in the petitions and was simply listed because he fulfilled the role of a caregiver with regard to the two minor children at issue, with such temporary care not warranting a conclusion that he stood in loco parentis to the children. In re A.P., 165 N.C. App. 841, 600 S.E.2d 9, 2004 N.C. App. LEXIS 1527 (2004).

Review Order not Final. — In dependency proceedings, a trial court's order finding that an agency should pursue termination of a father's parental rights and adoption of the father's child by the child's foster parents, based on a finding that the child's placement with the father was "unlikely" and that it was in the child's best interests for the agency to pursue termination, was not a final order subject to appeal under G.S. 7B-1001(4). In re A.R.G., 361 N.C. 392, 646 S.E.2d 349, 2007 N.C. LEXIS 597 (2007).

Applied in In re B.M., 168 N.C. App. 350, 607 S.E.2d 698, 2005 N.C. App. LEXIS 252 (2005).

Cited in In re T.M., — N.C. App. —, 643 S.E.2d 471, 2007 N.C. App. LEXIS 802 (2007).

§ 7B-1002. Proper parties for appeal.

Appeal from an order permitted under G.S. 7B-1001 may be taken by:

(1) A juvenile acting through the juvenile's guardian ad litem previously appointed under G.S. 7B-601.
(2) A juvenile for whom no guardian ad litem has been appointed under G.S. 7B-601. If such an appeal is made, the court shall appoint a guardian ad litem pursuant to G.S. 1A-1, Rule 17 for the juvenile for the purposes of that appeal.
(3) A county department of social services.
(4) A parent, a guardian appointed under G.S. 7B-600 or Chapter 35A of the General Statutes, or a custodian as defined in G.S. 7B-101 who is a nonprevailing party.
(5) Any party that sought but failed to obtain termination of parental rights. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-456, s. 60; 2005-398, s. 11.)

Editor's Note. — This section, as rewritten by Session Laws 2005-398, s. 11, effective October 1, 2005, is applicable to petitions or actions filed on or after that date.

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Temporary Caregiver. — Paternal step-grandfather has no standing to appeal under G.S. 7B-1002; the fact that paternal step-grandfather was listed on the county's petition for neglect did not make him a party to the action because he was not deemed a custodian in the petitions and was simply listed because he fulfilled the role of a caregiver with regard to the two minor children at issue, with such temporary care not warranting a conclusion that he stood in loco parentis to the children. In re A.P., 165 N.C. App. 841, 600 S.E.2d 9, 2004 N.C. App. LEXIS 1527 (2004).

County May Not Appeal. — It is manifest that this statute (former G.S. 7A-667) does not empower a county to take an appeal in a juvenile proceeding. In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

Cited in In re Brown, 141 N.C. App. 550, 539 S.E.2d 366, 2000 N.C. App. LEXIS 1310 (2000).

§ 7B-1003. Disposition pending appeal.

(a) During an appeal of an order entered under this Subchapter, the trial court may enforce the order unless the trial court or an appellate court orders a stay.

(b) Pending disposition of an appeal, unless directed otherwise by an appellate court or subsection (c) of this section applies, the trial court shall:
(1) Continue to exercise jurisdiction and conduct hearings under this Subchapter with the exception of Article 11 of the General Statutes; and
(2) Enter orders affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile.

(c) Pending disposition of an appeal of an order entered under Article 11 of this Chapter where the petition for termination of parental rights was not filed as a motion in a juvenile matter initiated under Article 4 of this Chapter, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile. Upon the affirmation of the order of adjudication or disposition of the court in a juvenile case by the Court of Appeals, or by the Supreme Court in the event of an appeal, the court shall have authority to modify or alter its original order of adjudication or disposition as the court finds to be in the best interests of the juvenile to reflect any adjustment made by the juvenile or change in circumstances during the period of time the case on appeal was pending, provided that if the modifying order be entered ex parte, the court shall give notice to interested parties to show cause, if there be any, within 10 days thereafter, as to why the modifying order should be vacated or altered.

(d) When the court has found that a juvenile has suffered physical abuse and that the individual responsible for the abuse has a history of violent behavior, the court shall consider the opinion of the mental health professional who performed the evaluation under G.S. 7B-503(b) before returning the juvenile to the custody of that individual pending resolution of an appeal.

(e) The provisions of subsections (b), (c), and (d) of G.S. 7B-905 shall apply to any order entered during an appeal that provides for the placement or continued placement of a juvenile in foster care. (1979, c. 815, s. 1; 1987 (Reg. Sess., 1988), c. 1090, s. 12; 1998-202, s. 6; 1999-318, s. 8; 1999-456, s. 60; 2001-208, s. 27; 2001-487, s. 101; 2003-140, s. 8; 2005-398, s. 12.)

Editor's Note. — This section, as rewritten by Session Laws 2005-398, s. 12, effective October 1, 2005, is applicable to petitions or actions filed on or after that date.

Legal Periodicals. — For article, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

Constitutionality of Former § 7A-289. — Former G.S. 7A-289, permitting the district court to enter a temporary custody order affecting a juvenile who is appealing a commitment order of the court, was not unconstitutional on the ground that the statute deprived the juvenile of the right to bail. In re Martin, 9 N.C. App. 576, 176 S.E.2d 849 (1970), decided under former § 7A-289.

Section Controls over § 1-294. — Although G.S. 1-294 states the general rule regarding jurisdiction of the trial court pending appeal, it is not controlling where there is a specific statute, such as former G.S. 7A-669 (see now this section), addressing the matter in question. In re Huber, 57 N.C. App. 453, 291 S.E.2d 916, appeal dismissed and cert. denied, 306 N.C. 557, 294 S.E.2d 223 (1982).

Section Permits Court to Circumvent Recalcitrant Parties. — Without authority of the district court to provide for the treatment of a neglected child pending appeal, a recalcitrant party could frustrate the efforts of the court to provide for the child's best interests by simply entering notice of appeal. In re Huber, 57 N.C. App. 453, 291 S.E.2d 916, appeal dismissed and cert. denied, 306 N.C. 557, 294 S.E.2d 223 (1982).

Emergency Commitment Held Improper. — Written order which merely stated that it was an "emergency commitment," without stating any supporting reasons or findings of fact, was not proper. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988), holding, however, that juvenile had not shown prejudice from such order.

Trial court lacked jurisdiction under G.S. 7B-1003 to enter an order terminating a father's parental rights while the father's appeal from the court's permanency planning review order was pending before the Court of Appeals of North Carolina. In re Hopkins, 163 N.C. App. 38, 592 S.E.2d 22, 2004 N.C. App. LEXIS 266 (2004), cert. denied, 359 N.C. 632, 616 S.E.2d 230 (2005).

Trial Court Improperly Failed to Comply with Appellate Mandate. — Termination order was improper under circumstances in which the trial court proceeded with the termination hearing before complying with the appellate mandate vacating permanency planning order, which changed the permanent plan from reunification to termination; the legislature did not intend for its amendment of G.S. 7B-1003 to divest trial courts of jurisdiction over termination petitions during appeals of dispositional orders, but to nonetheless allow trial courts to avoid the effect of those appeals once they were decided. Garrison v. R.V.P. (In re P.P.), — N.C. App. —, 645 S.E.2d 398, 2007 N.C. App. LEXIS 1154 (2007).

This section did not deprive the trial court of jurisdiction to terminate the mother's parental rights during the pendency of the custody review order appeal; G.S. 7B-1003 applied only to dependency proceedings, not to termination proceedings, and allowing parents to delay termination proceedings by appealing custody review orders would have thwarted G.S. 7B-100(5), which sought to place children in safe, permanent houses within a reasonable amount of time. In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

Appeal of Permanency Planning Order Not Mooted. — After a mother filed a notice of appeal of a permanency planning order under G.S. 7B-1003(b), the trial court no longer had jurisdiction to rule on the petitions to terminate her parental rights under G.S. 7B-1101; consequently, the order terminating the mother's parental rights was void ab initio, and did not render moot the appeal of the permanency planning order. In re Z.J.T.B., — N.C. App. —, 645 S.E.2d 206, 2007 N.C. App. LEXIS 1161 (2007).

Lack of Timeliness. — Mother was not prejudiced by a trial court's delay in entering its order in a child neglect and pendency proceeding because neither the pendency of the trial court's order, nor an appeal, deprived the mother of reunification with her children; if the mother had complied with the trial court's order, she could have requested a review hearing and sought custody of her children. In re T.S., 178 N.C. App. 110, 631 S.E.2d 19, 2006 N.C. App. LEXIS 1299 (2006).

Applied in In re J.C.S., 164 N.C. App. 96, 595 S.E.2d 155, 2004 N.C. App. LEXIS 746 (2004).

§ 7B-1004. Disposition after appeal.

When an order of the court is affirmed by the Court of Appeals or by the Supreme Court, the trial court may modify or alter the original order as the court finds to be in the best interests of the juvenile to reflect any change in circumstances during the period of time the appeal was pending. If the modifying order is entered ex parte, the court shall give notice to interested parties to show cause within 10 days thereafter as to why the modifying order should be vacated or altered. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-456, s. 60; 2005-398, s. 13.)

Editor's Note. — This section, as rewritten by Session Laws 2005-398, s. 13, effective October 1, 2005, is applicable to petitions or actions filed on or after that date.

CASE NOTES

Cited in In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

Article 11.

Termination of Parental Rights.

§ 7B-1100. Legislative intent; construction of Article.

The General Assembly hereby declares as a matter of legislative policy with respect to termination of parental rights:

(1) The general purpose of this Article is to provide judicial procedures for terminating the legal relationship between a juvenile and the juvenile's biological or legal parents when the parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the juvenile.

(2) It is the further purpose of this Article to recognize the necessity for any juvenile to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all juveniles from the unnecessary severance of a relationship with biological or legal parents.

(3) Action which is in the best interests of the juvenile should be taken in all cases where the interests of the juvenile and those of the juvenile's parents or other persons are in conflict.

(4) This Article shall not be used to circumvent the provisions of Chapter 50A of the General Statutes, the Uniform Child-Custody Jurisdiction and Enforcement Act. (1977, c. 879, s. 8; 1979, c. 110, s. 6; 1998-202, s. 6; 1999-223, s. 5; 1999-456, s. 60.)

Editor's Note. — Articles 1-11, of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

Section 5 of Session Laws 1998-202, also effective July 1, 1999, repealed the former North Carolina Juvenile Code, Articles 41 through 59 of Chapter 7A, along with additional related provisions.

Where applicable, historical citations and case annotations to former sections have been added to the corresponding sections in new Chapter 7B.

At the end of new Chapter 7B are tables showing comparable sections and their disposition of new Chapter 7B.

Session Laws 1998-202, s. 36, contains a severability clause.

Legal Periodicals. — For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

For survey of 1982 law relating to family law, see 61 N.C.L. Rev. 1155 (1983).

For article, "Coercive Governmental Intervention and the Family: A Comment on North Carolina's Proposed Standards," see 7 Campbell L. Rev. 145 (1984).

For comment, "The Child Abuse Amendments of 1984: Congress Is Calling North Carolina to Respond to the Baby Doe Dilemma," 20 Wake Forest L. Rev. 975 (1984).

For 1984 survey, "Termination of Parental Rights: Putting Love in Its Place," see 63 N.C.L. Rev. 1177 (1985).

For comment, "Termination of Parental Rights," see 21 Wake Forest L. Rev. 431 (1986).

For article,"The Parental Rights of Unwed Fathers: A Developmental Perspective," see 20 N.C. Cent. L.J. 45 (1992).

For note, "M.L.B. v. S.L.J.: Protecting Familial Bonds and Creating a New Right of Access in the Civil Courts," see 76 N.C.L. Rev. 621 (1998).

CASE NOTES

Editor's Note. — *Most of the following cases were decided prior to the enactment of this Chapter.*

The exclusive judicial procedure to be used in termination of parental rights cases is prescribed by the legislature in former G.S. 7A-289.22 (see now this section). Curtis v. Curtis, 104 N.C. App. 625, 410 S.E.2d 917 (1991).

This Article (see now Chapter 7B, Article 11) exclusively controls the procedure to be followed in termination of parental rights, and the Rules of Civil Procedure (G.S. 1A-1) are inapplicable to such a proceeding. In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

The provisions of this Article (see now Chapter 7B, Article 11) adequately assure respondents of procedural due process protection. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

Rules of Civil Procedure Not Superimposed on Hearings under Article. — This Article (see now Chapter 7B, Article 11) comprehensively delineates in detail the judicial procedure to be followed in the termination of parental rights. It provides for the basic procedural elements which are to be utilized in these cases. Due to the legislature's prefatory statement in former G.S. 7A-289.22 (see now this section) with regard to its intent to establish judicial procedures for the termination of parental rights, and due to the specificity of the procedural rules set out in the article, the legislative intent was that this Article (see now Chapter 7B, Article 11) exclusively control the procedure to be followed in the termination of parental rights. It was not the intent that the requirements of the Rules of Civil Procedure, G.S. 1A-1, be superimposed upon the requirements of this Article. In re Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982).

The judicial procedure to be used in termination of parental rights cases is prescribed by the legislature in this Article. The Rules of Civil Procedure, G.S. 1A-1, while they are not to be ignored, are not superimposed upon these hearings. In re Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982).

Effect on Chapter 50A. — While a determination of jurisdiction over child custody matters will precede a determination of jurisdiction over parental rights, it does not supplant the parental rights proceedings; the language of subdivision (4) of this section (now G.S. 7B-1100(4)) is that it shall not be "used to circumvent" Chapter 50A, G.S. 50A-1, et seq., not that it shall be "in conformity with" Chapter 50A. In re Leonard, 77 N.C. App. 439, 335 S.E.2d 73 (1985).

Final Order. — In dependency proceedings, a trial court's order finding that an agency should pursue termination of a father's parental rights and adoption of the father's child by the child's foster parents, based on a finding that the child's placement with the father was "unlikely" and that it was in the child's best interests for the agency to pursue termination, was not a final order subject to appeal under G.S. 7B-1001(4). In re A.R.G., 361 N.C. 392, 646

S.E.2d 349, 2007 N.C. LEXIS 597 (2007).

Findings and Conclusions of Court. — In a proceeding to terminate parental rights pursuant to this Article (see now Chapter 7B, Article 11), the trial judge must find facts based on the evidence and make conclusions of law which resolve the ultimate issue of whether neglect authorizing termination of parental rights is present at that time. Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

Summary Proceeding Not Allowed. — Article 24 of Chapter 7A does not provide for a summary proceeding to determine whether the petitioner has proven the existence of one or more of the grounds for termination. Thus, the trial court erred in granting petitioners' motion for partial summary judgment. Curtis v. Curtis, 104 N.C. App. 625, 410 S.E.2d 917 (1991).

Dual Burden of Proof Where Child Was Native American. — Where a minor child's status as a Native American made a termination proceeding under this Article also subject to the provisions of the Indian Child Welfare Act (25 U.S.C. 1901 et seq.), the federal provision did not require that the North Carolina statutory grounds to terminate parental rights be proven beyond a reasonable doubt. Rather, a dual burden of proof was created in which the state provisions and federal provisions had to be satisfied separately; i.e., the state grounds for termination had to be supported by clear and convincing evidence, while the federal law required evidence which justified termination beyond a reasonable doubt. In re Bluebird, 105 N.C. App. 42, 411 S.E.2d 820 (1992).

Permanent Plan of Care. — The legislature has enunciated a public policy that every child should have a permanent plan of care. Because adoption is more likely than a custody proceeding between non-parents to result in a permanent plan of care, and because the superior court has jurisdiction over adoptions, that court's jurisdiction supersedes that of the district court with regard to the custody of a child who is the subject of a simultaneous adoption and custody proceeding. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

Upon the entry of an interlocutory order of adoption by the superior court, the jurisdiction of the district court with regard to the custody of the child who is the subject of the interlocutory order is in abeyance until such time as the interlocutory decree is vacated, the adoption petition is dismissed, or a final decree of adoption is entered. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

The parental rights of a parent in his child are not to be bartered away at the parent's whim. Foy v. Foy, 57 N.C. App. 128, 290 S.E.2d 748 (1982).

When the interests of the child and parents conflict, the best interests of the child control. In re Tate, 67 N.C. App. 89, 312 S.E.2d 535 (1984).

The legislature expressed its intent that the best interests of the child are controlling by recognizing the necessity for any child to have a permanent plan of care at the earliest possible age, and by providing that action which is in the best interests of the child should be taken in all cases where the interests of the child and those of his or her parents or other persons are in conflict. In re Montgomery, 77 N.C. App. 709, 336 S.E.2d 136 (1985).

Right to Object to Immunizations. — Even though their parental rights had not been formally terminated, parents lost the right to object to their children's immunization, on religious grounds, where they lost custody of the children due to neglect, including the failure to provide the children with adequate shelter, clothing, food, medical care, and a formal education. In re Stratton, 153 N.C. App. 428, 571 S.E.2d 234, 2002 N.C. App. LEXIS 1183 (2002), review denied, 356 N.C. 436, 573 S.E.2d 512 (2002).

Best Interests of Child May Require That Family Not Be Dissolved. — The legislature has properly recognized that in certain situations, where the grounds for termination could be legally established, the best interests of the child, considering the intangibles, indicate that the family unit should not be dissolved. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

Where there is a reasonable hope that the family unit, within a reasonable period of time, can reunite and provide for the emotional and physical welfare of the child, the trial court is given discretion not to terminate rights. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

Discontinuance of Visitation Rights Following Affirmation of Termination. — The trial court did not err in entering an order discontinuing respondents' visitation rights, which order had allowed respondents to visit their children pending appeal of termination proceeding, after the North Carolina Supreme Court affirmed the termination, as the best interests of the children required that a permanent home be found for them, i.e., that steps be taken leading to their adoption. In re Montgomery, 77 N.C. App. 709, 336 S.E.2d 136 (1985).

Right to Counsel. — It cannot be said that the Constitution requires the appointment of counsel in every parental termination proceeding; therefore the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings is to be answered in the first instance by the trial court, subject, of course, to appellate review. Lassiter v. Department of Social Servs., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640, rehearing denied, 453 U.S. 927, 102 S. Ct. 889, 69 L. Ed. 2d 1023 (1981).

Mother who was facing termination of parental rights had the right to be represented by counsel; the trial court erred when it denied the mother's request for court-appointed counsel, even though the mother (1) had not answered a petition that the department of social services filed, (2) did not attend a pretrial conference that the trial court scheduled, and (3) made her request for counsel on the day the case was set for a hearing. In re Hopkins, 163 N.C. App. 38, 592 S.E.2d 22, 2004 N.C. App. LEXIS 266 (2004), cert. denied, 359 N.C. 632, 616 S.E.2d 230 (2005).

Guardian Ad Litem Requirement. — Although the mother's parental rights were not terminated for dependency under G.S. 7B-1111(a)(6), the trial court erred in failing to appoint the mother a guardian ad litem under former G.S. 7B-1101; the guardian ad litem requirement was triggered because the mother's mental health issues, involving, in part, bipolar disorder, were central to the termination. In re L.W., 175 N.C. App. 387, 623 S.E.2d 626, 2006 N.C. App. LEXIS 55 (2006), review denied, appeal dismissed, 360 N.C. 534, 633 S.E.2d 818 (2006).

Applied in In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

Cited in In re Blackburn, 142 N.C. App. 607, 543 S.E.2d 906, 2001 N.C. App. LEXIS 190 (2001); In re Mitchell, 148 N.C. App. 483, 559 S.E.2d 237, 2002 N.C. App. LEXIS 43 (2002); In re A.C.F., 176 N.C. App. 520, 626 S.E.2d 729, 2006 N.C. App. LEXIS 529 (2006); In re R.R., — N.C. App. —, 638 S.E.2d 502, 2006 N.C. App. LEXIS 2506 (2006).

§ 7B-1101. Jurisdiction.

The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. Provided, that before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. Provided, that before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, without regard to G.S. 50A-204 and that process was served on the nonresident parent pursuant to G.S. 7B-1106. Provided, further, that the clerk of superior court shall have jurisdiction for adoptions under Chapter 48 of the General Statutes. (1977, c. 879, s. 8; 1979, c. 110, s. 7; 1979, 2nd Sess., c. 1206, s. 1; 1981, c. 996, s. 1; 1983, c. 89, s. 1; 1995, c. 457, s. 3; 1998-202, s. 6; 1999-223, s. 6; 1999-456, s. 60; 2000-144, s. 18; 2000-183, s. 2; 2003-140, s. 4; 2005-398, s. 14; 2007-152, s. 1.)

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, G.S. 7A-498 et seq.

Editor's Note. — This section, as rewritten by Session Laws 2005-398, s. 14, effective October 1, 2005, is applicable to petitions or actions filed on or after that date.

Effect of Amendments. — Session Laws 2007-152, s. 1, effective October 1, 2007, and applicable to motions in the cause or petitions filed on or after that date, added the fourth and fifth sentences.

Legal Periodicals. — For note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

For survey of 1981 family law, see 60 N.C.L. Rev. 1379 (1982).

For 1984 survey, "Termination of Parental Rights: Putting Love in Its Place," see 63 N.C.L. Rev. 1177 (1985).

CASE NOTES

Editor's Note. — *Some of the following cases were decided prior to the enactment of this Chapter.*

State's jurisdiction is governed by both the Uniformed Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act, and trial court's jurisdiction in a termination of parental rights case must be compatible with both of these acts. In re Bean, 132 N.C. App. 363, 511 S.E.2d 683 (1999).

Effect on Chapter 50A. — While a determination of jurisdiction over child custody matters will precede a determination of jurisdiction over parental rights, it does not supplant the parental rights proceedings; the language of G.S. 7A-289.22(4) is that it shall not be "used to circumvent" Chapter 50A, G.S. 50A-1, et seq., not that it shall be "in conformity with" Chapter 50A. In re Leonard, 77 N.C. App. 439, 335 S.E.2d 73 (1985).

Guardian Ad Litem Requirement. — Where the allegations contained in a petition or motion to terminate parental rights tend to show that the respondent is incapable of properly caring for his or her child because of mental illness, the trial court is required to appoint a guardian ad litem to represent the respondent at the termination hearing pursuant to this section and G.S. 7B-1111(6). In re Estes, 157 N.C. App. 513, 579 S.E.2d 496, 2003 N.C. App. LEXIS 734 (2003), cert. denied, 357 N.C. 459, 585 S.E.2d 390 (2003).

When a Division of Social Services pursues termination on the grounds of parental incapability under G.S. 7B-1111(a)(6), the parent has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right. A guardian ad litem shall also be appointed. In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1, 2004 N.C. App. LEXIS 129 (2004).

Although a trial court found, inter alia, that a mother suffered from significant mental health issues, it terminated her parental rights pursuant to G.S. 7B-1111(a)(1) because she had neglected her daughter; however, because the mother's mental instability was so intertwined with a child's neglect, the trial court erred in failing to appoint a guardian ad litem for the mother pursuant to G.S. 7B-1101 at a parental rights termination hearing. In re J.D., 164 N.C. App. 176, 605 S.E.2d 643, 2004 N.C. App. LEXIS 744 (2004), cert. denied, 358 N.C. 732, 601 S.E.2d 531 (2004).

Mother was entitled to a guardian ad litem where the petition to terminate her parental rights alleged that depression and personality and emotional problems rendered her unable to parent her child; because the trial failed to appoint a guardian ad litem for the mother, the termination order was reversed and the case was remanded. In re S.B., 166 N.C. App. 494, 602 S.E.2d 694, 2004 N.C. App. LEXIS 1783 (2004).

Order terminating the parental rights of both parents to four minor children was reversed on appeal, because the trial court erred by failing to appoint a guardian ad litem for the parents, who had significant mental health issues that bore directly on their ability to provide proper care and supervision of their children. In re B.M., 168 N.C. App. 350, 607 S.E.2d 698, 2005 N.C. App. LEXIS 252 (2005).

Trial court did not err by not appointing a guardian ad litem for the mother for a termination of parental rights hearing as it was not alleged, pursuant to G.S. 7B-1111(a)(6), that the mother was incapable of properly caring for her children; additionally, whether the trial court should have appointed a guardian ad litem for the mother in a prior dependency proceeding was not an issue before the court on the appeal of the termination of the mother's parental rights. In re O.C., 171 N.C. App. 457, 615 S.E.2d 391, 2005 N.C. App. LEXIS 1272 (2005), cert. denied, — N.C. —, 623 S.E.2d 587 (2005).

Trial court erred when it failed to appoint a guardian ad litem for mother pursuant to prior language of G.S. 7B-1101 after reviewing her psychological evaluation, but still considered her mental illness, even though it never mentioned G.S. 7B-1111(a)(6) as a factor in terminating her parental rights. Accordingly, the mother was entitled to a new termination hearing and the appointment of a guardian ad litem. In re T.W., 173 N.C. App. 153, 617 S.E.2d 702, 2005 N.C. App. LEXIS 1922 (2005).

Section G.S. 7B-602(b) Analysis Compared to G.S. 7B-1101 Analysis for Appointment of Guardian Ad Litem. — Court saw no reason why the analysis of the issues arising under G.S. 7B-1101 were not applicable to the same issues arising under G.S. 7B-602(b) with respect to whether to appoint a guardian ad litem; the G.S. 7B-1101 analysis centered on the intertwining of the parent's condition and the child's neglect. In re C.B., 171 N.C. App. 341, 614 S.E.2d 579, 2005 N.C. App. LEXIS 1205 (2005).

While the termination of a mother's parental rights was based on G.S. 7B-1111(a)(1), (7), the original petition alleged grounds for termination pursuant to G.S. 7B-1111(a)(6), and the trial court considered the mother's substance abuse and mental illness in making that determination; therefore, G.S. 7B-1101 required appointment of a guardian ad litem for the mother, and the failure of the trial court to do so was error. In re K.R.S., 170 N.C. App. 643, 613 S.E.2d 318, 2005 N.C. App. LEXIS 1092 (2005).

Failure to Appoint Guardian Ad Litem Required Reversal of Termination Order. — Order terminating a father's parental rights, which was entered under G.S. 7B-1111(a)(6) on the basis of the father's 20-year history of substance abuse, was reversed; the trial court failed to appoint a guardian ad litem to represent the father's interests as required by G.S. 7B-1101(1), and regardless of whether that failure prejudiced the father, remand was required for appointment of a guardian ad litem and for rehearing. In re S.B., 166 N.C. App. 488, 602 S.E.2d 691, 2004 N.C. App. LEXIS 1776 (2004).

The proper time for appointing a guardian ad litem under G.S. 7B-1101, where grounds for termination are based on G.S. 7B-1111(a)(6), is upon the filing of the petition. In re D.S.C., 168 N.C. App. 168, 607 S.E.2d 43, 2005 N.C. App. LEXIS 172 (2005).

Mother Was Not Entitled to Appointment of Guardian Ad Litem. — Mother was not entitled to the appointment of a guardian ad litem in an action to terminate her parental rights; the mother's sparse references to her need to counseling and drug treatment did not rise to the level of being so intertwined with the neglect of her children and to be virtually inseparable and while the Department of Social Services recommended counseling, there was no significant evidence in the record to suggest that the mother's parental rights were terminated due to any mental illness or substance abuse. In re As.L.G., 173 N.C. App. 551, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005).

In termination of parental rights action, the trial court was not required to appoint a guardian ad litem for the mother under G.S. 7B-1101, because the termination did not allege dependency. In re J.S.L., 177 N.C. App. 151, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006).

Trial court terminated a mother's parental rights based on: (1) neglect; (2) wilfully leaving the children in foster care for more than 12 months without showing reasonable progress; (3) wilfully failing to provide financial support to the children; and (4) abandonment of the children for at least six months immediately preceding the filing of the petition for termination of parental rights; the mother did not request that a guardian ad litem (GAL) be appointed. Also, the petition for termination of her parental rights did not allege the mother's incapability to parent the children, and no allegations were asserted, and no showing was made that the mother was incompetent; thus, the trial court was not required to appoint a GAL to the mother under either G.S. 7B-1101 and 35A-1101, or G.S. 1A-1-17 . In re D.H., 177 N.C. App. 700, 629 S.E.2d 920, 2006 N.C. App. LEXIS 1195 (2006).

Appointment of a guardian ad litem was not compelled because the mother's mental illness was not a central factor in the trial court findings. In re J.M.W., — N.C. App. —, 635 S.E.2d 916, 2006 N.C. App. LEXIS 2116 (2006).

Trial court erred in failing to appoint a guardian ad litem for a mother in an action to terminate her parental rights; under the version of G.S. 7B-1101 in effect when the petition was filed, a guardian was required where it was alleged that the mother was physically disabled pursuant to G.S. 7B-1111(a)(6). In re D.S.C., 168 N.C. App. 168, 607 S.E.2d 43, 2005 N.C. App. LEXIS 172 (2005).

Failure to Appoint Guardian Ad Litem Is Not Reversible Error. — Where multiple grounds are alleged for termination of parental rights, including an allegation under G.S. 7B-1111(6) that the parent is unable to provide for the care of the child, where that allegation is not pursued, and where valid findings support termination on other statutory grounds, it is not reversible error for a trial court to fail to appoint a guardian ad litem for the parent, as required by G.S. 7B-1101(1). In re Dhermy, 161 N.C. App. 424, 588 S.E.2d 555, 2003 N.C. App. LEXIS 2181 (2003).

Failure to Appoint Counsel Not Error. — In an action to terminate the mother's parental rights, the trial court's failure to appoint the mother a guardian ad litem did not amount to reversible error. There were no circumstances of the type that, of brought to the judge's attention, would have raised a substantial question regarding the mother's competency. In re S.N.H., 177 N.C. App. 82, 627 S.E.2d 510, 2006 N.C. App. LEXIS 717 (2006).

Trial court's failure to appoint counsel for the father was not error where the father failed to contact the clerk as specifically required and stated on the summons. In re R.R., — N.C. App. —, 638 S.E.2d 502, 2006 N.C. App. LEXIS 2506 (2006).

Right to Effective Assistance of Counsel. — If no remedy is provided for inadequate representation, the statutory right to counsel will become an empty formality, therefore, the right to counsel provided by this section includes the right to effective assistance of counsel. Buncombe County Dep't of Social Servs. v. Burks, 92 N.C. App. 662, 375 S.E.2d 676 (1989).

Where lack of preparation for proceedings to terminate mother's parental rights was due to respondent's unexcused unavailability, the trial court did not err in denying her counsel's motion to continue or withdraw, and there was no denial of effective assistance of counsel. Buncombe County Dep't of Social Servs. v. Burks, 92 N.C. App. 662, 375 S.E.2d 676 (1989).

The right to counsel provided by this section includes the right to effective assistance of counsel. In re Oghenekevebe, 123 N.C. App. 434, 473 S.E.2d 393 (1996).

A claim of ineffective assistance of counsel requires the respondent to show that counsel's performance was so serious as to deprive the represented party of a fair hearing. In re Oghenekevebe, 123 N.C. App. 434, 473 S.E.2d 393 (1996).

Mother who was facing termination of parental rights had the right to be represented by counsel; the trial court erred when it denied the mother's request for court-appointed counsel, even though the mother (1) had not answered a petition that the department of social services filed, (2) did not attend a pretrial conference that the trial court scheduled, and (3) made her request for counsel on the day the case was set for a hearing. In re Hopkins, 163 N.C. App. 38, 592 S.E.2d 22, 2004 N.C. App. LEXIS 266 (2004), cert. denied, 359 N.C. 632, 616 S.E.2d 230 (2005).

Failure not to remove counsel was not an error. — In a termination of parental rights proceeding where the father was alleged to have abused and neglected the children, the trial court did not err in in not removing the father's attorney from the case on the basis that counsel failed to schedule a new hearing in the abuse and neglect hearing, as the father did not show prejudice arising from there being no rehearing in the abuse and neglect proceeding prior to the termination hearing. In re Faircloth, 153 N.C. App. 565, 571 S.E.2d 65, 2002 N.C. App. LEXIS 1273 (2002).

Residing or Found in District. — Where mother left with child for Ohio four days before the petition was filed, the child was not "residing in" or "found in" the district "at the time of filing" and therefore the petition failed for lack of subject matter jurisdiction. In re Leonard, 77 N.C. App. 439, 335 S.E.2d 73 (1985).

Trial Court Had No Authority to Act Where No Request for Relief in Motion. — Trial court lacked subject matter jurisdiction to enter an order on the county Department of Social Services' (DSS) "motion in the cause," which was made at the previous direction of the trial court for DSS to petition for termination of a mother's parental rights, where the motion lacked any request for relief, as required by G.S. 1A-1, Rule 7(b)(1); although the trial court had subject matter jurisdiction over termination proceedings and motions therein, pursuant to G.S. 7B-200(a)(4) and 7B-1101, it was bound to follow the Rules of Civil Procedure in such an action, based on G.S. 1A-1, Rule 17(c)(2), and accordingly, the motion was found to be insufficient. In re McKinney, 158 N.C. App. 441, 581 S.E.2d 793, 2003 N.C. App. LEXIS 1191 (2003).

The district court had jurisdiction over the subject matter of petition filed, signed and verified by county division of social services, which alleged that child had been placed with DSS by its mother; that the putative father was unknown; that North Carolina was the home state of the child and no other state had jurisdiction over the child; and that the best interest of the child would be served if the court assumed jurisdiction over him. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

District court in New Hanover County had jurisdiction over the father's petition to terminate the mother's parental rights despite the fact that Wake County still maintained jurisdiction over the child custody proceeding because the New Hanover County court found the child to be neglected. In re Humphrey, 156 N.C. App. 533, 577 S.E.2d 421, 2003 N.C. App. LEXIS 236 (2003).

When a child was undisputedly present in the county over which a district court had jurisdiction when a petition to terminate the parental rights of the child's father was filed in that court, and the father did not seek a change of venue after the petition was filed, waiving any defect in venue under N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 12(b), the district court properly heard the petition. In re J.L.K., 165 N.C. App. 311, 598 S.E.2d 387, 2004 N.C. App. LEXIS 1162 (2004), cert. denied, 359 N.C. 68, 604 S.E.2d 314 (2004).

Trial court had subject matter jurisdiction to enter an order terminating the father's parental rights even though the child and the child's custodial guardians resided in Alabama because no determination was made that the child's parents did not reside in North Carolina. In re H.L.A.D., — N.C. App. —, 646 S.E.2d 425, 2007 N.C. App. LEXIS 1482 (2007).

Court Had Jurisdiction. — There is no authority that compels dismissal of an action solely because petitioner fails to include the G.S. 7B-1104(7) statement of fact in a termination petition. In re J.D.S., 170 N.C. App. 244, 612 S.E.2d 350, 2005 N.C. App. LEXIS 1013 (2005), cert. denied, — U.S. —, 360 N.C. 64, 623 S.E.2d 584 (2005).

Continuing Jurisdiction. — Once jurisdiction of the court attaches to a child custody matter, it exists for all time until the cause is fully and completely determined. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

Refusal to Assert Jurisdiction. — Although child resided in North Carolina, the court properly declined jurisdiction where the father continued to reside in the state of the court of original jurisdiction; thus, the Florida court retained jurisdiction under the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A. In re Bean, 132 N.C. App. 363, 511 S.E.2d 683 (1999).

Jurisdiction Lacking Under the North Carolina Uniform Child-Custody Jurisdiction and Enforcement Act. — Although the general requirement for jurisdiction was satisfied as the children who were the subject of a petition to terminate their mother's parental rights resided in North Carolina when the petition was filed, the trial court's order denying the mother's motion to dismiss was vacated as the trial court lacked subject matter jurisdiction under the North Carolina Uniform Child-Custody Jurisdiction and Enforcement Act. In re N.R.M., 165 N.C. App. 294, 598 S.E.2d 147, 2004 N.C. App. LEXIS 1163 (2004).

Jurisdiction During Pendency of Custody Review Order Appeal. — Where the trial court terminated the mother's parental rights during the pendency of the mother's custody review order appeal, G.S. 1-294 did not deprive the trial court of jurisdiction to terminate the mother's parental rights, as such jurisdiction was granted under G.S. 7B-1101 and G.S. 7B-1103. In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

Jurisdiction During Pendency of Appeal of Permanency Planning Order. — After a mother filed a notice of appeal of a permanency planning order under G.S. 7B-1003(b), the trial court no longer had jurisdiction to rule on the petitions to terminate her parental rights under G.S. 7B-1101; consequently, the order terminating the mother's parental rights was void ab initio, and did not render moot the appeal of the permanency planning order. In re Z.J.T.B., — N.C. App. —, 645 S.E.2d 206, 2007 N.C. App. LEXIS 1161 (2007).

Jurisdiction Absent Where Petition Was Insufficient. — Where a termination of rights petition did not address guardianship issues raised by the noncustodial parent respondent, where no custody order was attached, and where the trial court merely announced that it had decided the claimed guardianship was void, without further explanation, it was impossible to review the trial court's decision and the appeals court was forced to hold that the trial court had lacked subject matter jurisdiction due to the facial defects of the petition. In re Z.T.B., 170 N.C. App. 564, 613 S.E.2d 298, 2005 N.C. App. LEXIS 1093 (2005).

Because the petition for termination of parental rights was not accompanied by a copy of the custody order then in effect, the petition failed to confer subject matter jurisdiction on the trial court; that omission need not have been fatal if the Vance County Department of Social Services (DSS) had simply amended the petition by attaching the proper custody order or otherwise ensured the custody order was made a part of the record before the trial court. Thus, it was the failure by the DSS either to attach the custody order to the petition or to remedy that omission that ultimately deprived the trial court of subject matter jurisdiction. In re T.B., 177 N.C. App. 790, 629 S.E.2d 895, 2006 N.C. App. LEXIS 1224 (2006).

Where a petition to terminate parental rights was captioned with the names of both children, but the summons that was issued referenced only the younger child, the trial court lacked subject matter jurisdiction to terminate the mother's parental rights in the older child because a summons pertaining to the child was not issued. In re C.T., — N.C. App. —, 643 S.E.2d 23, 2007 N.C. App. LEXIS 683 (2007).

Waiver of Counsel by Inaction Not Allowed. — The General Assembly did not intend to allow for waiver of court appointed counsel due to inaction prior to the hearing. If a parent is present at the hearing and does not waive representation, counsel shall be appointed. Little v. Little, 127 N.C. App. 191, 487 S.E.2d 823 (1997).

Ruling by the trial court that parents right to counsel was waived by inaction prior to the termination hearing was prejudicial error. Little v. Little, 127 N.C. App. 191, 487 S.E.2d 823 (1997).

Appointment of Counsel for Indigent Parents in Proceedings Brought Prior to August 9, 1981. — In proceedings to terminate parental rights brought prior to August 9, 1981, the effective date of the 1981 amendment to this section, relating to appointment of counsel for indigent parents, where other circumstances do not dictate to the contrary an indigent parent is not entitled to appointment of counsel as a matter of law; rather, the right to appointed counsel must be determined on a case by case basis. In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

Payment of Fees of Counsel Appointed in Proceedings Brought Prior to August 9, 1981. — Attorneys' fees allowed by the court for attorneys appointed in proceedings to terminate parental rights, whether as separate counsel or as guardian ad litem, brought before August 9, 1981, the effective date of the 1981 amendment to this section, shall be borne by the Administrative Office of the Courts. In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

Jurisdiction Absent Where the Department of Social Services Did Not Have Custody at the Time the Petition Was Filed. — Since the trial court lacked jurisdiction as the children were not in the custody of the Department of Social Services at the time the petition to terminate the mother's parental rights was filed and the children were not residing in North Carolina pursuant to G.S. 7B-1101, the trial court's order terminating the mother's parental rights was vacated. In re D.D.J., 177 N.C. App. 441, 628 S.E.2d 808, 2006 N.C. App. LEXIS 933 (2006).

Cited in In re J.G.B., 177 N.C. App. 375, 628 S.E.2d 450, 2006 N.C. App. LEXIS 978 (2006).

§ 7B-1101.1. Parent's right to counsel; guardian ad litem.

(a) The parent has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right. The fees of appointed counsel shall be borne by the Office of Indigent Defense Services.

(b) In addition to the right to appointed counsel under subsection (a) of this section, a guardian ad litem shall be appointed in accordance with G.S. 1A-1, Rule 17, to represent any parent who is under the age of 18 years and who is not married or otherwise emancipated.

(c) On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest. The parent's counsel shall not be appointed to serve as the guardian ad litem.

(d) Communications between the guardian ad litem appointed under this section and the parent and between the guardian ad litem and the parent's counsel shall be privileged and confidential to the same extent that communications between the parent and the parent's counsel are privileged and confidential.

(e) Guardians ad litem appointed under this section may engage in all of the following practices:

(1) Helping the parent to enter consent orders, if appropriate.
(2) Facilitating service of process on the parent.
(3) Assuring that necessary pleadings are filed.
(4) Assisting the parent and the parent's counsel, if requested by the parent's counsel, to ensure that the parent's procedural due process requirements are met.

(f) The fees of a guardian ad litem appointed pursuant to this section shall be borne by the Office of Indigent Defense Services when the court finds that the respondent is indigent. In other cases, the fees of the court-appointed guardian ad litem shall be a proper charge against the respondent if the respondent does not secure private legal counsel. (2005-398, s. 15.)

Editor's Note. — Session Laws 2005-398, s. 19, made this section effective October 1, 2005, and applicable to petitions or actions filed on or after that date.

CASE NOTES

Appointment of Guardian Ad Litem. — G.S. 7B-1101.1 requires that a guardian ad litem be appointed in accordance with the provisions of G.S. 1A-1, N.C. R. Civ. P. 17 to represent a parent, meaning that where an allegation is made that parental rights should be terminated, a trial court is required to conduct a hearing to determine whether a guardian ad litem should be appointed to represent the parent, and an allegation under G.S. 7B-1111(a)(6) serves as a triggering mechanism, alerting the trial court that it should conduct a hearing to determine whether a guardian ad litem should be appointed; at the hearing, the trial court must determine whether the parents are incompetent within the meaning of G.S. 35A-1101, such that the individual would be unable to aid in their defense at the termination of parental rights proceeding, and the trial court should always keep in mind that the appointment of a guardian ad litem will divest the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination. In re J.A.A., 175 N.C. App. 66, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

Appointment of Guardian Ad Litem Not Required. — When it was alleged that a mother's parental rights to two children should be terminated because she (1) neglected them while they were in an agency's care within the meaning of G.S. 7B-101, under G.S. 7B-1111(a)(1), (2) willfully left the children in foster care for more than 12 months without showing reasonable progress to correct the conditions that led to their removal, under G.S. 7B-1111(a)(2), and (3) willfully failed to pay a reasonable portion of the cost of the children's care while in an agency's custody, under G.S. 7B-1111(a)(3), there was no requirement that a guardian ad litem be appointed for the parent, even though the petition made reference to the mother's drug abuse and mental illness, because there was no allegation under G.S. 7B-1111(a)(6) that the mother was incapable of caring for her children, she did not seek a guardian ad litem, and the trial court properly inquired into her competency, under G.S. 1A-1, N.C. R. Civ. P. 17. In re J.A.A., 175 N.C. App. 66, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

Cited in In re J.S.L., 177 N.C. App. 151, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006); In re K.N., — N.C. App. —, 640 S.E.2d 813, 2007 N.C. App. LEXIS 376 (2007).

§ 7B-1102. Pending child abuse, neglect, or dependency proceedings.

(a) When the district court is exercising jurisdiction over a juvenile and the juvenile's parent in an abuse, neglect, or dependency proceeding, a person or agency specified in G.S. 7B-1103(a) may file in that proceeding a motion for termination of the parent's rights in relation to the juvenile.

(b) A motion pursuant to subsection (a) of this section and the notice required by G.S. 7B-1106.1 shall be served in accordance with G.S. 1A-1, Rule 5(b), except:

(1) Service must be in accordance with G.S. 1A-1, Rule 4, if one of the following applies:
  a. The person or agency to be served was not served originally with summons.
  b. The person or agency to be served was served originally by publication that did not include notice substantially in conformity with the notice required by G.S. 7B-406(b)(4)e.
  c. Two years has elapsed since the date of the original action.

(2) In any case, the court may order that service of the motion and notice be made pursuant to G.S. 1A-1, Rule 4.

For purposes of this section, the parent of the juvenile shall not be deemed to be under disability even though the parent is a minor.

(c) When a petition for termination of parental rights is filed in the same district in which there is pending an abuse, neglect, or dependency proceeding involving the same juvenile, the court on its own motion or motion of a party may consolidate the action pursuant to G.S. 1A-1, Rule 42. (1998-229, ss. 9.1, 26.1; 1999-456, s. 60; 2000-183, s. 3.)

Editor's Note. — This section was originally enacted by Session Laws 1998-229, s. 9.1 as 7A-289.23.1 (recodified as 7A-289.23A at the direction of the Revisor of Statutes) and was then amended and recodified by s. 26.1 of that act as 7B-1101.1. It has been renumbered as 7B-1102 at the direction of the Revisor of Statutes.

CASE NOTES

Rehearing In Abuse And Neglect Proceeding Not Required. — In a termination of parental rights proceeding, the father failed to show an error arising from the trial court's failure to hold a rehearing in the abuse and neglect proceeding prior to the case, as such a hearing on abuse and neglect was redundant with parts of the termination hearing, and and there was a length of delay resulting from an earlier appeal, the status of the children and the need to determine permanency had changed. In re Faircloth, 153 N.C. App. 565, 571 S.E.2d 65, 2002 N.C. App. LEXIS 1273 (2002).

Notice Requirement. — Trial court erred in terminating the parental rights of parents to their minor children; the notice of the action required by G.S. 7B-1106.1 provided to the parents by an agency failed to meet the statutory requirements for such a notice, the service of the notice was made mandatory by this section and G.S. 1A-1, Rule 5(b), and the agency's failure to provide a proper notice was reversible error. Orange County Dep't of Soc. Servs. v. Alexander (In re Alexander), 158 N.C. App. 522, 581 S.E.2d 466, 2003 N.C. App. LEXIS 1180 (2003).

Because G.S. 7B-1102(b) merely directed the Department of Social Services (DSS) to serve the motion and notice pursuant to G.S. 1A-1-4, and nowhere suggested that the DSS had to issue a summons instead of or in addition to those documents. In re D.R.S., — N.C. App. —, 638 S.E.2d 626, 2007 N.C. App. LEXIS 23 (2007).

Applied in In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006).

Cited in In re J.L.K., 165 N.C. App. 311, 598 S.E.2d 387, 2004 N.C. App. LEXIS 1162 (2004), cert. denied, 359 N.C. 68, 604 S.E.2d 314 (2004); In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), aff'd, — N.C. —, 625 S.E.2d 779 (2006); In re H.T., — N.C. App. —, 637 S.E.2d 923, 2006 N.C. App. LEXIS 2497 (2006).

§ 7B-1103. Who may file a petition or motion.

(a) A petition or motion to terminate the parental rights of either or both parents to his, her, or their minor juvenile may only be filed by one or more of the following:

(1) Either parent seeking termination of the right of the other parent.

(2) Any person who has been judicially appointed as the guardian of the person of the juvenile.

(3) Any county department of social services, consolidated county human services agency, or licensed child-placing agency to whom custody of the juvenile has been given by a court of competent jurisdiction.

(4) Any county department of social services, consolidated county human services agency, or licensed child-placing agency to which the juvenile has been surrendered for adoption by one of the parents or by the guardian of the person of the juvenile, pursuant to G.S. 48-3-701.

(5) Any person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion.

(6) Any guardian ad litem appointed to represent the minor juvenile pursuant to G.S. 7B-601 who has not been relieved of this responsibility.

(7) Any person who has filed a petition for adoption pursuant to Chapter 48 of the General Statutes.

(b) Any person or agency that may file a petition under subsection (a) of this section may intervene in a pending abuse, neglect, or dependency proceeding for the purpose of filing a motion to terminate parental rights.

(c) No person whose actions resulted in a conviction under G.S. 14-27.2 or G.S. 14-27.3 and the conception of the juvenile may file a petition to terminate the parental rights of another with respect to that juvenile. (1977, c. 879, s. 8; 1983, c. 870, s. 1; 1985, c. 758, s. 1; 1987, c. 371, s. 2; 1995 (Reg. Sess., 1996), c. 690, s. 4; 1998-202, s. 6; 1998-229, s. 9.1; 1999-456, s. 60; 2000-183, s. 4; 2004-128, s. 13.)

Editor's Note. — This section was originally enacted as G.S. 7B-1102. It has been renumbered as this section at the direction of the Revisor of Statutes.

Subsection (c), added by Session Laws 2004-128, s. 13, effective December 1, 2004, is applicable to petitions or actions filed on or after that date.

Legal Periodicals. — For note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

For 1984 survey, "Termination of Parental Rights: Putting Love in Its Place," see 63 N.C.L. Rev. 1177 (1985).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

Former § 7A-289.24 (see now this section) limits the persons or agencies who may petition for termination of parental rights. Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

Proof of Intent to Adopt Not a Prerequisite. — Proof of a petitioner's plan to adopt the child is not a prerequisite for the institution of a proceeding to terminate the parental rights of the child's parents. Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

Allegations of Standing by DSS. — Allegations of petition filed by county department of social services, though inartfully drafted, were sufficient to establish that DSS was a party entitled to petition for termination of respondent's parental rights in her children pursuant to G.S. 7A-289.24(3) (see now this section). Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

Agency's Lack of Standing Based on No Longer Having Custody of a Child. — Trial court lacked jurisdiction to enter an order terminating a mother's parental rights, because an agency no longer had custody of the child when it brought the termination action, and therefore lacked standing to bring the action pursuant to G.S. 7B-1103(a)(3). In re Miller, 162 N.C. App. 355, 590 S.E.2d 864, 2004 N.C. App. LEXIS 114 (2004).

Since it was undisputed that the Department of Social Services (DSS) did not have custody of the children on the date upon which the petition was filed and the children were living in South Carolina at the time, at the time of the filing of the DSS petition, DSS lacked standing to petition for termination of parental rights. In re D.D.J., 177 N.C. App. 441, 628 S.E.2d 808, 2006 N.C. App. LEXIS 933 (2006).

Agency Had Standing Under Nonsecure Custody Order. — DSS had standing to file a termination of parental rights petition as it had been granted indefinite custody of a child under a nonsecure custody order issued under G.S. 7B-506(a), and G.S. 7B-1103(a)(3) did not limit standing to parties granted custody by an order entered pursuant to G.S. 7B-905, but required only that DSS be granted custody by a court of competent jurisdiction. In re T.M., — N.C. App. —, 643 S.E.2d 471, 2007 N.C. App. LEXIS 802 (2007).

Substitution of DSS for Director as Petitioner. — Respondents were not entitled to dismissal of petition by reason of the erroneous designation of the director of the county department of social services as petitioner, and could in no way be prejudiced by permitting DSS to ratify the petition and be substituted as petitioner. Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

Guardian ad litem had standing to petition for the termination of a mother's parental rights under G.S. 7B-1103(a)(5), and the trial court had jurisdiction over the termination proceedings, where the child had continuously lived with the guardian ad litem for over two years when the petition for termination was filed. In re E.T.S., 175 N.C. App. 32, 623 S.E.2d 300, 2005 N.C. App. LEXIS 2724 (2005).

A guardian ad litem, who did not file or join in the filing of the petition and, thus, was not a party in a termination of parental rights case, did not have to be served with a copy of the notice of appeal by the parent; while a guardian ad litem for a child in a termination of parental rights proceeding may, in some instances, be a petitioner, there is no statutory authority for that guardian ad litem to be a respondent or party. In re Brown, 141 N.C. App. 550, 539 S.E.2d 366, 2000 N.C. App. LEXIS 1310 (2000).

Grandmother Proper Person To File Petition. — Since the minor child lived with the grandmother for the two years preceding the filing of the motion to terminate the mother's parental rights, the grandmother was a proper person to file the petition. Lechuga v. Ore (In re Ore), 160 N.C. App. 586, 586 S.E.2d 486, 2003 N.C. App. LEXIS 1816 (2003).

Out-of-State Guardians had Standing to File Petition. — Guardians who had custody of the child in Alabama had standing to file a petition for termination of parental rights pursuant to G.S./A 7B-1103(a)(3). In re H.L.A.D., — N.C. App. —, 646 S.E.2d 425, 2007 N.C. App. LEXIS 1482 (2007).

Jurisdiction to Terminate Parental Rights During Pendency of Custody Review Order Appeal. — Where the trial court terminated the mother's parental rights during the pendency of the mother's custody review order appeal, G.S. 1-294 did not deprive the trial court of jurisdiction to terminate the mother's parental rights, as such jurisdiction was granted under G.S. 7B-1101 and G.S. 7B-1103. In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

Two-Year Period in G.S. 7B-1103(a)(5) Not Tolled. — Two-year period required under G.S. 7B-1103(a)(5) was not tolled until a mother reached the age of majority, even though the mother did not have a guardian ad litem appointed in earlier neglect and dependency proceedings, as the mother was an adult during the entire termination of parental rights proceeding, was represented by counsel, and did not directly attack the prior neglect and dependency proceedings based on the failure to appoint a guardian ad litem for the mother; G.S. 7B-1103(a)(5) was not a statute of limitations, or the equivalent of one. In re E.T.S., 175 N.C. App. 32, 623 S.E.2d 300, 2005 N.C. App. LEXIS 2724 (2005).

While it is a correct statement of the law that a statute of limitations is tolled during the minority of a plaintiff, it does not follow that the two-year requirement of G.S. 7B-1103(a)(5) is a statute of limitations or the equivalent of such; this statute confers standing on the petitioners to file a termination of parental rights proceeding based on their two-year relationship with the child, which is in no manner related to the parent or his or her relationship with the child during that two-year period, and the person or persons with whom legal custody lies during this time period is irrelevant. In re E.T.S., 175 N.C. App. 32, 623 S.E.2d 300, 2005 N.C. App. LEXIS 2724 (2005).

Jurisdiction Absent Where Petition Was Insufficient. — Because the petition for termination of parental rights was not accompanied by a copy of the custody order then in effect, the petition failed to confer subject matter jurisdiction on the trial court; that omission need not have been fatal if the Vance County Department of Social Services (DSS) had simply amended the petition by attaching the proper custody order or otherwise ensured the custody order was made a part of the record before the trial court. Thus, it was the failure by the DSS either to attach the custody order to the petition or to remedy that omission that ultimately deprived the trial court of subject matter jurisdiction. In re T.B., 177 N.C. App. 790, 629 S.E.2d 895, 2006 N.C. App. LEXIS 1224 (2006).

Petitions for nonsecure custody filed by DSS did not comply with G.S. 7B-403, DSS was not an agency awarded custody of the minor children by a court of competent jurisdiction, DSS did not have standing under G.S. 7B-1103(a)(3) to file the termination of parental rights petitions, and the trial court did not have subject matter jurisdiction to enter the termination orders as: (1) the petition for adjudication with respect to child one contained a "Signature of Petitioner" as the "Director of DSS by an employee" and did not contain the signature of the director under G.S. 10B-3(25); (2) DSS filed an amended petition regarding child two with no signature in the "Signature of Petitioner" space; and (3) the orders awarding DSS custody were void ab initio. In re S.E.P., — N.C. App. —, 646 S.E.2d 617, 2007 N.C. App. LEXIS 1431 (2007).

Trial Court Had Subject Matter Jurisdiction, Even Though No Order Conferring Custody Was Attached to Motion. — Motion to terminate a mother's parental rights was not void ab initio, and the trial court had subject matter jurisdiction, even though no order conferring custody of the children upon department of social services (DSS) was attached to the motion as required by G.S. 7B-1104(5); although under G.S. 7B-1103, to have standing to file for termination of parental rights, DSS had to prove that it had legal custody at the time the petition was filed, the record contained a custody order awarding DSS custody of the children, and the mother failed to show that she was prejudiced in any way by the failure to physically attach a custody order to the motion. In re W.L.M., — N.C. App. —, 640 S.E.2d 439, 2007 N.C. App. LEXIS 250 (2007).

Applied in In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005); A Child's Hope, LLC v. Doe, 178 N.C. App. 96, 630 S.E.2d 673, 2006 N.C. App. LEXIS 1291 (2006).

Cited in In re C.W., — N.C. App. —, 641 S.E.2d 725, 2007 N.C. App. LEXIS 596 (2007).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — *The opinion below was rendered prior to the enactment of this Chapter.*

Foster Parents Have Standing. — Irrespective of their status toward the county department of social services, foster parents have standing pursuant to subdivision (5) of this section to petition for termination of parental rights. See opinion of Attorney General to James W. Swindell, Assistant County Attorney, Durham County, 50 N.C.A.G. 1 (1980).

§ 7B-1104. Petition or motion.

The petition, or motion pursuant to G.S. 7B-1102, shall be verified by the petitioner or movant and shall be entitled "In Re (last name of juvenile), a minor juvenile", and shall set forth such of the following facts as are known; and with respect to the facts which are unknown the petitioner or movant shall so state:

(1) The name of the juvenile as it appears on the juvenile's birth certificate, the date and place of birth, and the county where the juvenile is presently residing.

(2) The name and address of the petitioner or movant and facts sufficient to identify the petitioner or movant as one authorized by G.S. 7B-1103 to file a petition or motion.

(3) The name and address of the parents of the juvenile. If the name or address of one or both parents is unknown to the petitioner or movant, the petitioner or movant shall set forth with particularity the petitioner's or movant's efforts to ascertain the identity or whereabouts of the parent or parents. The information may be contained in an

affidavit attached to the petition or motion and incorporated therein by reference. A person whose actions resulted in a conviction under G.S. 14-27.2 or G.S. 14-27.3 and the conception of the juvenile need not be named in the petition.

(4) The name and address of any person who has been judicially appointed as guardian of the person of the juvenile.

(5) The name and address of any person or agency to whom custody of the juvenile has been given by a court of this or any other state; and a copy of the custody order shall be attached to the petition or motion.

(6) Facts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist.

(7) That the petition or motion has not been filed to circumvent the provisions of Article 2 of Chapter 50A of the General Statutes, the Uniform Child-Custody Jurisdiction and Enforcement Act. (1977, c. 879, s. 8; 1979, c. 110, s. 8; 1981, c. 469, s. 23; 1987, c. 550, s. 15; 1998-202, s. 6; 1999-223, s. 7; 1999-456, s. 60; 2000-183, s. 5; 2004-128, s. 14.)

Editor's Note. — This section was originally enacted as G.S. 7B-1103. It has been renumbered as this section at the direction of the Revisor of Statutes.

Subdivision (3), as amended by Session Laws 2004-128, s. 14, effective December 1, 2004, is applicable to offenses committed on or after that date.

Legal Periodicals. — For note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

For 1984 survey, "Termination of Parental Rights: Putting Love in Its Place," see 63 N.C.L. Rev. 1177 (1985).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

Invocation of Court's Jurisdiction. — Like the verified pleadings in divorce and juvenile actions, verified petitions for the termination of parental rights are necessary to invoke the jurisdiction of the court over the subject matter. In re Triscari Children, 109 N.C. App. 285, 426 S.E.2d 435 (1993).

Because the petition for termination of parental rights was not accompanied by a copy of the custody order then in effect, the petition failed to confer subject matter jurisdiction on the trial court; that omission need not have been fatal if the Vance County Department of Social Services (DSS) had simply amended the petition by attaching the proper custody order or otherwise ensured the custody order was made a part of the record before the trial court. Thus, it was the failure by the DSS either to attach the custody order to the petition or to remedy that omission that ultimately deprived the trial court of subject matter jurisdiction. In re T.B., 177 N.C. App. 790, 629 S.E.2d 895, 2006 N.C. App. LEXIS 1224 (2006).

Where Vance County Department of Social Services (DSS) filed a motion for termination of parental rights, the trial court had subject matter jurisdiction only if the record included a copy of an order, in effect when the petition was filed, that awarded DSS custody of the child; that was implicitly recognized by G.S. 7B-1104(5), which set out the requirements for a petition for termination of parental rights, and provided in part that the petition would set forth the name and address of any person or agency to whom custody of the juvenile had been given by a court of North Carolina or any other state, and a copy of the custody order would be attached to the petition or motion for termination. In re T.B., 177 N.C. App. 790, 629 S.E.2d 895, 2006 N.C. App. LEXIS 1224 (2006).

Failure to Attach Custody Order. — DSS's failure to attach a custody order to a termination of parental rights petition in accordance with G.S. 7B-1104(5) was not fatal as a mother did not demonstrate any prejudice arising from the technical defect, as there was no indication that the mother was unaware of the child's placement with DSS at any point during the case. In re T.M., — N.C. App. —, 643 S.E.2d 471, 2007 N.C. App. LEXIS 802 (2007).

DSS's failure to attach a custody order to a termination of parental rights petition in accordance with G.S. 7B-1104(5) was not fatal, as a father did not demonstrate any prejudice arising from the technical defect as from the time the father became a party to the case through his second counsel's withdrawal, he was consistently represented by counsel at hearings at which it was made abundantly clear that his child was in DSS custody, and the attorneys' knowledge was imputed to the father. In re T.M., — N.C. App. —, 643 S.E.2d 471, 2007 N.C. App. LEXIS 802 (2007).

Father did not demonstrate prejudice from the guardian's failure to attach a copy of the custody order to the petition for termination, as required by G.S. 7B-1104(5), because there was no indication that the father was unaware of the child's placement at any point during the case; in fact, the father entered into a consent order providing for the child's guardianship with the guardians, relatives of the child's mother. In re H.L.A.D., — N.C. App. —, 646 S.E.2d 425, 2007 N.C. App. LEXIS 1482 (2007).

Trial Court Had Subject Matter Jurisdiction, Even Though No Order Conferring Custody Was Attached to Motion. — Motion to terminate a mother's parental rights was not void ab initio, and the trial court had subject matter jurisdiction, even though no order conferring custody of the children upon department of social services (DSS) was attached to the motion as required by G.S. 7B-1104(5); although under G.S. 7B-1103, to have standing to file for termination of parental rights, DSS had to prove that it had legal custody at the time the petition was filed, the record contained a custody order awarding DSS custody of the children, and the mother failed to show that she was prejudiced in any way by the failure to physically attach a custody order to the motion. In re W.L.M., — N.C. App. —, 640 S.E.2d 439, 2007 N.C. App. LEXIS 250 (2007).

When an incarcerated parent is denied transportation to the hearing in contested termination cases, the better practice is for the court, when so moved, to provide the funds necessary for the deposing of the incarcerated parent. The parent's deposition, combined with representation by counsel at the hearing, will ordinarily provide sufficient participation by the incarcerated parent so as to reduce the risk of error attributable to his absence to a level consistent with due process. In re Quevedo, 106 N.C. App. 574, 419 S.E.2d 158, appeal dismissed, 332 N.C. 483, 424 S.E.2d 397 (1992).

Petition Held Sufficient. — Although petitioners' bare recitation of the alleged statutory grounds for termination did not comply with the requirement in former G.S. 7A-289.25(6) (see now this section) that the petition state "facts which are sufficient to warrant a determination" that grounds exist to warrant termination, the petition incorporated an attached custody award, and the custody award stated sufficient facts to warrant such a determination. In re Quevedo, 106 N.C. App. 574, 419 S.E.2d 158, appeal dismissed, 332 N.C. 483, 424 S.E.2d 397 (1992).

Trial court did not err in refusing to dismiss the father's petition for termination of the mother's parental rights due to the father's failure to include language, required under G.S. 7B-1104(7), that the petition "has not been filed to circumvent the provisions of Article 2 of Chapter 50A of the General Statutes, the Uniform Child-Custody Jurisdiction and Enforcement Act"; there was sufficient evidence to establish that the petition was not filed to circumvent the Act and to cure the father's error, and the mother failed to demonstrate she was prejudiced. In re Humphrey, 156 N.C. App. 533, 577 S.E.2d 421, 2003 N.C. App. LEXIS 236 (2003).

Trial court did not err in considering the issue of neglect due to the father's failure to allege that the mother had neglected the child since, under G.S. 7B-1104(6), the factual allegations in the father's petition were sufficient to give the mother notice as to the issue of neglect. In re Humphrey, 156 N.C. App. 533, 577 S.E.2d 421, 2003 N.C. App. LEXIS 236 (2003).

Allegations that the mother did not follow through with all of the components of the case plan, tested positive for marijuana, cocaine, and benzodiazepines, failed to hold a job, failed to obtain and maintain stable housing, and failed to pay child support were sufficient to put the mother on notice of neglect allegations. In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639, 2005 N.C. App. LEXIS 797 (2005).

There is no authority that compels dismissal of an action solely because petitioner fails to include the G.S. 7B-1104(7) statement of fact in a termination petition. In re J.D.S., 170 N.C. App. 244, 612 S.E.2d 350, 2005 N.C. App. LEXIS 1013 (2005), cert. denied, — U.S. —, 360 N.C. 64, 623 S.E.2d 584 (2005).

Although the termination of parental rights petition did not specifically refer to G.S. 7B-1111(a)(6), the petition, which contained language directly paralleling G.S. 7B-1111(a)(6), provided the mother with sufficient notice of the acts, omissions, or conditions on which the petition was based. In re A.H., — N.C. App. —, 644 S.E.2d 635, 2007 N.C. App. LEXIS 1159 (2007).

Petition Held Insufficient. — While there was sufficient evidence to support the termination of mother's parental rights with regard to her two older children, including the children's multiple placements in foster homes, the mother's severe mental problems, and the mother's inability to provide a stable residence, the trial court should have dismissed the Department of Social Services' petition for termination of parental rights as to her youngest child, removed from her care the day after its birth, because the petition did not allege any facts to support the allegation that the mother was unable to provide for the proper care and supervision of this child, as was required by G.S. 7B-1104(6). In re Hardesty, 150 N.C. App. 380, 563 S.E.2d 79, 2002 N.C. App. LEXIS 481 (2002).

Where a termination of rights petition did not address guardianship issues raised by the noncustodial parent respondent, where no custody order was attached, and where the trial court merely announced that it had decided the claimed guardianship was void, without further explanation, it was impossible to review the trial court's decision and the appeals court was forced to hold that the trial court had lacked subject matter jurisdiction due to the facial defects of the petition. In re Z.T.B., 170 N.C. App. 564, 613 S.E.2d 298, 2005 N.C. App. LEXIS 1093 (2005).

Service Held Sufficient. — Failure to attach custody order to petition to terminate parental rights or include statements within petition explaining petitioner's efforts to find parent, as required by former G.S. 7A-289.25 (see now this section), where service was by publication, was not error which resulted in any prejudice to respondent, where service by publication complied with G.S. 1A-1, Rule 4(j1), and informed respondent of the petition filed against her, her need to answer, the availability of counsel if she was indigent, and the telephone number of the Clerk of Juvenile Court if she needed further information. In re Joseph Children, 122 N.C. App. 468, 470 S.E.2d 539 (1996).

Sufficiency of Seven-Day Order Inapplicable. — It was not necessary to decide if the seven-day order was sufficient under G.S. 7B-1104(5) because the trial court admitted into evidence the order resulting from the hearing initially adjudicating the child to be a neglected child and awarding custody to the department. In re D.J.G., — N.C. App. —, 643 S.E.2d 672, 2007 N.C. App. LEXIS 826 (2007).

Challenge to Sufficiency of Petition Not Preserved for Review. — Challenge to the sufficiency of the facts alleged in the termination petition was not preserved for appellate review because the father only objected to the sufficiency of the evidence, not the legal insufficiency of the petition, when the father moved to dismiss the action after the presentation of the guardians' evidence and at the close of all evidence. In re H.L.A.D., — N.C. App. —, 646 S.E.2d 425, 2007 N.C. App. LEXIS 1482 (2007).

Applied in In re B.S.D.S., 163 N.C. App. 540, 594 S.E.2d 89, 2004 N.C. App. LEXIS 404 (2004); In re B.D., 174 N.C. App. 234, 620 S.E.2d 913, 2005 N.C. App. LEXIS 2387 (2005), cert. denied, — N.C. —, 628 S.E.2d 245 (2006).

Cited in In re J.S.L., 177 N.C. App. 151, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006); In re H.T., — N.C. App. —, 637 S.E.2d 923, 2006 N.C. App. LEXIS 2497 (2006); In re C.W., — N.C. App. —, 641 S.E.2d 725, 2007 N.C. App. LEXIS 596 (2007).

§ 7B-1105. Preliminary hearing; unknown parent.

(a) If either the name or identity of any parent whose parental rights the petitioner seeks to terminate is not known to the petitioner, the court shall, within 10 days from the date of filing of the petition, or during the next term of court in the county where the petition is filed if there is no court in the county in that 10-day period, conduct a preliminary hearing to ascertain the name or identity of such parent.

(b) The court may, in its discretion, inquire of any known parent of the juvenile concerning the identity of the unknown parent and may appoint a guardian ad litem for the unknown parent to conduct a diligent search for the parent. Should the court ascertain the name or identity of the parent, it shall enter a finding to that effect; and the parent shall be summoned to appear in accordance with G.S. 7B-1106.

(c) Notice of the preliminary hearing need be given only to the petitioner who shall appear at the hearing, but the court may cause summons to be issued to any person directing the person to appear and testify.

(d) If the court is unable to ascertain the name or identity of the unknown parent, the court shall order publication of notice of the termination proceeding and shall specifically order the place or places of publication and the contents of the notice which the court concludes is most likely to identify the juvenile to such unknown parent. The notice shall be published in a newspaper qualified for legal advertising in accordance with G.S. 1-597 and G.S. 1-598 and published in the counties directed by the court, once a week for three successive weeks. Provided, further, the notice shall:

(1) Designate the court in which the petition is pending;

(2) Be directed to "the father (mother) (father and mother) of a male (female) juvenile born on or about ______________ in
(date)

______________ County, ______________,
(city)
______________________, respondent";
(State)

(3) Designate the docket number and title of the case (the court may direct the actual name of the title be eliminated and the words "In Re Doe" substituted therefor);

(4) State that a petition seeking to terminate the parental rights of the respondent has been filed;

(5) Direct the respondent to answer the petition within 30 days after a date stated in the notice, exclusive of such date, which date so stated shall be the date of first publication of notice and be substantially in the form as set forth in G.S. 1A-1, Rule 4(j1); and

(6) State that the respondent's parental rights to the juvenile will be terminated upon failure to answer the petition within the time prescribed.

Upon completion of the service, an affidavit of the publisher shall be filed with the court.

(e) The court shall issue the order required by subsections (b) and (d) of this section within 30 days from the date of the preliminary hearing unless the court shall determine that additional time for investigation is required.

(f) Upon the failure of the parent served by publication pursuant to subsection (d) of this section to answer the petition within the time prescribed, the court shall issue an order terminating all parental rights of the unknown parent. (1977, c. 879, s. 8; 1987, c. 282, s. 1; 1998-202, s. 6; 1999-456, s. 60.)

Editor's Note. — This section was originally enacted as G.S. 7B-1104. It has been renumbered as this section at the direction of the Revisor of Statutes.

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Former § 7A-289.26 (see now this section) contains no provision to determine the "whereabouts" of the parent whose parental rights the petitioner seeks to terminate; rather, the section authorizes a preliminary hearing to ascertain the name or identity of such parent. In re Clark, 76 N.C. App. 83, 332 S.E.2d 196, cert. denied, 314 N.C. 665, 335 S.E.2d 322 (1985).

Due diligence in locating a parent is required in all parental rights termination cases before notice of publication can properly be used. In re Clark, 76 N.C. App. 83, 332 S.E.2d 196, cert. denied, 314 N.C. 665, 335 S.E.2d 322 (1985).

§ 7B-1106. Issuance of summons.

(a) Except as provided in G.S. 7B-1105, upon the filing of the petition, the court shall cause a summons to be issued. The summons shall be directed to the following persons or agency, not otherwise a party petitioner, who shall be named as respondents:

(1) The parents of the juvenile;

(2) Any person who has been judicially appointed as guardian of the person of the juvenile;

(3) The custodian of the juvenile appointed by a court of competent jurisdiction;

(4) Any county department of social services or licensed child-placing agency to whom a juvenile has been released by one parent pursuant to Part 7 of Article 3 of Chapter 48 of the General Statutes or any county department of social services to whom placement responsibil-

ity for the child has been given by a court of competent jurisdiction; and

(5) The juvenile.

Provided, no summons need be directed to or served upon any parent who, under Chapter 48 of the General Statutes, has irrevocably relinquished the juvenile to a county department of social services or licensed child-placing agency nor to any parent who has consented to the adoption of the juvenile by the petitioner. The summons shall notify the respondents to file a written answer within 30 days after service of the summons and petition. Except that the summons and other pleadings or papers directed to the juvenile shall be served upon the juvenile's guardian ad litem if one has been appointed, service of the summons shall be completed as provided under the procedures established by G.S. 1A-1, Rule 4(j). But the parent of the juvenile shall not be deemed to be under a disability even though the parent is a minor.

(b) The summons shall be issued for the purpose of terminating parental rights pursuant to the provisions of subsection (a) of this section and shall include:

(1) The name of the minor juvenile;

(2) Notice that a written answer to the petition must be filed with the clerk who signed the petition within 30 days after service of the summons and a copy of the petition, or the parent's rights may be terminated;

(3) Notice that if they are indigent, the parents are entitled to appointed counsel; the parents may contact the clerk immediately to request counsel;

(4) Notice that this is a new case. Any attorney appointed previously will not represent the parents in this proceeding unless ordered by the court;

(5) Notice that the date, time, and place of the hearing will be mailed by the clerk upon filing of the answer or 30 days from the date of service if no answer is filed; and

(6) Notice of the purpose of the hearing and notice that the parents may attend the termination hearing.

(c) If a county department of social services, not otherwise a party petitioner, is served with a petition alleging that the parental rights of the parent should be terminated pursuant to G.S. 7B-1111, the department shall file a written answer and shall be deemed a party to the proceeding. (1977, c. 879, s. 8; 1981, c. 966, s. 2; 1983, c. 581, ss. 1, 2; 1995, c. 457, s. 4; 1998-202, s. 6; 1998-229, ss. 10, 27; 1999-456, s. 60; 2000-183, s. 13; 2001-208, s. 28; 2001-487, s. 101.)

Editor's Note. — This section was originally enacted as G.S. 7B-1105. It has been renumbered as this section at the direction of the Revisor of Statutes.

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

For note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

CASE NOTES

Editor's Note. *— Some of the following cases were decided prior to the enactment of this Chapter.*

Where the "name or identity" of a respondent parent is known, but his or her whereabouts are unknown, the petitioner in a parental rights termination case must proceed under former G.S. 7A-289.27 (see now this section) and must comply with G.S. 1A-1, Rule 4(j1) as regards service by publication, and specifically, with the due diligence requirement contained therein. In re Clark, 76 N.C. App. 83, 332 S.E.2d 196, cert. denied, 314 N.C. 665, 335 S.E.2d 322 (1985).

Failure to attach custody order to petition to terminate parental rights or include statements within petition explaining petitioner's efforts to find parent, as required by former G.S. 7A-289.25 (see now G.S. 7B-1104), where service was by publication, was not error which resulted in any prejudice to respondent, where service by publication complied with G.S. 1A-1, Rule 4(j1), and informed respondent of the petition filed against her, her need to answer, the availability of counsel if she was indigent, and the telephone number of the Clerk of Juvenile Court if she needed further information. In re Joseph Children, 122 N.C. App. 468, 470 S.E.2d 539 (1996).

Service of petition and summons to terminate parental rights by publication must comply with former G.S. 7A-289.27 (see now this section) and G.S. 1A-1, Rule 4(j1). In re Joseph Children, 122 N.C. App. 468, 470 S.E.2d 539 (1996).

Service Upon Child. — Trial court did not err by exercising personal jurisdiction over a mother with regard to terminating her parental rights to her son by serving the summons required by G.S. 7B-1106(a)(5) upon the attorney advocate of the child's guardian ad litem rather than the guardian ad litem, because the guardian ad litem did not object at trial to the sufficiency of service nor did the guardian ad litem argue the issue on appeal; the mother actually lacked standing to challenge service of the summons in that she was not an aggrieved party on that issue. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

Service of Summons. — Though the child was not served the summons required by G.S. 7B-1106(a)(5), nor was the child's guardian ad litem, but rather, the guardian ad litem's attorney advocate received the summons regarding the termination of parental rights proceeding, such procedural irregularity caused no prejudice to the parents and the guardian ad litem never objected to the same. In re B.D., 174 N.C. App. 234, 620 S.E.2d 913, 2005 N.C. App. LEXIS 2387 (2005), cert. denied, — N.C. —, 628 S.E.2d 245 (2006).

Termination of a mother's parental rights pursuant to G.S. 7B-1111(a)(1) was vacated because the mother was not provided notice of the termination hearing as required by G.S. 7B-1106, as there was no evidence that the addresses to which notices were sent were the mother's dwelling, and this fact, along with the fact that the mother did not attend the hearing or respond in any way, refuted the presumption of valid service under G.S. 1A-1-4(j)(2). In re K.N., — N.C. App. —, 640 S.E.2d 813, 2007 N.C. App. LEXIS 376 (2007).

Where a petition to terminate parental rights was captioned with the names of both children, but the summons that was issued referenced only the younger child, the trial court lacked subject matter jurisdiction to terminate the mother's parental rights in the older child because a summons pertaining to the child was not issued. In re C.T., — N.C. App. —, 643 S.E.2d 23, 2007 N.C. App. LEXIS 683 (2007).

Party to Testify Without Issuance of Subpoena. — A respondent in a proceeding to terminate her parental rights is a party to the proceeding, and could be called to testify as an adverse party when she appeared at the proceeding, and a subpoena was not required. In re Davis, 116 N.C. App. 409, 448 S.E.2d 303, cert. denied, 338 N.C. 516, 452 S.E.2d 808 (1994).

Right to Counsel. — Mother who was facing termination of parental rights had the right to be represented by counsel; the trial court erred when it denied the mother's request for court-appointed counsel, even though the mother (1) had not answered a petition that the department of social services filed, (2) did not attend a pretrial conference that the trial court scheduled, and (3) made her request for counsel on the day the case was set for a hearing. In re Hopkins, 163 N.C. App. 38, 592 S.E.2d 22, 2004 N.C. App. LEXIS 266 (2004), cert. denied, 359 N.C. 632, 616 S.E.2d 230 (2005).

Cited in In re Brown, 141 N.C. App. 550, 539 S.E.2d 366, 2000 N.C. App. LEXIS 1310 (2000); In re J.S.L., 177 N.C. App. 151, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006); In re H.T., — N.C. App. —, 637 S.E.2d 923, 2006 N.C. App. LEXIS 2497 (2006).

§ 7B-1106.1. Notice in pending child abuse, neglect, or dependency cases.

(a) Upon the filing of a motion pursuant to G.S. 7B-1102, the movant shall prepare a notice directed to each of the following persons or agency, not otherwise a movant:

(1) The parents of the juvenile.
(2) Any person who has been judicially appointed as guardian of the person of the juvenile.
(3) The custodian of the juvenile appointed by a court of competent jurisdiction.

(4) Any county department of social services or licensed child-placing agency to whom a juvenile has been released by one parent pursuant to Part 7 of Article 3 of Chapter 48 of the General Statutes or any county department of social services to whom placement responsibility for the juvenile has been given by a court of competent jurisdiction.

(5) The juvenile's guardian ad litem if one has been appointed pursuant to G.S. 7B-601 and has not been relieved of responsibility.

(6) The juvenile, if the juvenile is 12 years of age or older at the time the motion is filed.

Provided, no notice need be directed to or served upon any parent who, under Chapter 48 of the General Statutes, has irrevocably relinquished the juvenile to a county department of social services or licensed child-placing agency nor to any parent who has consented to the adoption of the juvenile by the movant. The notice shall notify the person or agency to whom it is directed to file a written response within 30 days after service of the motion and notice. Service of the motion and notice shall be completed as provided under G.S. 7B-1102(b).

(b) The notice required by subsection (a) of this section shall include all of the following:

(1) The name of the minor juvenile.

(2) Notice that a written response to the motion must be filed with the clerk within 30 days after service of the motion and notice, or the parent's rights may be terminated.

(3) Notice that any attorney appointed previously to represent the parent in the abuse, neglect, or dependency proceeding will continue to represent the parents unless otherwise ordered by the court.

(4) Notice that if the parent is indigent, the parent is entitled to appointed counsel and if the parent is not already represented by appointed counsel the parent may contact the clerk immediately to request counsel.

(5) Notice that the date, time, and place of hearing will be mailed by the moving party upon filing of the response or 30 days from the date of service if no response is filed.

(6) Notice of the purpose of the hearing and notice that the parents may attend the termination hearing.

(c) If a county department of social services, not otherwise a movant, is served with a motion seeking termination of a parent's rights, the director shall file a written response and shall be deemed a party to the proceeding. (2000-183, s. 6.)

CASE NOTES

Required Notice. — Trial court erred in terminating the parental rights of parents to their minor children; the notice of the action required by this section provided to the parents by an agency failed to meet the statutory requirements for such a notice, the service of the notice was made mandatory by G.S. 1102 and G.S. 1A-1, Rule 5(b), and the agency's failure to provide a proper notice was reversible error. Orange County Dep't of Soc. Servs. v. Alexander (In re Alexander), 158 N.C. App. 522, 581 S.E.2d 466, 2003 N.C. App. LEXIS 1180 (2003).

Trial court erred in terminating a mother's parental rights to her children; the notice of termination served on the mother pursuant to G.S. 7B-1106.1 by an agency did not contain all of the required information, and therefore a new hearing was required. In re D.A., 169 N.C. App. 245, 609 S.E.2d 471, 2005 N.C. App. LEXIS 532 (2005).

Since each notice contained all of the information required by G.S. 7B-1106.1(b), tracking the actual language used in the statute, and the certificate of service attached to each notice of proceeding included the names of all parties, including the mother and her counsel, there was proper notice in the termination of parental rights case. In re J.T.W., 178 N.C. App. 678, 632 S.E.2d 237, 2006 N.C. App. LEXIS 1677 (2006), rev'd on other grounds, 361 N.C. 341, 643 S.E.2d 579 (2007).

Waiver of Objection to Lack of Notice. — Mother in a termination of parental rights action waived any objection to improper notice by appearing with counsel at the hearing and failing to object to any lack of notice. In re J.S.L., 177 N.C. App. 151, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006).

Applied in In re B.M., 168 N.C. App. 350, 607 S.E.2d 698, 2005 N.C. App. LEXIS 252 (2005); In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

Cited in In re J.L.K., 165 N.C. App. 311, 598 S.E.2d 387, 2004 N.C. App. LEXIS 1162 (2004), cert. denied, 359 N.C. 68, 604 S.E.2d 314 (2004); In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), aff'd, — N.C. —, 625 S.E.2d 779 (2006).

§ 7B-1107. Failure of parent to answer or respond.

Upon the failure of a respondent parent to file written answer to the petition or written response to the motion within 30 days after service of the summons and petition or notice and motion, or within the time period established for a defendant's reply by G.S. 1A-1, Rule 4(j1) if service is by publication, the court may issue an order terminating all parental and custodial rights of that parent with respect to the juvenile; provided the court shall order a hearing on the petition or motion and may examine the petitioner or movant or others on the facts alleged in the petition or motion. (1977, c. 879, s. 8; 1979, c. 525, s. 3; 1987, c. 282, s. 2; 1998-202, s. 6; 1998-229, s. 10; 1999-456, s. 60; 2000-183, s. 7.)

Editor's Note. — This section was originally enacted as G.S. 7B-1106. It has been renumbered as this section at the direction of the Revisor of Statutes.

CASE NOTES

Editor's Note. — *Most of the following cases were decided prior to the enactment of this Chapter.*

The absence of an answer denying any of the material allegations of the petition does not authorize the trial court to enter a "default type" order terminating the respondent's parental rights. In re Tyner, 106 N.C. App. 480, 417 S.E.2d 260 (1992).

Sufficiency of Answer. — Respondent's letter addressed to his attorney which the attorney filed with the trial court at sometime on the day of the hearing did not constitute an answer to the petition. In re Tyner, 106 N.C. App. 480, 417 S.E.2d 260 (1992).

Late Answer. — Where a mother sought to terminate the father's parental rights and the father filed a last minute response to the petition in violation of G.S. 1A-1, N.C. R. Civ. P. 12(a)(1) and contrary to G.S. 7B-1107, the trial court erred under G.S. 7B-1108(b) in failing to appoint a guardian ad litem for the child; it was improper to punish the child for the father's late response. In re J.L.S., 168 N.C. App. 721, 608 S.E.2d 823, 2005 N.C. App. LEXIS 453 (2005).

§ 7B-1108. Answer or response of parent.

(a) Any respondent may file a written answer to the petition or written response to the motion. The answer or response shall admit or deny the allegations of the petition or motion and shall set forth the name and address of the answering respondent or the respondent's attorney.

(b) If an answer or response denies any material allegation of the petition or motion, the court shall appoint a guardian ad litem for the juvenile to represent the best interests of the juvenile, unless the petition or motion was filed by the guardian ad litem pursuant to G.S. 7B-1103, or a guardian ad litem has already been appointed pursuant to G.S. 7B-601. A licensed attorney shall be appointed to assist those guardians ad litem who are not attorneys licensed to practice in North Carolina. The appointment, duties, and payment of the guardian ad litem shall be the same as in G.S. 7B-601 and G.S. 7B-603, but in no event shall a guardian ad litem who is trained and supervised by the guardian ad litem program be appointed to any case unless the juvenile is or has been the subject of a petition for abuse, neglect, or dependency or with good cause shown the local guardian ad litem program consents to the appointment.

The court shall conduct a special hearing after notice of not less than 10 days nor more than 30 days given by the petitioner or movant to the respondent who answered or responded, and the guardian ad litem for the juvenile to determine the issues raised by the petition and answer or motion and response.

Notice of the hearing shall be deemed to have been given upon the depositing thereof in the United States mail, first-class postage prepaid, and addressed to the respondent, and guardian ad litem or their counsel of record, at the addresses appearing in the petition or motion and responsive pleading.

(c) In proceedings under this Article, the appointment of a guardian ad litem shall not be required except, as provided above, in cases in which an answer or response is filed denying material allegations, or as required under G.S. 7B-1101; but the court may, in its discretion, appoint a guardian ad litem for a juvenile, either before or after determining the existence of grounds for termination of parental rights, in order to assist the court in determining the best interests of the juvenile.

(d) If a guardian ad litem has previously been appointed for the juvenile under G.S. 7B-601, and the appointment of a guardian ad litem could also be made under this section, the guardian ad litem appointed under G.S. 7B-601, and any attorney appointed to assist that guardian, shall also represent the juvenile in all proceedings under this Article and shall have the duties and payment of a guardian ad litem appointed under this section, unless the court determines that the best interests of the juvenile require otherwise. (1977, c. 879, s. 8; 1981 (Reg. Sess., 1982), c. 1331, s. 3; 1983, c. 870, s. 2; 1989 (Reg. Sess., 1990), c. 851, s. 1; 1998-202, s. 6; 1999-456, s. 60; 2000-183, s. 8; 2003-140, s. 7.)

Editor's Note. — This section was originally enacted as G.S. 7B-1107. It has been renumbered as this section at the direction of the Revisor of Statutes.

Legal Periodicals. — For note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

CASE NOTES

***Editor's Note.** — Most of the following cases were decided prior to the enactment of this Chapter.*

No Right to File Counterclaim. — Statutorily established procedure for termination of parental rights under former G.S. 7A-289.29 (see now this section) does not include the right to file a counterclaim. In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

Notice When Hearing Is Continued. — Former G.S. 7A-289.29(b) (see now this section) does not prescribe the rules for notice when a hearing is continued. Herell v. Taylor, 97 N.C. App. 57, 387 S.E.2d 230 (1990).

A brief special hearing to determine the issues raised by the pleadings held just prior to the trial does not conflict with the requirements of former 7A-289.29(b) (see now this section). Herell v. Taylor, 97 N.C. App. 57, 387 S.E.2d 230 (1990).

Sufficiency of Answer. — Respondent's letter addressed to his attorney which the attorney filed with the trial court at sometime on the day of the hearing did not constitute an answer to the petition. In re Tyner, 106 N.C. App. 480, 417 S.E.2d 260 (1992).

Reversal for Failure to Appoint Guardian Ad Litem. — Where a mother sought to terminate the father's parental rights and the father filed a last minute response to the petition in violation of G.S. 1A-1, N.C. R. Civ. P. 12(a)(1) and contrary to G.S. 7B-1107, the trial court erred under G.S. 7B-1108(b) in failing to appoint a guardian ad litem for the child; it was improper to punish the child for the father's late response. In re J.L.S., 168 N.C. App. 721, 608 S.E.2d 823, 2005 N.C. App. LEXIS 453 (2005).

Trial court erred in failing to appoint a guardian ad litem (GAL) for the child from the beginning of a termination proceeding; a GAL and an attorney advocate performed distinct and separate roles, so the appointment of the attorney advocate as the GAL after three and a half days of testimony was insufficient, even though the advocate had been involved in the case from an earlier time. In re R.A.H., 171 N.C. App. 427, 614 S.E.2d 382, 2005 N.C. App. LEXIS 1256 (2005).

Because five different guardian ad litems (GAL) made sporadic appearances for a mother's children at different hearings over a three-year period, and the only GAL actually appointed by the court never appeared at any hearing, there was no GAL discharging their duty to protect and promote the best interests of the children until formally relieved of the responsibility by the court as required by G.S. 7B-601(a). In re J.E., — N.C. App. —, 644 S.E.2d 28, 2007 N.C. App. LEXIS 1048 (2007).

Failure of the record to disclose guardian ad litem papers did not require reversal where the guardian ad litem was noted as present at every hearing prior to and including the termination hearing where she represented the interests of the children. In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639, 2005 N.C. App. LEXIS 797 (2005).

Applied in In re B.D., 174 N.C. App. 234, 620 S.E.2d 913, 2005 N.C. App. LEXIS 2387 (2005), cert. denied, — N.C. —, 628 S.E.2d 245 (2006).

§ 7B-1109. Adjudicatory hearing on termination.

(a) The hearing on the termination of parental rights shall be conducted by the court sitting without a jury and shall be held in the district at such time and place as the chief district court judge shall designate, but no later than 90 days from the filing of the petition or motion unless the judge pursuant to subsection (d) of this section orders that it be held at a later time. Reporting of the hearing shall be as provided by G.S. 7A-198 for reporting civil trials.

(b) The court shall inquire whether the juvenile's parents are present at the hearing and, if so, whether they are represented by counsel. If the parents are not represented by counsel, the court shall inquire whether the parents desire counsel but are indigent. In the event that the parents desire counsel but are indigent as defined in G.S. 7A-450(a) and are unable to obtain counsel to represent them, counsel shall be appointed to represent them in accordance with rules adopted by the Office of Indigent Defense Services. The court shall grant the parents such an extension of time as is reasonable to permit their appointed counsel to prepare their defense to the termination petition or motion. In the event that the parents do not desire counsel and are present at the hearing, the court shall examine each parent and make findings of fact sufficient to show that the waivers were knowing and voluntary. This examination shall be reported as provided in G.S. 7A-198.

(c) The court may, upon finding that reasonable cause exists, order the juvenile to be examined by a psychiatrist, a licensed clinical psychologist, a physician, a public or private agency, or any other expert in order that the juvenile's psychological or physical condition or needs may be ascertained or, in the case of a parent whose ability to care for the juvenile is at issue, the court may order a similar examination of any parent of the juvenile.

(d) The court may for good cause shown continue the hearing for up to 90 days from the date of the initial petition in order to receive additional evidence including any reports or assessments that the court has requested, to allow the parties to conduct expeditious discovery, or to receive any other information needed in the best interests of the juvenile. Continuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court shall issue a written order stating the grounds for granting the continuance.

(e) The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent. The adjudicatory order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection.

(f) The burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence. No husband-wife or physician-patient privilege shall be grounds for excluding any evidence regarding the existence or nonexistence of any circumstance authorizing the termination of parental rights. (1977, c. 879, s. 8; 1979, c. 669, s. 1; 1981, c. 966, s. 3; (Reg. Sess., 1982), c. 1331, s. 3; 1983, c. 870, s. 2; 1989 (Reg. Sess., 1990), c. 851, s. 1; 1998-202, s. 6; 1999-456, s. 60; 2000-144, s. 19; 2000-183, s. 9; 2001-208, ss. 7, 22; 2001-487, s. 101; 2003-304, s. 2; 2005-398, s. 16.)

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, G.S. 7A-498 et seq.

Editor's Note. — This section was originally enacted as G.S. 7B-1108. It has been renumbered as this section at the direction of the Revisor of Statutes.

Subsection (e), as amended by Session Laws 2005-398, s. 16, effective October 1, 2005, is applicable to petitions or actions filed on or after that date.

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

For survey of 1981 constitutional law, see 60 N.C.L. Rev. 1272 (1982).

For survey of 1982 law relating to family law, see 61 N.C.L. Rev. 1155 (1983).

For 1984 survey, "Termination of Parental Rights: Putting Love in Its Place," see 63 N.C.L. Rev. 1177 (1985).

CASE NOTES

Editor's Note. *— Most of the following cases were decided prior to the enactment of this Chapter.*

This Article (see now Chapter 7B, Article 11) is not unconstitutional in depriving the parties of trial by jury; under N.C. Const., Art. I, § 19, trial by jury is guaranteed only where the prerogative existed at common law or by statute at the time the Constitution was adopted, and proceedings to terminate parental rights in children were unknown at common law and did not exist by statute until 1969. In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

The North Carolina constitutional requirement of trial by jury is not applicable to a proceeding for termination of parental rights. In re Ferguson, 50 N.C. App. 681, 274 S.E.2d 879 (1981).

Voluntary Dismissal of First Petition. — Fact that county department of social services had dismissed a prior petition for termination of mother's parental rights did not preclude a subsequent petition since the best interests of the children was always the primary focus, with no procedural rule barring the court's continuing jurisdiction over such a matter. In re L.O.K., 174 N.C. App. 426, 621 S.E.2d 236, 2005 N.C. App. LEXIS 2476 (2005).

The termination of parental rights statute provides for a two-stage termination proceeding: Former G.S. 7A-289.30 governs the adjudication stage, while former G.S. 7A-289.31 governs the disposition stage of a termination proceeding. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984); In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986).

Former G.S. 7A-289.30 and former G.S. 7A-289.31, when read together, mean that in the adjudication stage, the petitioner must prove clearly, cogently, and convincingly the existence of one or more of the grounds for termination listed in former G.S. 7A-289.32. Once the petitioner has proven this ground by this standard, it has met its burden within the statutory scheme of former G.S. 7A-289.30 and 7A-289.31. The petitioner having met his burden of proof at the adjudication stage, the court then moves on to the disposition stage, where the court's decision to terminate parental rights is discretionary. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

In a proceeding to terminate parental rights on the grounds of abuse, a prior adjudication of abuse was binding upon the court. It still had to be shown, however, by clear, cogent, and convincing evidence, that the grounds for termination, i.e., abuse or the probability of its repetition, existed at the time of the termination proceeding. The court then had to determine whether termination was in the child's best interest. In re Alleghany County Dep't of Social Servs. v. Reber, 75 N.C. App. 467, 331 S.E.2d 256 (1985), aff'd, 315 N.C. 382, 337 S.E.2d 851 (1986).

At the adjudication stage, petitioner is required to prove the existence of grounds for termination listed in former G.S. 7A-289.32 by clear, cogent and convincing evidence, pursuant to former G.S. 7A-289.30(e), while at the disposition stage, the court's decision as to whether to terminate parental rights is discretionary. In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986).

Proceeding for termination of parental rights requires the trial court to conduct a two part inquiry; subsection (e) of this section directs that the court first shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111, which authorize the termination of parental rights of the respondent. Disposition is governed by G.S. 7B-1110, which provides in relevant part that, upon a finding that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated under G.S. 7B-1111(a). In re Baker, 158 N.C. App. 491, 581 S.E.2d 144, 2003 N.C. App. LEXIS 1194 (2003).

Adjudication and disposition are the two phases required by subsection (e) of this section in a termination of parental rights proceeding, but there exists no requirement that the two phases be conducted during separate hearings. At the adjudication phase, the petitioner has the burden of proving there is clear, cogent, and convincing evidence supporting at least one statutory ground under G.S. 7B-1111 for termination, and at the disposition phase, the determination is whether it is in the best interests of the child to terminate parental rights. In re Dhermy, 161 N.C. App. 424, 588 S.E.2d 555, 2003 N.C. App. LEXIS 2181 (2003).

During the initial adjudication phase of the trial, the petitioner seeking termination must show by clear, cogent, and convincing evidence that grounds exist to terminate parental rights and a finding of any one of those grounds is sufficient to support termination of parental rights. If the petitioner succeeds in establishing the existence of any one of the statutory grounds, the trial court moves to the second, or dispositional, stage, where it determines whether it is in the best interests of the child to terminate the parental rights; so long as the court applies the different evidentiary standards at each of the two stages, there is no requirement that the stages be conducted at two separate hearings. In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1, 2004 N.C. App. LEXIS 129 (2004).

Timeline of Termination Proceedings. — Allowing the mother to stay the termination proceedings pending an appeal of a custody review order would have precluded compliance with the termination timeline mandated under G.S. 7B-907, G.S. 7B-1109, and G.S. 7B-1110, and this would have been improper. In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

Timeliness of Hearing. — Where the termination of parental rights hearing was initially set for less than one month outside that 90-day window, by agreement of the parties, the hearing was continued, and took place within the 90-day continuance window, and there was no showing of prejudice, there was no due process violation. In re J.T.W., 178 N.C. App. 678, 632 S.E.2d 237, 2006 N.C. App. LEXIS 1677 (2006), rev'd on other grounds, 361 N.C. 341, 643 S.E.2d 579 (2007).

Failure to conduct a termination hearing within 90 days after petition was filed did not require reversal because the father was not prejudiced by the delay; the Department of Social Services stated that the long delay was the result of it's inability to serve process on the father and the mother because of an incorrect address. In re R.R., — N.C. App. —, 638 S.E.2d 502, 2006 N.C. App. LEXIS 2506 (2006).

Failure to hold a termination of parental rights hearing within 90 days did not require reversal because the oldest child's detailed plan showed that the delay was due to the extraordinary efforts by the trial court to allow the mother to demonstrate an ability to parent the three younger children by monitoring the mother's performance in parenting the older child; rather than prejudicing the mother, the efforts inured to the mother's benefit, affording the mother every possible opportunity to be reunited with the children. In re C.M., — N.C. App. —, 644 S.E.2d 630, 2007 N.C. App. LEXIS 1152 (2007).

Time limitations in the Juvenile Code were not jurisdictional in termination cases and did not require reversal of orders in the absence of a showing by the appellant of prejudice resulting from the time delay; the mother made no serious effort to establish prejudice, but rather argued that the late filing resulted in prejudice per se, which was a contention consistently rejected, and in any event, the record revealed no violation of G.S. 7B-1109(a) under circumstances in which the continuances of the termination hearing were because of the need to appoint new counsel for the mother, to allow time for responsive pleadings, to allow the mother discovery, and to allow sufficient time to fully hear the case. In re D.J.G., — N.C. App. —, 643 S.E.2d 672, 2007 N.C. App. LEXIS 826 (2007).

Holding of a hearing on a termination of parental rights petition 133 days after the petition was filed was not fatal, even though G.S. 7B-1109(a) required that the hearing commence within 90 days, as the father failed to show prejudice resulting from the delay. In re T.M., — N.C. App. —, 643 S.E.2d 471, 2007 N.C. App. LEXIS 802 (2007).

Standard of Proof. — Although this section does not specifically require the trial court to affirmatively state in its order terminating parental rights that the allegations of the petition were proved by clear and convincing evidence, G.S. 7B-807 does require such a statement, and without such an affirmative statement the appellate court is unable to determine if the proper standard of proof was utilized. In re Church, 136 N.C. App. 654, 525 S.E.2d 478, 2000 N.C. App. LEXIS 107 (2000).

During adjudication, the North Carolina Department of Social Services has the burden of proving by clear, cogent, and convincing evidence that one or more of the statutory grounds set forth in G.S. 7B-1111 for termination exists. In re Mitchell, 148 N.C. App. 483, 559 S.E.2d 237, 2002 N.C. App. LEXIS 43 (2002).

Father's neglect of his minor child under G.S. 7B-1111 was shown at the adjudication stage by clear, cogent, and convincing evidence in that the father did not provide any support for the child, did not communicate with the child, and visited the child only a few times. In re Yocum, 158 N.C. App. 198, 580 S.E.2d 399, 2003 N.C. App. LEXIS 1054 (2003).

Trial court's finding under G.S. 7B-1111(a)(3) that a mother failed to contribute to the cost of her children's foster care, despite being physically and financially able to do so, was not supported by clear, cogent and convincing evidence, as required by G.S. 7B-1109(f); the only evidence presented to the trial court on this subject established that she had been employed at various times since 1999 and did not address whether she was employed during the six months preceding the filing of the termination petition or whether she had the financial ability to contribute to the children's support during that time. In re Faircloth, 161 N.C. App. 523, 588 S.E.2d 561, 2003 N.C. App. LEXIS 2179 (2003).

Exercise of Discretion. — Former G.S. 7A-289.30 and 7A-289.31 provide that the court may exercise its discretion in the dispositional stage only after the court has found that there is clear and convincing evidence of one of the statutory grounds for terminating parental rights during the adjudicatory stage, and no discretion may be exercised during the adjudicatory stage. In re Carr, 116 N.C. App. 403, 448 S.E.2d 299 (1994).

Separate Hearings Not Required. — Although the court is required to apply different evidentiary standards at each of the two stages of adjudication and disposition, there is no requirement that the stages be conducted at two separate hearings. In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986); In re Parker, 90 N.C. App. 423, 368 S.E.2d 879 (1988).

Failure to Record Testimony. — Where respondent argued that he must receive a new hearing because children's testimony, which was taken in chambers with all counsel present, was not recorded, respondent did not argue any error in the unrecorded testimony itself and failed to show prejudice. In re Nolen, 117 N.C. App. 693, 453 S.E.2d 220 (1995).

Waiver of Counsel Due to Inaction Improper. — The General Assembly did not intend to allow for waiver of court appointed counsel due to inaction prior to the hearing. If a parent is present at the hearing and does not waive representation, counsel shall be appointed. Little v. Little, 127 N.C. App. 191, 487 S.E.2d 823 (1997).

Ruling by the trial court that parents right to counsel was waived by inaction prior to the termination hearing was prejudicial error. Little v. Little, 127 N.C. App. 191, 487 S.E.2d 823 (1997).

Mother who was facing termination of parental rights had the right to be represented by counsel; the trial court erred when it denied the mother's request for court-appointed counsel, even though the mother (1) had not answered a petition that the department of social services filed, (2) did not attend a pretrial conference that the trial court scheduled, and (3) made her request for counsel on the day the case was set for a hearing. In re Hopkins, 163 N.C. App. 38, 592 S.E.2d 22, 2004 N.C. App. LEXIS 266 (2004), cert. denied, 359 N.C. 632, 616 S.E.2d 230 (2005).

Removal of Counsel. — In a termination of parental rights proceeding where the father was alleged to have abused and neglected the children, the trial court did not err in in not removing the father's attorney from the case on the basis that counsel failed to schedule a new hearing in the abuse and neglect hearing, as the father did not show prejudice arising from there being no rehearing in the abuse and neglect proceeding prior to the termination hearing. In re Faircloth, 153 N.C. App. 565, 571 S.E.2d 65, 2002 N.C. App. LEXIS 1273 (2002).

Failure to Sign Termination Order Within 30 Days. — When a trial court did not sign a written order terminating a father's parental rights within 30 days of the hearing resulting in that order, the trial court's statutory violation did not require that its order be vacated, as no authority compelled such a result, and, on the facts, that was not an appropriate remedy for the statutory violation as the father's neglect and abandonment of the child were proved by clear, cogent, and convincing evidence, and the father did not show he suffered any prejudice from the trial court's delay. In re J.L.K., 165 N.C. App. 311, 598 S.E.2d 387, 2004 N.C. App. LEXIS 1162 (2004), cert. denied, 359 N.C. 68, 604 S.E.2d 314 (2004).

Mother was not entitled to reversal of an order terminating her parental rights despite the fact that it was entered more than 30 days after the hearing because she failed to show that she suffered prejudice as a result of the late order. In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), aff'd, — N.C. —, 625 S.E.2d 779 (2006).

Extraordinary delay of almost one year after the termination hearing in entering the order terminating a mother's parental rights pursuant to G.S. 7B-1109(e), G.S. 7B-1110(a) was sufficient to show prejudice to warrant reversal and a new hearing. In re T.W., 173 N.C. App. 153, 617 S.E.2d 702, 2005 N.C. App. LEXIS 1922 (2005).

Trial court's entry of an order 83 days following the termination of parental rights hearing did not constitute prejudice per se, requiring a new hearing; the mother failed to articulate any prejudice she suffered. In re S.N.H., 177 N.C. App. 82, 627 S.E.2d 510, 2006 N.C. App. LEXIS 717 (2006).

Delay in Entering Order Requires Prejudice for Reversal. — Trial court erred by not entering its termination order within the statutory time frame, but reversal was not required since the parents did not show how they were prejudiced by the delay. In re D.R., 172 N.C. App. 300, 616 S.E.2d 300, 2005 N.C. App. LEXIS 1578 (2005).

Trial court did not lack subject matter jurisdiction over a termination of parental rights hearing because the trial court did not comply with the time limits as set forth in G.S. 7B-1109(a) and (d) as: (1) each continuance granted by the trial court was necessary in order for all the essential parties to be present and to provide testimony and evidence at the termination hearing; (2) at no time did mother object to any delay or continuance; and (3) the mother failed to provide any argument as to how she, or the children, were specifically prejudiced by the delay. In re W.L.M., — N.C. App. —, 640 S.E.2d 439, 2007 N.C. App. LEXIS 250 (2007).

Reversal of a termination of parental rights order was not warranted under G.S. 7B-1109(a) due to the delay between the petition and the hearing, because the mother failed to meet the burden to show prejudice caused by the delay in scheduling the hearing; the delay inured to the mother's benefit since it gave the mother more time to address housing, employment, individual counseling, and substance abuse issues. In re C.T., — N.C. App. —, 643 S.E.2d 23, 2007 N.C. App. LEXIS 683 (2007).

Delay in Entering Termination Order. — Seven month delay between a termination hearing and the trial court's entry of its termination order ran counter to the legislative intent in enacting the 30-day requirement of G.S. 7B-1109(e) and G.S. 7B-1110(a), and prejudiced the mother, who was prevented from filing an appeal until seven months after the hearing; pending the appellate court's determination of the appeal, the child remained in the department's custody, and subsequent court proceedings involving the child were limited to those "temporary" orders authorized by G.S. 7B-1113. In re T.L.T., 170 N.C. App. 430, 612 S.E.2d 436, 2005 N.C. App. LEXIS 1008 (2005).

Order terminating a father's parental rights was reversed, where the trial court entered its order more than five months after the conclusion of the termination hearing; the late entry of the written order was a clear and egregious violation of G.S. 7B-1109(e) and G.S. 7B-1110(a). Owen v. Keeter (In re C.L.K.), — N.C. App. —, 643 S.E.2d 458, 2007 N.C. App. LEXIS 804 (2007).

When a trial court failed to state ground for granting a youth and family services' continuance in a petition to terminate a mother's parental rights without stating the grounds as required by G.S. 7B-1109(d), and there was a delay of almost 11 months beyond the 90-day deadline of G.S. 7B-1109(a) before a hearing was held on the petition, the delay was egregious because the services' termination of the mother's visitations with the children constituted a de facto termination of the mother's parental rights 14 months prior to the matter actually coming before the trial court; for 14 months the mother was denied the company and familial relationship with her children solely through the inaction of the services and the trial court, and thus showed that she was prejudiced by the delay. In re J.Z.M., — N.C. App. —, 646 S.E.2d 631, 2007 N.C. App. LEXIS 1474 (2007).

Delay in Hearing Due to Request for Counsel. — The trial court did not err by holding a hearing on the petition to terminate the mother's parental rights outside of the initial 90-day time requirement where the other's request for appointment of counsel led to the delay. In re S.N.H., 177 N.C. App. 82, 627 S.E.2d 510, 2006 N.C. App. LEXIS 717 (2006).

Where the trial court did not reduce the parental termination to writing until seven months after the termination hearing in violation of the 30-day requirement of G.S. 7B-1109(e), -1110(a), -1111(a); all parties were prejudiced, as the mother and child lost time together, the foster parents were in a state of flux, and the adoptive parents were unable to complete their family plan. In re D.S., 177 N.C. App. 136, 628 S.E.2d 31, 2006 N.C. App. LEXIS 711 (2006).

Untimely termination of parental rights hearing did not require dismissal of the termination petition because the father's own motion for a continuance added 68 days to the trial court's original error and the father was not prejudiced thereby. In re D.J.D., 171 N.C.

App. 230, 615 S.E.2d 26, 2005 N.C. App. LEXIS 1268 (2005).

Trial court's failure to timely enter its adjudication and disposition order in a termination of parental rights action did not warrant reversal because that would only further delay the determination regarding the children's custody in opposition to the intent of G.S. 7B-1109(e) and G.S. 7B-1110(a). In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639, 2005 N.C. App. LEXIS 797 (2005).

Mother was awarded a new termination of parental rights trial where the written order was not entered until five months after the trial court orally announced its decision; this violated G.S. 7B-1109 and G.S. 7B-1110, which required entry to be made within 30 days, and prejudice was shown, as the delay was unnecessary, closure was not obtained, and records and transcripts were either misplaced or irretrievable. In re C.J.B., 171 N.C. App. 132, 614 S.E.2d 368, 2005 N.C. App. LEXIS 1168 (2005).

The petitioner seeking termination of parental rights bears the burden of showing by clear, cogent and convincing evidence that such neglect exists at the time of the termination proceeding. In re Ballard, 311 N.C. 708, 319 S.E.2d 227 (1984); Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

Finding of Neglect. — Trial court properly terminated the father's parental rights on the ground that the father neglected the father's children, because the father expressed some interest in visitation rights, but only if a paternity test showed that the father was one child's biological father. In re Mills, 152 N.C. App. 1, 567 S.E.2d 168, 2002 N.C. App. LEXIS 905 (2002), cert. denied, 356 N.C. 672, 577 S.E.2d 627 (2003).

Order terminating mother's parental rights to her four minor children was proper because the children were previously adjudicated neglected, there was a probability of repetition of neglect if returned to the mother, four to five trial placements with the mother had failed, the mother had a history of failing to show a positive response to counseling and educational programs, the mother left a stable job and housing to move to another state where she did not have employment or independent housing, and she had been unable to cope with the pressure of caring for the children at the same time, with such findings being sufficient to establish neglect under G. S. 7B-1111(a)(1). In re L.O.K., 174 N.C. App. 426, 621 S.E.2d 236, 2005 N.C. App. LEXIS 2476 (2005).

The proper evidentiary standard of proof in termination of parental rights proceedings is clear and convincing evidence. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

"Clear and convincing" and "clear, cogent, and convincing" describe the same evidentiary standard. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

The clear, cogent and convincing standard is greater than the preponderance of the evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in criminal cases. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

Statement of Clear and Convincing Evidence Required. — When construing G.S. 7B-807 and this section together to determine legislative intent, under subsection (f) of this section, the trial court is required to affirmatively state in its order the standard of proof utilized in the termination proceeding. In re Church, 136 N.C. App. 654, 525 S.E.2d 478, 2000 N.C. App. LEXIS 107 (2000).

Under former G.S. 7A-289.32, where the trial court failed to state that its findings in the adjudicatory stage of a proceeding to terminate parental rights were made by "clear, cogent and convincing evidence," the Court of Appeals could not determine if the correct standard of proof had been applied and, therefore, reversed the trial court's order terminating the parents' rights. In re Lambert-Stowers, 146 N.C. App. 438, 552 S.E.2d 278, 2001 N.C. App. LEXIS 948 (2001).

Court May Consider Previous Adjudication. — In determining whether there is neglect which authorizes the termination of parental rights, the trial court is allowed to consider a previous adjudication of neglect. It must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect. In re Stewart, 82 N.C. App. 651, 347 S.E.2d 495 (1986).

Admissibility of Psychological Reports. — The clear intent of the legislature is that a hearing upon a motion for review is in the nature of a dispositional hearing rather than an adjudicatory hearing, and that the formal rules of evidence do not apply. Therefore, the trial court could properly consider written psychological reports in determining, on a motion brought by parents whose parental rights had been terminated under former G.S. 7A-289.34, whether the needs of the children would best be served by modification of its previous orders concerning visitation. In re Montgomery, 77 N.C. App. 709, 336 S.E.2d 136 (1985).

Although psychological evaluations in termination case were not court-ordered, they were relevant and admissible. Buncombe County Dep't of Social Servs. v. Burks, 92 N.C. App. 676, 375 S.E.2d 676 (1989).

Standard for Review on Appeal. — On appeal, when a trial court's order is reviewed as not being supported by the evidence, the appellate court looks to see whether there is clear, cogent, and convincing competent evidence to support the findings. If there is such competent evidence, the findings are binding upon the court on appeal. In re Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982).

Standard of Review. — The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law; courts then consider, based on the grounds found for termination, whether the trial court abused its discretion in finding termination to be in the best interest of the child. Evidence heard or introduced throughout the adjudicatory stage, as well as any additional evidence, may be considered during the dispositional stage. In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1, 2004 N.C. App. LEXIS 129 (2004).

Effect of Findings on Appeal. — Factual findings must be based on clear, cogent, and convincing evidence. Such properly supported findings are binding on appeal, even though there may be evidence to the contrary. Furthermore, findings of fact not excepted to are deemed to be supported by competent evidence and are conclusive on appeal. In re Tyson, 76 N.C. App. 411, 333 S.E.2d 554 (1985); Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

Failure to Make Reasonable Progress. — Record held to demonstrate a failure on the part of parents to make reasonable progress toward improving home conditions during the period in which parents' children were in foster care, despite the fact that they showed a willingness to provide for the children during part of the time at issue. Herell v. Taylor, 97 N.C. App. 57, 387 S.E.2d 230 (1990).

The trial court's findings were insufficient to terminate the mother's rights since it did not address whether the mother could pay support, address the concerns leading to the child's removal, or list the unmet conditions. In re Locklear, 151 N.C. App. 573, 566 S.E.2d 165, 2002 N.C. App. LEXIS 765 (2002).

Late Entry of Termination Order Held Reversible Error. — Trial court reversibly erred in failing to enter an order terminating a mother's parental rights over her children until over 180 days after the termination hearing, in violation of G.S. 7B-1109(e) and G.S. 7B-1110(a), because the long delay was highly prejudicial to the mother, the children, and the foster parent. In re L.E.B., 169 N.C. App. 375, 610 S.E.2d 424, 2005 N.C. App. LEXIS 598 (2005).

Termination Held Warranted. — Where a jailed father asked not to be taken to court to appear at a parental rights termination hearing, it showed that the child was not a priority and that the child was a neglected and abandoned; termination of the father's parental rights was therefore in the child's best interest. Whittington v. Hendren (In re Hendren), 156 N.C. App. 364, 576 S.E.2d 372, 2003 N.C. App. LEXIS 132 (2003).

Evidence Held Insufficient. — Evidence held insufficient to support the grounds for termination of parental rights. In re Young, 346 N.C. 244, 485 S.E.2d 612 (1997).

County department of social services did not satisfy its burden of proving the allegations in its juvenile petitions by clear, cogent, and convincing evidence under G.S. 7B-1109 because the subject children were not neglected juveniles under G.S. 7B-101(15), nor dependant juveniles under G.S. 7B-101(9); the trial court in its ruling properly entered uncontested findings of fact that: (1) the father possessed a gun, but did not point it at the mother or the children during a domestic disturbance; (2) the parents' three oldest children left their residence with the father, but no kidnapping was reported, and an Amber Alert was not issued; (3) the district attorney's office dismissed the charges against the father for communicating threats to and assault by pointing a gun at the mother; and (4) the father was not in possession of a gun when he was arrested. In re H.M., — N.C. App. —, 641 S.E.2d 715, 2007 N.C. App. LEXIS 594 (2007).

Order terminating a father's parental rights was improper because it did not identify any G.S. 7B-1111(a) grounds for termination and did not indicate the evidentiary standard under which the trial court made its adjudicatory findings of fact; without an identified basis for adjudication, effective review of the termination order was precluded, and without a finding of willfulness, there was insufficient basis for a finding of abandonment, and the father's incarceration alone was insufficient to support the termination order. Bolick v. Brizendine (In re D.R.B.), — N.C. App. —, 643 S.E.2d 77, 2007 N.C. App. LEXIS 787 (2007).

Applied in In re Johnston, 151 N.C. App. 728, 567 S.E.2d 219, 2002 N.C. App. LEXIS 866 (2002); In re T.C.B., 166 N.C. App. 482, 602 S.E.2d 17, 2004 N.C. App. LEXIS 1732 (2004).

Cited in In re McLemore, 139 N.C. App. 426, 533 S.E.2d 508, 2000 N.C. App. LEXIS 889 (2000); In re Blackburn, 142 N.C. App. 607, 543 S.E.2d 906, 2001 N.C. App. LEXIS 190 (2001); In re Hardesty, 150 N.C. App. 380, 563 S.E.2d 79, 2002 N.C. App. LEXIS 481 (2002); In re L.D.B., 168 N.C. App. 206, 617 S.E.2d 288, 2005 N.C. App. LEXIS 165 (2005); In re V.L.B., 168 N.C. App. 679, 608 S.E.2d 787, 2005 N.C. App. LEXIS 394 (2005), cert denied, — N.C. —, 614 S.E.2d 924 (2005); In re B.N.H., 170 N.C. App. 157, 611 S.E.2d 888, 2005 N.C. App. LEXIS 885 (2005); In re C.C., 173 N.C. App. 375, 618 S.E.2d 813, 2005 N.C. App. LEXIS 2017 (2005); In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005); In re

As.L.G., 173 N.C. App. 551, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005); In re A.C.F., 176 N.C. App. 520, 626 S.E.2d 729, 2006 N.C. App. LEXIS 529 (2006); A Child's Hope, LLC v. Doe, 178 N.C. App. 96, 630 S.E.2d 673, 2006 N.C. App. LEXIS 1291 (2006); In re S.N., — N.C. App. —, 636 S.E.2d 316, 2006 N.C. App. LEXIS 2236 (2006); In re C.W., — N.C. App. —, 641 S.E.2d 725, 2007 N.C. App. LEXIS 596 (2007); In re B.M., — N.C. App. —, 643 S.E.2d 644, 2007 N.C. App. LEXIS 833 (2007); In re J.S.B., — N.C. App. —, 644 S.E.2d 580, 2007 N.C. App. LEXIS 1041 (2007).

§ 7B-1110. Determination of best interests of the juvenile.

(a) After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. In making this determination, the court shall consider the following:

(1) The age of the juvenile.
(2) The likelihood of adoption of the juvenile.
(3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
(4) The bond between the juvenile and the parent.
(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
(6) Any relevant consideration.

Any order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection.

(b) Should the court conclude that, irrespective of the existence of one or more circumstances authorizing termination of parental rights, the best interests of the juvenile require that rights should not be terminated, the court shall dismiss the petition or deny the motion, but only after setting forth the facts and conclusions upon which the dismissal or denial is based.

(c) Should the court determine that circumstances authorizing termination of parental rights do not exist, the court shall dismiss the petition or deny the motion, making appropriate findings of fact and conclusions.

(d) Counsel for the petitioner or movant shall serve a copy of the termination of parental rights order upon the guardian ad litem for the juvenile, if any, and upon the juvenile if the juvenile is 12 years of age or older.

(e) The court may tax the cost of the proceeding to any party. (1977, c. 879, s. 8; 1981 (Reg. Sess., 1982), c. 1131, s. 1; 1983, c. 581, s. 3; c. 607, s. 3; 1998-202, s. 6; 1999-456, s. 60; 2000-183, s. 10; 2001-208, s. 23; 2001-487, s. 101; 2005-398, s. 17.)

Editor's Note. — This section was originally enacted as G.S. 7B-1109. It has been renumbered as this section at the direction of the Revisor of Statutes.

Subsection (a), as rewritten by Session Laws 2005-398, s. 17, effective October 1, 2005, is applicable to petitions or actions filed on or after that date.

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

For article on rights and interest of parent, child, family and state, see 4 Campbell L. Rev. 85 (1981).

For note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

For survey of 1982 law relating to family law, see 61 N.C.L. Rev. 1155 (1983).

For 1984 survey, "Termination of Parental Rights: Putting Love in Its Place," see 63 N.C.L. Rev. 1177 (1985).

CASE NOTES

Editor's Note. *— Most of the following cases were decided prior to the enactment of this Chapter.*

The termination of parental rights statute provides for a two-stage termination proceeding: G.S. 7A-289.30 [see now G.S. 7B-1109] governs the adjudication stage, while this section governs the disposition stage of a termination proceeding. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

In a proceeding to terminate parental rights on the grounds of abuse, a prior adjudication of abuse was binding upon the court. It still had to be shown, however, by clear, cogent, and convincing evidence, that the grounds for termination, i.e., abuse or the probability of its repetition, existed at the time of the termination proceeding. The court then had to determine whether termination was in the child's best interest. In re Alleghany County Dep't of Social Servs. v. Reber, 75 N.C. App. 467, 331 S.E.2d 256 (1985), aff'd, 315 N.C. 382, 337 S.E.2d 851 (1986).

In a department of social services' petition to terminate a father's parental rights, the trial court found the department met its burden of proving by clear, cogent, and convincing evidence at least one of the grounds in G.S.7B-1111, and then proceeded to the dispositional phase to consider whether termination was in the children's best interests, under G.S. 7B-1110(a). In re Shermer, 156 N.C. App. 281, 576 S.E.2d 403, 2003 N.C. App. LEXIS 112 (2003).

Proceeding for termination of parental rights requires the trial court to conduct a two part inquiry; G.S. 7B-1109(e) directs that the court first shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111, which authorize the termination of parental rights of the respondent. Disposition is governed by this section, which provides in relevant part that upon a finding that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated under G.S. 7B-1111(a). In re Baker, 158 N.C. App. 491, 581 S.E.2d 144, 2003 N.C. App. LEXIS 1194 (2003).

During the initial adjudication phase of the trial, the petitioner seeking termination must show by clear, cogent, and convincing evidence that grounds exist to terminate parental rights and a finding of any one of those grounds is sufficient to support termination of parental rights. If the petitioner succeeds in establishing the existence of any one of the statutory grounds, the trial court moves to the second, or dispositional, stage, where it determines whether it is in the best interests of the child to terminate the parental rights; so long as the court applies the different evidentiary standards at each of the two stages, there is no requirement that the stages be conducted at two separate hearings. In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1, 2004 N.C. App. LEXIS 129 (2004).

If a petitioner meets its burden of proving at least one ground for termination of parental rights exists under G.S. 7B-1111(a), then a trial court proceeds to the dispositional phase and determines whether termination of parental rights is in the best interest of the child. In re D.M.W., 173 N.C. App. 679, 619 S.E.2d 910, 2005 N.C. App. LEXIS 2308 (2005), cert. granted, 360 N.C. 364, 629 S.E.2d 850, rev'd, 360 N.C. 583, 635 S.E.2d 50 (2006).

Timeline of termination proceedings. — Allowing the mother to stay the termination proceedings pending an appeal of a custody review order would have precluded compliance with the termination timeline mandated under G.S. 7B-907, G.S. 7B-1109, and G.S. 7B-1110, and this would have been improper. In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

Exercise of Discretion. — Former G.S. 7A-289.31 (see now this section) and the predecessor to G.S. 7B-1109 provide that the court may exercise its discretion in the dispositional stage only after the court has found that there is clear and convincing evidence of one of the statutory grounds for terminating parental rights during the adjudicatory stage, and no discretion may be exercised during the adjudicatory stage. In re Carr, 116 N.C. App. 403, 448 S.E.2d 299 (1994).

A finding that children are well settled in their new family unit does not alone support a finding that it is in the best interest of the children to terminate other parent's parental rights. Bost v. Van Nortwick, 117 N.C. App. 1, 449 S.E.2d 911 (1994).

At the dispositional stage a court is required to issue an order of termination unless it "determines that the best interests of the child require that the parental rights of such parent not be terminated." In re Parker, 90 N.C. App. 423, 368 S.E.2d 879 (1988).

Burden of Proof at Disposition Stage of Hearing. — Although the evidence supported the findings of abuse by the mother and failure to correct conditions which led to the removal of her children, the trial court erroneously placed the burden of proof on the mother as to the best interests of the children at the dispositive stage of the hearing; therefore, the judgment had to be vacated as to the dispositional order and the case was remanded for a new dispositional hearing. In re Mitchell, 148 N.C. App. 483, 559 S.E.2d 237, 2002 N.C. App. LEXIS 43 (2002).

Finding of Neglect. — Trial court properly terminated the father's parental rights on the ground that the father neglected the father's children, because the father expressed some interest in visitation rights, but only if a paternity test showed that the father was one child's biological father. In re Mills, 152 N.C. App. 1, 567 S.E.2d 168, 2002 N.C. App. LEXIS 905 (2002), cert. denied, 356 N.C. 672, 577 S.E.2d 627 (2003).

Separate Hearings Not Required. — Although the court is required to apply different evidentiary standards at each of the two stages of adjudication and disposition, there is no requirement that the stages be conducted at two separate hearings. In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986); In re Parker, 90 N.C. App. 423, 368 S.E.2d 879 (1988).

The children's best interests are paramount, not the rights of the parent. In re Smith, 56 N.C. App. 142, 287 S.E.2d 440, cert. denied, 306 N.C. 385, 294 S.E.2d 212 (1982).

Parental rights were properly terminated under G.S. 7B-1111 because the trial court found that the children were abused under G.S. 7B-101(1) and that they exhibited symptoms of that abuse; further, the Department of Social Services met its burden of proving that termination was in the best interests of the children under G.S. 7B-1110(a). In re L.C., — N.C. App. —, 638 S.E.2d 638, 2007 N.C. App. LEXIS 83 (2007).

Family Integrity May Be Considered. — It is within the court's discretion to consider such factors as family integrity in making its decision of whether termination is in the best interests of the children. In re Smith, 56 N.C. App. 142, 287 S.E.2d 440, cert. denied, 306 N.C. 385, 294 S.E.2d 212 (1982).

During the adjudicatory phase of a termination of parental rights proceeding, a trial court does not consider whether there is a relative who can take custody of the minor child, but focuses on whether there is evidence to support termination on the grounds alleged in the petition, and if a fit relative were to come forward and declare their desire to have custody of the child, the court may consider this during the dispositional phase as grounds for why it would not be in the child's best interests to terminate the parent's parental rights. In re J.A.A., 175 N.C. App. 66, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

Termination of Both Parents' Parental Rights. — Where the trial court properly concluded that grounds for termination existed, as set forth in former G.S. 7A-289.32(7), the court did not abuse its discretion in finding that it was in the best interests of the child to terminate both parents' parental rights. In re Guynn, 113 N.C. App. 114, 437 S.E.2d 532 (1993).

Termination of Parental Rights Supported by Child's Best Interests. — The respondent mother offered "nothing" upon which the trial court could reasonably base a decision to find it would not be in the child's best interests to terminate parental rights, where although she proffered evidence claiming she had overcome her problems and achieved rehabilitation while in prison, enrolling in a cosmetology course there, frequently writing letters to her daughter, writing to petitioner and the court asking them not to terminate her parental rights, and requesting visits with the child, she had been written up at least 11 times for disciplinary problems during her latest incarceration, including disobeying orders, misusing medicine, theft of property, possessing non-threatening contraband and provoking an assault. In re Blackburn, 142 N.C. App. 607, 543 S.E.2d 906, 2001 N.C. App. LEXIS 190 (2001).

A trial court did not abuse its discretion in determining that termination of a mother's parental rights to her daughter was in the child's best interests where: (1) numerous findings were made regarding the extensive sexual abuse the daughter suffered at the hands of her brother and her stepfather; (2) where the mother acknowledged awareness of the abuse, but did virtually nothing to protect the daughter from it; (3) where the mother lacked insight regarding her own significant mental health issues; (4) where the mother played a significant role in creating a neglectful and abusive home environment for the daughter, and (5) where the mother had made minimal progress in correcting the issues that led to removal of the daughter from the mother's home. In re Dhermy, 161 N.C. App. 424, 588 S.E.2d 555, 2003 N.C. App. LEXIS 2181 (2003).

Trial court did not abuse its discretion in finding that it was in the best interests of the children under G.S. 7B-1110(a) that the mother's parental rights be terminated; while the mother emphasized the strong bond with the children and that the mother made progress doing what the trial court ordered, the trial court was entitled to give greater weight to other evidence, including the mother's repeated statements that the mother could not handle the responsibility of parenting the children. In re C.L.C., 171 N.C. App. 438, 615 S.E.2d 704, 2005 N.C. App. LEXIS 1316 (2005), aff'd, 360 N.C. 475, 628 S.E.2d 760 (2006).

Trial court did not abuse its discretion in concluding that it was in a child's best interests to terminate a mother's parental rights where: (1) the mother failed to maintain stable housing, was unemployed, and failed to comply with a child support order, (2) the mother had left the child with others, including an incident initiating the child's removal from her custody, (3) the mother had attempted suicide, had not cooperated with social workers, did not follow through with mental health counseling, and did not complete parenting classes, (4) the mother only sporadically visited and contacted the child for over five years, (5) the child had been living with a guardian ad litem (GAL) for over five years and considered the GAL's step-son her big brother, and (6) the mother had been aware of the GAL's intent to adopt the child for three years, yet her personal situation had not improved or stabilized. In re E.T.S., 175 N.C. App. 32, 623 S.E.2d 300, 2005 N.C. App. LEXIS 2724 (2005).

At the dispositional stage, a court is required to issue an order of termination unless it determines that the best interests of the child require that the parental rights of such parent not be terminated; a trial court did not err in refusing to conclude that termination was not in the best interests of the child where it found, inter alia, that the father was a convicted sex offender who violated his parole and was returned to prison while the child was in the custody of Department of Social Services, that the father was permitted only supervised visits with the child, was forbidden to reside in the same house with the child, and was ordered to complete sex offender treatment, which he failed to do. In re S.B.M., 173 N.C. App. 634, 619 S.E.2d 583, 2005 N.C. App. LEXIS 2115 (2005).

Termination of the mother's parental rights was in the best interest of the child where, inter alia, the mother demonstrated no ability to establish a safe and stable home for the child, despite repeated offers of funding and logistical assistance from petitioner Durham County Department of Social Services. In re L.A.B., 178 N.C. App. 295, 631 S.E.2d 61, 2006 N.C. App. LEXIS 1409 (2006).

Terminating a mother's parental rights was in a child's best interest under G.S. 7B-1110(a) as: (1) the child had been in stable foster care since 2002; (2) the child's foster parents hoped to adopt the child; (3) the foster parents were of good health and good character, and their adoption of the child would likely be approved; and (4) the child was a healthy child with no significant behavioral or physical problems that would hamper the child's adoption. In re T.M., — N.C. App. —, 643 S.E.2d 471, 2007 N.C. App. LEXIS 802 (2007).

Refusal to Dismiss Petition. — The trial court did not err in refusing to exercise its discretion under former G.S. 7A-289.31 (see now this section), which authorizes the court to dismiss a petition to terminate a parent's rights despite the existence of grounds for termination. Furthermore, the court was not required to find facts for this refusal. In re Caldwell, 75 N.C. App. 299, 330 S.E.2d 513 (1985).

Entry of Judgment Not Addressed by Section. — This section refers to the court issuing an order. It does not speak of the entry of judgment and nowhere is it found that the court is under a 10-day rule to enter a written judgment. In re Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982).

Abuse of Discretion. — Trial court abused its discretion in concluding that it was in the best interest of the children to terminate father's parental rights. Bost v. Van Nortwick, 117 N.C. App. 1, 449 S.E.2d 911 (1994).

Evidence Held Insufficient. — Evidence held insufficient to support the grounds for termination of parental rights. In re Young, 346 N.C. 244, 485 S.E.2d 612 (1997).

Evidence Sufficient to Support Termination. — Ample evidence supported the three statutory grounds for termination of the mother's parental rights found by the trial court, including that the mother failed to show an ability to properly parent the children by using the skills that had been taught in the various programs that the mother attended. In re C.M., — N.C. App. —, 644 S.E.2d 630, 2007 N.C. App. LEXIS 1152 (2007).

The evidence supported a finding that termination of parental rights was in the best interest of the child; while there were perceived improvements in respondent's mental condition, the evidence tended to show that after almost two years of diligent efforts by DSS, respondent was not able to demonstrate that she could adequately provide for her child's needs, and testimony by one expert as to the negative effect of any further delay on a permanent placement of the child, given his age and close bond to his foster family, was particularly persuasive. In re Brim, 139 N.C. App. 733, 535 S.E.2d 367, 2000 N.C. App. LEXIS 1028 (2000).

Trial court's findings were supported by evidence that the mother left her three children in foster care for over a year without showing reasonable progress; her fourth child's treatment and status were clearly relevant to show neglect. In re Johnston, 151 N.C. App. 728, 567 S.E.2d 219, 2002 N.C. App. LEXIS 866 (2002).

Trial court did not abuse its discretion in terminating a father's parental rights because grounds for termination existed under G.S. 7B-1111(a)(5) where, in the three-and-a-half years since the mother told the father that she was pregnant and that he was the father, and until the mother contacted him about child support, the father had expressed no interest in discovering whether the mother had given birth, in determining whether the child was his, or in taking responsibility for the child. In re T.L.B., 167 N.C. App. 298, 605 S.E.2d 249, 2004 N.C. App. LEXIS 2165 (2004).

There were sufficient findings to support the termination of parental rights order, including the fact that the father failed to propose an alternate replacement to take care of the children, that the father failed to provide any contact, love, or affection for the children, and that the father failed to attempt to contact the children while he was incarcerated. In re D.J.D., 171 N.C. App. 230, 615 S.E.2d 26, 2005 N.C. App. LEXIS 1268 (2005).

Trial court's decision to award custody of the children to their biological father, to limit the mother's visits with the children by requiring them to be supervised, and to prohibit any contact between the children and the stepfather, was plainly the result of a reasoned decision guided by the clear best interests of these juveniles, as the evidence showed that, inter alia, the mother "thumped" the five-year-old in the face hard enough to leave a finger-shaped bruise, the stepfather hit the younger child with a brush hard enough to leave a large bruise, respondents attempted to convince the younger child to lie, and the mother admitted that she left the younger child alone in the bathtub every night for 20 to 30 minutes. In re L.T.R., — N.C. App. —, 639 S.E.2d 122, 2007 N.C. App. LEXIS 157 (2007).

The court did not err in issuing a written order terminating respondent's parental rights which contained language not included in its recital in open court where the findings about which respondent complained related to the "adjudication" by the trial court, pursuant to the provisions of former G.S. 7A-289.32, that grounds for termination of respondent's parental rights existed at the time of the hearing, not to the court's "disposition" pursuant to former G.S. 7A-289.31, and where the order entered by the trial court was in "general conformity" to the disposition announced in open court. In re Brim, 139 N.C. App. 733, 535 S.E.2d 367, 2000 N.C. App. LEXIS 1028 (2000).

Failure to Enter Written Termination Order Within 30 Days. — Mother was awarded a new termination of parental rights trial where the written order was not entered until five months after the trial court orally announced its decision; this violated G.S. 7B-1109 and G.S. 7B-1110, which required entry to be made within 30 days, and prejudice was shown, as the delay was unnecessary, closure was not obtained, and records and transcripts were either misplaced or irretrievable. In re C.J.B., 171 N.C. App. 132, 614 S.E.2d 368, 2005 N.C. App. LEXIS 1168 (2005).

Trial court's six-month delay in entering order terminating parental rights was so prejudicial to the rights of the parent, the child, and the foster parents who hoped to adopt that the decree was vacated and the matter remanded for a new hearing. In re O.S.W., 175 N.C. App. 414, 623 S.E.2d 349, 2006 N.C. App. LEXIS 70 (2006).

Where the trial court did not reduce the parental termination to writing until seven months after the termination hearing in violation of the 30-day requirement of G.S. 7B-1109(e), -1110(a), -1111(a); all parties were prejudiced, as the mother and child lost time together, the foster parents were in a state of flux, and the adoptive parents were unable to complete their family plan. In re D.S., 177 N.C. App. 136, 628 S.E.2d 31, 2006 N.C. App. LEXIS 711 (2006).

Trial court's failure to reduce to writing its bench ruling terminating a father's parental rights within 30 days as required by G.S. 7B-1110(a) was reversible error; the father established prejudice from, inter alia, the following: (1) he was entitled to a speedy resolution of the termination of the parental rights petition; (2) the child was entitled to a permanent plan of care at the earliest possible age; (3) the trial court's delay in entering the order delayed the father's right to appeal; and (4) the trial court's delay extends the time when parents are separated from their children to the prejudice of his relationship with the child. In re J.N.S., — N.C. App. —, 637 S.E.2d 914, 2006 N.C. App. LEXIS 2509 (2006).

Delay in Entering Termination Order. — Seven month delay between a termination hearing and the trial court's entry of its termination order ran counter to the legislative intent in enacting the 30-day requirement of G.S. 7B-1109(e) and G.S. 7B-1110(a), and prejudiced the mother, who was prevented from filing an appeal until seven months after the hearing; pending the appellate court's determination of the appeal, the child remained in the department's custody, and subsequent court proceedings involving the child were limited to those "temporary" orders authorized by G.S. 7B-1113. In re T.L.T., 170 N.C. App. 430, 612 S.E.2d 436, 2005 N.C. App. LEXIS 1008 (2005).

Extraordinary delay of almost one year after the termination hearing in entering the order terminating a mother's parental rights pursuant to G.S. 7B-1109(e), G.S. 7B-1110(a) was sufficient to show prejudice to warrant reversal and a new hearing. In re T.W., 173 N.C. App. 153, 617 S.E.2d 702, 2005 N.C. App. LEXIS 1922 (2005).

Order terminating a father's parental rights was reversed, where the trial court entered its order more than five months after the conclusion of the termination hearing; the late entry of the written order was a clear and egregious violation of G.S. 7B-1109(e) and G.S. 7B-1110(a). Owen v. Keeter (In re C.L.K.), — N.C. App. —, 643 S.E.2d 458, 2007 N.C. App. LEXIS 804 (2007).

Failure to Tax Costs in Award. — Where the father sought to terminate the mother's parental rights and sought child support, under G.S. 7B-1110(e), the trial court could not award attorney's fees to the mother for the termination of parental rights portion of the trial without taxing the costs to the father, which it failed to do. Burr v. Burr, 153 N.C. App. 504, 570 S.E.2d 222, 2002 N.C. App. LEXIS 1185 (2002).

An order terminating parental rights is a "nullity" when signed by a judge other than the one who presided over the hearing. In re Savage, 163 N.C. App. 195, 592 S.E.2d 610, 2004 N.C. App. LEXIS 296 (2004).

Delay in Entering Termination Order Requires Prejudice for Reversal. — Trial court erred by not entering its termination order within the statutory time frame, but reversal was not required since the parents did not show how they were prejudiced by the delay. In re D.R., 172 N.C. App. 300, 616 S.E.2d 300, 2005 N.C. App. LEXIS 1578 (2005).

Delay in Filing Termination Order. — Father was required to show prejudice from a trial court's delay in filing its termination order, but his sole argument was that the five-month delay prejudiced him by the delay of his right to appeal and to achieve finality in the relationship with his daughter before he faced a potentially long incarceration; in light of the father's continuous incarceration since before the termination hearing, there was insufficient prejudice to warrant a new trial. In re S.B.M., 173 N.C. App. 634, 619 S.E.2d 583, 2005 N.C. App. LEXIS 2115 (2005).

Trial court's failure to timely enter its adjudication and disposition order in a termination of parental rights action did not warrant reversal because that would only further delay the determination regarding the children's custody in opposition to the intent of G.S. 7B-1109(e) and G.S. 7B-1110(a). In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639, 2005 N.C. App. LEXIS 797 (2005).

Trial court reversibly erred in failing to enter an order terminating a mother's parental rights over her children until over 180 days after the termination hearing, in violation of G.S. 7B-1109(e) and G.S. 7B-1110(a), because the long delay was highly prejudicial to the mother, the children, and the foster parent. In re L.E.B., 169 N.C. App. 375, 610 S.E.2d 424, 2005 N.C. App. LEXIS 598 (2005).

Applied in In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

Cited in In re McLemore, 139 N.C. App. 426, 533 S.E.2d 508, 2000 N.C. App. LEXIS 889 (2000); In re Brown, 141 N.C. App. 550, 539 S.E.2d 366, 2000 N.C. App. LEXIS 1310 (2000); In re Pittman, 149 N.C. App. 756, 561 S.E.2d 560, 2002 N.C. App. LEXIS 303 (2002), cert. denied, 538 U.S. 982, 123 S. Ct. 1799, 155 L. Ed. 2d 673 (2003); In re Hardesty, 150 N.C. App. 380, 563 S.E.2d 79, 2002 N.C. App. LEXIS 481 (2002); In re Pierce, 356 N.C. 68, 565 S.E.2d 81, 2002 N.C. LEXIS 547 (2002); In re Anderson, 151 N.C. App. 94, 564 S.E.2d 599, 2002 N.C. App. LEXIS 657 (2002); In re Locklear, 151 N.C. App. 573, 566 S.E.2d 165, 2002 N.C. App. LEXIS 765 (2002); In re Yocum, 158 N.C. App. 198, 580 S.E.2d 399, 2003 N.C. App. LEXIS 1054 (2003); In re V.L.B., 168 N.C. App. 679, 608 S.E.2d 787, 2005 N.C. App. LEXIS 394 (2005), cert denied, — N.C. —, 614 S.E.2d 924 (2005); In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), aff'd, — N.C. —, 625 S.E.2d 779 (2006); In re A.C.F., 176 N.C. App. 520, 626 S.E.2d 729, 2006 N.C. App. LEXIS 529 (2006); In re J.S.L., 177 N.C. App. 151, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006); A Child's Hope, LLC v. Doe, 178 N.C. App. 96, 630 S.E.2d 673, 2006 N.C. App. LEXIS 1291 (2006); In re S.N., — N.C. App. —, 636 S.E.2d 316, 2006 N.C. App. LEXIS 2236 (2006); In re C.W., — N.C. App. —, 641 S.E.2d 725, 2007 N.C. App. LEXIS 596 (2007); In re C.T., — N.C. App. —, 643 S.E.2d 23, 2007 N.C. App. LEXIS 683 (2007); In re J.S.B., — N.C. App. —, 644 S.E.2d 580, 2007 N.C. App. LEXIS 1041 (2007); In re A.H., — N.C. App. —, 644 S.E.2d 635, 2007 N.C. App. LEXIS 1159 (2007); In re T.H.T., — N.C. App. —, 648 S.E.2d 519, 2007 N.C. App. LEXIS 1812 (2007).

§ 7B-1111. Grounds for terminating parental rights.

(a) The court may terminate the parental rights upon a finding of one or more of the following:

(1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.

(2) The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the

satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

(3) The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

(4) One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by said decree or custody agreement.

(5) The father of a juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights:

a. Established paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Health and Human Services; provided, the court shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and shall incorporate into the case record the Department's certified reply; or

b. Legitimated the juvenile pursuant to provisions of G.S. 49-10 or filed a petition for this specific purpose; or

c. Legitimated the juvenile by marriage to the mother of the juvenile; or

d. Provided substantial financial support or consistent care with respect to the juvenile and mother.

(6) That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

(7) The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion, or the parent has voluntarily abandoned an infant pursuant to G.S. 7B-500 for at least 60 consecutive days immediately preceding the filing of the petition or motion.

(8) The parent has committed murder or voluntary manslaughter of another child of the parent or other child residing in the home; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child, another child of the parent, or other child residing in the home; has committed a felony assault that results in serious bodily injury to the child, another child of the parent, or other child residing in the home; or has committed murder or voluntary manslaughter of the other parent of the child. The petitioner has the burden of proving any of these offenses in the

termination of parental rights hearing by (i) proving the elements of the offense or (ii) offering proof that a court of competent jurisdiction has convicted the parent of the offense, whether or not the conviction was by way of a jury verdict or any kind of plea. If the parent has committed the murder or voluntary manslaughter of the other parent of the child, the court shall consider whether the murder or voluntary manslaughter was committed in self-defense or in the defense of others, or whether there was substantial evidence of other justification.

(9) The parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home.

(10) Where the juvenile has been relinquished to a county department of social services or a licensed child-placing agency for the purpose of adoption or placed with a prospective adoptive parent for adoption; the consent or relinquishment to adoption by the parent has become irrevocable except upon a showing of fraud, duress, or other circumstance as set forth in G.S. 48-3-609 or G.S. 48-3-707; termination of parental rights is a condition precedent to adoption in the jurisdiction where the adoption proceeding is to be filed; and the parent does not contest the termination of parental rights.

(b) The burden in such proceedings shall be upon the petitioner or movant to prove the facts justifying such termination by clear and convincing evidence. (1977, c. 879, s. 8; 1979, c. 669, s. 2; 1979, 2nd Sess., c. 1088, s. 2; c. 1206, s. 2; 1983, c. 89, s. 2; c. 512; 1985, c. 758, ss. 2, 3; c. 784; 1991 (Reg. Sess., 1992), c. 941, s. 1; 1997-390, ss. 1, 2; 1997-443, s. 11A.118(a); 1998-202, s. 6; 1998-229, ss. 11, 28; 1999-456, s. 60; 2000-183, s. 11; 2001-208, s. 6; 2001-291, s. 3; 2001-487, s. 101; 2003-140, s. 3; 2005-146, s. 1; 2007-151, s. 1; 2007-484, s. 26(a).)

Editor's Note. — This section was originally enacted as G.S. 7B-1110. It has been renumbered as this section at the direction of the Revisor of Statutes.

Session Laws 2001-291, s. 6, provides: "The Department of Health and Human Services, Division of Public Health, shall develop recommendations for a plan to inform the public as to the provisions of this act. [Session Laws 2001-291, the Infant Homicide Prevention Act, which decriminalized abandonment of an infant under seven days of age when that infant is voluntarily delivered to certain health care providers, law enforcement officials, social services personnel, or emergency medical service personnel]. The plan shall contain information on responsible parenting in addition to information about the provisions of the act. The plans shall be targeted at adolescents and young adults, and shall be developed in consultation with law enforcement officials, medical professionals, and representatives of the Department of Public Instruction. Not later than April 1, 2002, the Department of Health and Human Services shall report its recommendations, and the projected cost for implementing its recommendations, to the chairpersons of the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, the Senate Appropriations Committee on Justice and Public Safety, and the House Appropriations Subcommittee on Justice and Public Safety."

In addition to the plan developed pursuant to Session Laws 2001-291, s. 6, Session Laws 2003-284, s. 10.8B(a) and (b), effective July 1, 2003, provides: "(a) The Department of Health and Human Services, Division of Public Health and the Division of Social Services, shall incorporate education and awareness of the Infant Homicide Prevention Act pursuant to S.L. 2001-291, into other State-funded programs at the local level.

"(b) The Department shall report on its activities to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, and the Fiscal Research Division not later than April 1, 2004."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Subdivision (a)(8), as rewritten by Session Laws 2005-146, s. 1, effective June 30, 2005, is applicable to termination of parental rights proceedings filed on or after that date.

Effect of Amendments. — Session Laws 2007-151, s. 1, effective October 1, 2007, and applicable to motions in the cause or petitions filed on or after that date, added subdivision (a)(10).

Session Laws 2007-484, s. 26(a), effective October 1, 2007, and applicable to motions in the cause or petitions filed on or after that date, substituted "proceeding" for "preceding" in subdivision (a)(10).

Legal Periodicals. — For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

For note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

For survey of 1981 family law, see 60 N.C.L. Rev. 1379 (1982).

For survey of 1982 law relating to family law, see 61 N.C.L. Rev. 1155 (1983).

For article, "Coercive Governmental Intervention and the Family: A Comment on North Carolina's Proposed Standards," see 7 Campbell L. Rev. 145 (1984).

For comment, "Termination of Parental Rights," see 21 Wake Forest L. Rev. 431 (1986).

For note, "Minimizing the Putative Father's Rights: In re Adoption of Clark," see 68 N.C. L. Rev. 1257 (1990).

For note: "The Established Standard for Fathers Who Have Acknowledged Paternity and Who Are Seeking Custody of Their Illegitimate Child(ren): Rosero v. Blake, 357 N.C. 193 (2003)," see 26 N.C. Cent. L.J. 116 (2003).

CASE NOTES

I. General Consideration.
II. Neglect.
III. Failure to Pay Reasonable Portion of Cost of Care.
IV. Willful Abandonment.
V. Illustrative Cases.
VI. Willfully Leaving Child in Foster Care.
VII. Failure to Establish Paternity, Legitimate Child, or Provide Support or Care.
VIII. Failure to Pay Support Required by Decree or Agreement.

I. GENERAL CONSIDERATION.

Editor's Note. *— Most of the following cases were decided prior to the enactment of this Chapter.*

Constitutionality — Former § 7A-289.32(2). — Former G.S. 7A-289.32(2) (see now this section), permitting the termination of parental rights if a child is neglected, was not unconstitutionally vague, but is sufficiently definite to be applied in a uniform manner to protect both the State's substantial interest in the welfare of minor children and the parents' fundamental right to the integrity of the family unit. In re Biggers, 50 N.C. App. 332, 274 S.E.2d 236 (1981).

Former G.S. 7A-289.32(2) (see now this section) was not unconstitutionally vague. In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), appeal dismissed, 459 U.S. 1139, 103 S. Ct. 776, 74 L. Ed. 2d 987 (1983).

Former G.S. 7A-289.32(2) (see now this section) was not unconstitutionally vague, because the definition of a neglected child is clearly set out in G.S. 7A-517(21) [see now G.S. 7B-101(15)]. In re Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982).

Former G.S. 7A-289.32(2) (see now this section) was not unconstitutionally vague, nor is it violative of equal protection. In re Wright, 64 N.C. App. 135, 306 S.E.2d 825 (1983).

The standard of neglect to be applied under former G.S. 7A-289.32(2) (see now this section) was not unconstitutionally vague. In re Norris, 25 N.C. App. 269, 310 S.E.2d 25 (1983), cert. denied, 310 N.C. 744, 315 S.E.2d 703 (1984).

Former G.S. 7A-289.32(2) (see now this section) and former G.S. 7A-517(21) do not violate constitutional standards of equal protection or definiteness. Department of Social Servs. v. Johnson, 70 N.C. App. 383, 320 S.E.2d 301 (1984).

Same — Former § 7A-289.32(3). — Former G.S. 7A-289.32(3) (see now this section) was not unconstitutionally vague. In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), appeal dismissed, 459 U.S. 1139, 103 S. Ct. 776, 74 L. Ed. 2d 987 (1983).

Same — Former § 7A-289.32(4). — Former G.S. 7A-289.32(4) (see now this section), which permits the termination of parental rights for failure of the parent to pay a reasonable portion of a child's foster care costs for six months preceding the filing of the petition, is not unconstitutionally vague, and does not violate the equal protection clause by discriminating among persons similarly situated, since it applies to all parents equally and allows due consideration of their specific individual financial circumstances. In re Biggers, 50 N.C. App. 332, 274 S.E.2d 236 (1981).

Former G.S. 7A-289.32(4) (see now this section), which permits termination when a child is in the custody of a department of social services and the parent has failed to pay a reasonable portion of the cost of child care for six months preceding filing of the petition, is not unconstitutionally vague and overbroad, since the phrase "reasonable portion of the cost of care for the child" was, by all normal standards, understandable by people of common intelligence without any necessity of guessing as to its meaning or differing as to its application, contains words of such common usage and understanding as to give parents notice of their responsibilities and of the type of conduct which is condemned, and provides boundaries sufficiently distinct that judges may interpret and administer it uniformly. In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

There is no constitutional defect for vagueness in former G.S. 7A-289.32(4) (see now this section). In re Bradley, 57 N.C. App. 475, 291 S.E.2d 800 (1982).

Former G.S. 7A-289.32(4) (see now this section) was not unconstitutionally vague. It is sufficiently definite to be applied in a uniform manner to protect both the State's substantial interest in the welfare of minor children and the parents' fundamental right to the integrity of their family unit. In re Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982).

Same — Former § 7A-289.32(7) (see now this section). — Former G.S. 7A-289.32(7) (see now this section), which provides for the termination of parental rights upon a showing that a child's parents are mentally incapable of providing for the child, is not unconstitutional. It does not violate the equal protection clause, nor does it deny due process. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

Due Process. — Conduct inconsistent with a parent's protected status, which need not rise to the statutory level warranting termination of parental rights, would result in application of the "best interest of the child" test without offending the Due Process Clause. Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997).

Subject Matter Jurisdiction. — Trial court had subject matter jurisdiction over a case involving termination of a mother's parental rights to her son, and the trial court did not err in denying the mother's motion to stay the termination proceeding pending resolution of her appeal of a prior custody order, because case law established that the trial court retained jurisdiction to terminate parental rights during the pendency of the custody order appeal and, where a termination order is entered while a prior custody order is pending, the termination order necessarily renders the pending appeal moot. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

A severance proceeding is not essentially the same as a criminal proceeding, nor does a parent whose rights are sought to be terminated enjoy the same rights as a person accused of committing a crime, including the right to file an "Anders" brief. In re Harrison, 136 N.C. App. 831, 526 S.E.2d 502, 2000 N.C. App. LEXIS 159 (2000).

Construction of Section. — Section 7B-1111(a)(2) deleted the "diligent efforts" requirement of former G.S. 7A-289.32(3), indicating an intent by the legislature to eliminate the requirement that the Department of Social Services provide services to a parent before termination of parental rights can occur; thus a determination that the department made diligent efforts to provide services to a parent is no longer a condition precedent to terminating parental rights. In re Frasher, 147 N.C. App. 513, 555 S.E.2d 379, 2001 N.C. App. LEXIS 1191 (2001).

Construction with Other Sections. — It is not necessary for there to be evidence of mental retardation, mental illness, organic brain syndrome, or some other degenerative mental condition, which would be required in a termination of parental rights determination pursuant to former G.S. 7A-289.32(7), for the evidence to be sufficient in a former G.S. 7A-657 review hearing to evince a lack of ability to perform mentally that impedes a parent's child care decisions. In re Reinhardt, 121 N.C. App. 201, 464 S.E.2d 698 (1995), overruled in part, 347 N.C. 339, 493 S.E.2d 418 (1997).

Appellate court dismissed a mother's appeal from the trial court's order which found that her child was neglected and set adoption as the permanent plan for the child because the appeal became moot when the trial court entered a subsequent order terminating the mother's parental rights. In re V.L.B., 164 N.C. App. 743, 596 S.E.2d 896, 2004 N.C. App. LEXIS 1143 (2004).

Appeal With Regard to Deceased Child Not Moot. — Mother's appeal of termination of parental rights as to her deceased child was not moot because the order terminating her rights as to that child could have a bearing on subsequent proceedings to terminate her rights as to her other child. In re C.C., 173 N.C. App. 375, 618 S.E.2d 813, 2005 N.C. App. LEXIS 2017 (2005).

Indian Child Welfare Act Compared. — In North Carolina, grounds for termination of a parent's parental rights must be supported by clear and convincing evidence, while a termination of parental rights under the Indian Child Welfare Act, 25 U.S.C.S. § 1912 (2002), requires evidence which justifies termination beyond a reasonable doubt; to meet the federal requirement, the trial court must conclude beyond a reasonable doubt that continued custody by the parent is likely to result in serious emotional or physical damages to the child. In re Williams, 149 N.C. App. 951, 563 S.E.2d 202, 2002 N.C. App. LEXIS 364 (2002).

Grounds for Termination. — In a department of social services petition to terminate a father's parental rights, the trial court was only required, under G.S. 7B-1111(a) to find that one statutory ground for termination existed in order to proceed to the dispositional phase and decide if termination was in the children's best interests. In re Shermer, 156 N.C. App. 281, 576 S.E.2d 403, 2003 N.C. App. LEXIS 112 (2003).

Proceeding for termination of parental rights requires the trial court to conduct a two part inquiry; G.S. 7B-1109(e) directs that the court first shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in this section, which authorize the termination of parental rights of the respondent. Disposition is governed by G.S. 7B-1110, which provides in relevant part that upon a finding that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated under subsection (a) of this section. In re Baker, 158 N.C. App. 491, 581 S.E.2d 144, 2003 N.C. App. LEXIS 1194 (2003).

Where the court merely recited the testimony of witnesses and did not make the required findings of fact, further findings of fact and a determination of the father's parental fitness was needed if he was to be denied all contact with his daughter. Moore v. Moore, 160 N.C. App. 569, 587 S.E.2d 74, 2003 N.C. App. LEXIS 1827 (2003).

Termination of parental rights proceeding is a two-stage process: the trial court first determines whether sufficient grounds exist under G.S. 7B-1111 to warrant termination; if the trial court determines that any one of the grounds for termination listed in G.S. 7B-1111 exists, the trial court may then terminate parental rights consistent with the best interests of the child. In re T.D.P., 164 N.C. App. 287, 595 S.E.2d 735, 2004 N.C. App. LEXIS 811 (2004), aff'd, 359 N.C. 405, 610 S.E.2d 199 (2005).

Allowing the trial court to terminate the mother's parental rights during the pendency of the custody review order appeal did not prejudice the mother's rights, as the termination proceedings required that a ground for termination under G.S. 7B-1111 be established and the proceedings afforded the mother an opportunity to challenge the termination order on appeal under G.S. 7B-1113. In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

Termination of the mother's parental rights was upheld because the unchallenged grounds for termination of the mother's parental rights supported the trial court's termination order. In re J.M.W., — N.C. App. —, 635 S.E.2d 916, 2006 N.C. App. LEXIS 2116 (2006).

Trial court's order terminating a mother's parental rights was proper based on findings that the older of the two children was abused and neglected, the younger child was neglected, the mother willfully abandoned the children for six consecutive months preceding the filing of the petition, the mother left the children in foster care for more than 12 months without showing that reasonable progress had been made to correct the conditions that led to the children's removal, the children were dependent, and the mother committed and was convicted of a felony assault resulting in serious bodily injury to the older child. In re T.J.D.W., — N.C. App. —, 642 S.E.2d 471, 2007 N.C. App. LEXIS 672 (2007).

Standard of Review. — On review, the Court of Appeals must determine whether the trial court's findings of fact were based on clear, cogent and convincing evidence, and whether those findings of fact supported a conclusion that parental termination should occur on the grounds stated in this section. In re Oghenekevebe, 123 N.C. App. 434, 473 S.E.2d 393 (1996).

No right to file "Anders" brief. — Counsel for a parent appealing from a juvenile court's severance order has no right to file an "Anders" brief. In re Harrison, 136 N.C. App. 831, 526 S.E.2d 502, 2000 N.C. App. LEXIS 159 (2000).

The definition of mental retardation adopted by our legislature in G.S. 122C-3(22) represents the plain meaning of the term "mental retardation" used in former G.S. 7A-289.32(7). In re LaRue, 113 N.C. App. 807, 440 S.E.2d 301 (1994).

Burden on the Petitioner. — The burden is on the petitioner to prove the facts justifying termination by clear and convincing evidence. In re Nolen, 117 N.C. App. 693, 453 S.E.2d 220 (1995).

Proper Exercise of Police Power. — It is not an unreasonable or arbitrary exercise of the police power for the State to intervene between parent and child where that child is helpless and defenseless and is endangered by parental neglect, inattention, or abuse. In re Biggers, 50 N.C. App. 332, 274 S.E.2d 236 (1981).

Finding of Any One of the Enumerated

Grounds Is Sufficient to Support Termination. — Former G.S. 7A-289.32 sets out the statutory grounds for terminating parental rights. A finding of any one of the separately enumerated grounds is sufficient to support a termination. In re Pierce, 67 N.C. App. 257, 312 S.E.2d 900 (1984); Herrell v. Adcock, 69 N.C. App. 222, 316 S.E.2d 347 (1984); In re Tyson, 76 N.C. App. 411, 333 S.E.2d 554 (1985); In re Stewart, 82 N.C. App. 651, 347 S.E.2d 495 (1986); Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988); Herell v. Taylor, 97 N.C. App. 57, 387 S.E.2d 230 (1990).

Because the appellate court found grounds for termination of a mother's parental rights were properly established pursuant to G.S. 7B-1111(a)(2), the court did not need to address the mother's further arguments regarding termination pursuant to G.S. 7B-1111(a)(1) and G.S. 7B-1111(a)(3). In re O.C., 171 N.C. App. 457, 615 S.E.2d 391, 2005 N.C. App. LEXIS 1272 (2005), cert. denied, — N.C. —, 623 S.E.2d 587 (2005).

When it was alleged that a mother's parental rights to two children should be terminated because she (1) neglected them while they were in an agency's care within the meaning of G.S. 7B-101, under G.S. 7B-1111(a)(1), (2) willfully left the children in foster care for more than 12 months without showing reasonable progress to correct the conditions that led to their removal, under G.S. 7B-1111(a)(2), and (3) willfully failed to pay a reasonable portion of the cost of the children's care while in an agency's custody, under G.S. 7B-1111(a)(3), and the petition was sustained on all three grounds, when the mother objected to findings as to only one ground on appeal, the other findings were binding, under N.C. R. App. P. 10, and, as only one ground had to be found to terminate parental rights, it was unnecessary to consider the mother's appellate argument as to the ground she challenged. In re J.A.A., 175 N.C. App. 66, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

Dual Burden of Proof Where Child Was American Indian. — Where a minor child's status as a Native American made a termination proceeding under this Article also subject to the provisions of the Indian Child Welfare Act (25 U.S.C. 1901 et seq.), the federal provision did not require that the North Carolina statutory grounds to terminate parental rights be proven beyond a reasonable doubt. Rather, a dual burden of proof was created in which the state provisions and federal provisions had to be satisfied separately; i.e., the state grounds for termination had to be supported by clear and convincing evidence, while the federal law required evidence which justified termination beyond a reasonable doubt. In re Bluebird, 105 N.C. App. 42, 411 S.E.2d 820 (1992).

Separate Hearings Not Required. — Although the court is required to apply different evidentiary standards at each of the two stages of adjudication and disposition, there is no requirement that the stages be conducted at two separate hearings. In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986).

The welfare or best interest of the child is always to be treated as the paramount consideration to which even parental love must yield. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

Although severing parental ties is a harsh judicial remedy, the best interests of the children must be considered paramount. Herrell v. Adcock, 69 N.C. App. 222, 316 S.E.2d 347 (1984).

The court is not required to terminate parental rights under any circumstances. Forsyth County Dep't of Social Servs. v. Roberts, 22 N.C. App. 658, 207 S.E.2d 368 (1974); In re Godwin, 31 N.C. App. 137, 228 S.E.2d 521 (1976).

Upon a finding that grounds exist to authorize termination, the trial court is never required to terminate parental rights under any circumstances, but is merely given the discretion to do so. In re Tyson, 76 N.C. App. 411, 333 S.E.2d 554 (1985).

But Has Discretionary Authority to Do So. — The court has the authority to terminate parental rights in the exercise of its discretion. Forsyth County Dep't of Social Servs. v. Roberts, 22 N.C. App. 658, 207 S.E.2d 368 (1974); In re Godwin, 31 N.C. App. 137, 228 S.E.2d 521 (1976).

When the district court concluded that child was neglected, it was within the court's discretion, taking into account the best interests of the child, as to whether parental rights should be terminated. In re Webb, 70 N.C. App. 345, 320 S.E.2d 306 (1984), aff'd, 313 N.C. 322, 327 S.E.2d 879 (1985).

Former sections 7A-289.30 and 7A-289.31, when read together, mean that in the adjudication stage, the petitioner must prove clearly, cogently, and convincingly the existence of one or more of the grounds for termination listed in this section. Once the petitioner has proven this ground by this standard, it has met its burden within the statutory scheme of former G.S. 7A-289.30 and 7A-289.31. The petitioner having met his burden of proof at the adjudication stage, the court then moves on to the disposition stage, where the court's decision to terminate parental rights is discretionary. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

At the adjudication stage, petitioner is required to prove the existence of grounds for termination, listed in this section, by clear, cogent and convincing evidence, pursuant to former G.S. 7A-289.30(e), while at the disposition stage, the court's decision as to whether to terminate parental rights is discretionary. In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986).

Once a petitioner meets its burden of proof at the adjudicatory stage, the court's decision to terminate the parental rights is discretionary. In re Parker, 90 N.C. App. 423, 368 S.E.2d 879 (1988).

When Termination Order Will Be Affirmed. — If a conclusion that grounds exist under any subdivision of this section is supported by findings of fact based on clear, cogent, and convincing evidence, the order terminating parental rights must be affirmed. In re Ballard, 63 N.C. App. 580, 306 S.E.2d 150 (1983), rev'd on other grounds, 311 N.C. 708, 319 S.E.2d 227 (1984); In re Swisher, 74 N.C. App. 239, 328 S.E.2d 33 (1985).

Termination Order Reversed. — Order terminating a father's parental rights, which was entered under G.S. 7B-1111(a)(6) on the basis of the father's 20-year history of substance abuse, was reversed; the trial court failed to appoint a guardian ad litem to represent the father's interests as required by G.S. 7B-1101(1), and regardless of whether that failure prejudiced the father, remand was required for appointment of a guardian ad litem and for rehearing. In re S.B., 166 N.C. App. 488, 602 S.E.2d 691, 2004 N.C. App. LEXIS 1776 (2004).

Order terminating a father's parental rights was improper because it did not identify any G.S. 7B-1111(a) grounds for termination and did not indicate the evidentiary standard under which the trial court made its adjudicatory findings of fact; without an identified basis for adjudication, effective review of the termination order was precluded, and without a finding of willfulness, there was insufficient basis for a finding of abandonment, and the father's incarceration alone was insufficient to support the termination order. Bolick v. Brizendine (In re D.R.B.), — N.C. App. —, 643 S.E.2d 77, 2007 N.C. App. LEXIS 787 (2007).

Evidence was sufficient to support termination of parental rights, where mother did not attend any counseling sessions, had three criminal convictions, failed to attend some of the scheduled visits with the children, and willfully paid no child support. In re Becker, 111 N.C. App. 85, 431 S.E.2d 820 (1993).

Termination of a father's parental rights was supported by evidence which showed that the father's history of domestic violence toward the child's mother led to the child's removal, that the father agreed to participation in a domestic violence program but failed to complete that program, and failed to show that different counseling he participated in addressed the domestic violence issue. In re D.M., 171 N.C. App. 244, 615 S.E.2d 669, 2005 N.C. App. LEXIS 1263 (2005), aff'd, 360 N.C. 162, 622 S.E.2d 494 (2005).

Petition Sufficient to Give Notice. — Although the termination of parental rights petition did not specifically refer to G.S. 7B-1111(a)(6), the petition, which contained language directly paralleling G.S. 7B-1111(a)(6), provided the mother with sufficient notice of the acts, omissions, or conditions on which the petition was based. In re A.H., — N.C. App. —, 644 S.E.2d 635, 2007 N.C. App. LEXIS 1159 (2007).

The Department of Social Services provided sufficient evidence to withstand motion to dismiss termination proceedings, where the father willfully left the minor children in foster care for more than 18 months and the father had been incarcerated two times during the period that the children were in foster care. In re Becker, 111 N.C. App. 85, 431 S.E.2d 820 (1993).

Remoteness of evidence goes to its weight, not to its admissibility. In re McDonald, 72 N.C. App. 234, 324 S.E.2d 847 (1984), cert. denied, 314 N.C. 115, 332 S.E.2d 490 (1985).

Evidence concerning respondent's actions after the petition was filed was clearly relevant to determine the existence of the factors justifying termination under this section; in cases concerning termination of parental rights based upon neglect, the trial court must consider evidence of changes in conditions up to the time of the hearing. Buncombe County Dep't of Social Servs. v. Burks, 92 N.C. App. 662, 375 S.E.2d 676 (1989).

The proper time for appointing a guardian ad litem under G.S. 7B-1101, where grounds for termination are based on G.S. 7B-1111(a)(6), is upon the filing of the petition. In re D.S.C., 168 N.C. App. 168, 607 S.E.2d 43, 2005 N.C. App. LEXIS 172 (2005).

Trial court erred in failing to appoint a guardian ad litem for a mother in an action to terminate her parental rights; under the version of G.S. 7B-1101 in effect when the petition was filed, a guardian was required where it was alleged that the mother was physically disabled pursuant to G.S. 7B-1111(a)(6). In re D.S.C., 168 N.C. App. 168, 607 S.E.2d 43, 2005 N.C. App. LEXIS 172 (2005).

Although the mother's parental rights were not terminated for dependency under G.S. 7B-1111(a)(6), the trial court erred in failing to appoint the mother a guardian ad litem under former G.S. 7B-1101; the guardian ad litem requirement was triggered because the mother's mental health issues, involving, in part, bipolar disorder, were central to the termination. In re L.W., 175 N.C. App. 387, 623 S.E.2d 626, 2006 N.C. App. LEXIS 55 (2006), review denied, appeal dismissed, 360 N.C. 534, 633 S.E.2d 818 (2006).

Trial court erred when it failed to appoint a guardian ad litem for mother pursuant to G.S. 7B-1101 after reviewing her psychological evaluation, but still considered her mental illness, even though it never mentioned G.S. 7B-1111(a)(6) as a factor in terminating her parental rights. Accordingly, the mother was entitled to a new termination hearing and the appointment of a guardian ad litem. In re T.W., 173 N.C. App. 153, 617 S.E.2d 702, 2005 N.C. App. LEXIS 1922 (2005).

Trial court did not err by not appointing a guardian ad litem for the mother for a termination of parental rights hearing as it was not alleged, pursuant to G.S. 7B-1111(a)(6), that the mother was incapable of properly caring for her children; additionally, whether the trial court should have appointed a guardian ad litem for the mother in a prior dependency proceeding was not an issue before the court on the appeal of the termination of the mother's parental rights. In re O.C., 171 N.C. App. 457, 615 S.E.2d 391, 2005 N.C. App. LEXIS 1272 (2005), cert. denied, — N.C. —, 623 S.E.2d 587 (2005).

While the termination of a mother's parental rights was based on G.S. 7B-1111(a)(1), (7), the original petition alleged grounds for termination pursuant to G.S. 7B-1111(a)(6), and the trial court considered the mother's substance abuse and mental illness in making that determination; therefore,G.S. 7B-1101 required appointment of a guardian ad litem for the mother, and the failure of the trial court to do so was error. In re K.R.S., 170 N.C. App. 643, 613 S.E.2d 318, 2005 N.C. App. LEXIS 1092 (2005).

Testimony of Guardian Ad Litem Appointed for a Parent Was Properly Admitted. — Guardian ad litem appointed for mentally incompetent mother could not be prevented from testifying on issues that were against the mother's interests either on direct testimony for the department of social services or if she were testifying on behalf of the mother and the information were being elicited on cross examination. In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1, 2004 N.C. App. LEXIS 129 (2004).

Earlier decision setting aside termination order did not "void" basis of subsequent adoption proceeding or earlier termination proceeding, but simply held that termination order had to be set aside since service on putative father was void. In re Clark, 95 N.C. App. 1, 381 S.E.2d 835 (1989).

Father's contention that mother should be estopped from petitioning to terminate his parental rights because she knew the grounds for termination and concealed that knowledge from him was completely without merit. In re Hunt, 127 N.C. App. 370, 489 S.E.2d 428 (1997).

Putative Father Not Precluded from Asserting Rights. — Where termination order, later held to be invalid for failure to use due diligence in ascertaining the putative father's address, was filed with an adoption petition in lieu of the affidavit required by former G.S. 48-13, a subsequently filed affidavit did not relate back to the original filing date of the petition so as to cut off the rights of the putative father who filed a legitimation petition to G.S. 49-10 before the affidavit was filed. In re Adoption of Clark, 327 N.C. 61, 393 S.E.2d 791 (1990).

Low IQ No Excuse for Failing to Exercise Common Sense. — Mother could not use a purported IQ of 76 as a shield against the trial court's finding that the mother failed to exercise common sense by continuing to have unprotected sexual intercourse that resulted in numerous unplanned pregnancies and placed the child's welfare in jeopardy, if for no other reason than straining the mother's already limited resources, including the time and money she could devote to caring for the child. In re K.S, — N.C. App. —, 646 S.E.2d 541, 2007 N.C. App. LEXIS 1164 (2007).

The trial court did not err by issuing a written order terminating respondent's parental rights which contained language not included in its recital in open court where the findings about which respondent complained related to the "adjudication" by the trial court, pursuant to the provisions of former G.S. 7A-289.32, that grounds for termination of respondent's parental rights existed at the time of the hearing, not to the court's "disposition" pursuant to G.S. 7A-289.31 and where the order entered by the trial court was in "general conformity" to the disposition announced in open court. In re Brim, 139 N.C. App. 733, 535 S.E.2d 367, 2000 N.C. App. LEXIS 1028 (2000).

Assignments of Error Abandoned. — Mother's cursory argument concerning neglect and abandonment was predicated upon not receiving proper notice of the motion to terminate and thus, her assignment of error concerning G.S. 7B-1111 were deemed abandoned under N.C. R. App. P. 28(b)(6). In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), aff'd, — N.C. —, 625 S.E.2d 779 (2006).

Failure to Enter Written Termination Order Within 30 Days. — Where the trial court did not reduce the parental termination to writing until seven months after the termination hearing in violation of the 30-day requirement of G.S. 7B-1109(e), -1110(a), -1111(a); all parties were prejudiced, as the mother and child lost time together, the foster parents were in a state of flux, and the adoptive parents were unable to complete their family plan. In re D.S., 177 N.C. App. 136, 628 S.E.2d 31, 2006 N.C. App. LEXIS 711 (2006).

Failure to File Action Within 12-Month

Recovery Period. — Trial court erred in terminating a mother's parental rights pursuant to G.S. 7B-1111(a)(2), as an agency filed the petition inside the statutory 12-month period for showing progress, as the period ran from the entry of the first custody order rather than from the mother's initial voluntary separation from the child. In re A.C.F., 176 N.C. App. 520, 626 S.E.2d 729, 2006 N.C. App. LEXIS 529 (2006).

Duration Requirement Defined. — The "for more than 12 months" requirement in G.S. 7B-1111(a)(2) means the duration of time beginning when the child was "left" in foster care or placement outside the home pursuant to a court order, and ending when the motion or petition for termination of parental rights was filed. In re A.C.F., 176 N.C. App. 520, 626 S.E.2d 729, 2006 N.C. App. LEXIS 529 (2006).

Removal Defined. — The legislature did not intend for any separation between a parent and a child to trigger the termination ground set forth in G.S. 7B-1111(a)(2), failure to make reasonable progress; instead, the statute refers only to circumstances where a court has entered a court order requiring that a child be in foster care or other placement outside the home. In re A.C.F., 176 N.C. App. 520, 626 S.E.2d 729, 2006 N.C. App. LEXIS 529 (2006).

Rights Not Properly Terminated. — Termination of the father's parental rights was reversed where the father voluntarily agreed to and completed the requirements of the case plan, and no finding had been made that the father's failure to pay child support was willful or that father willfully left the children in foster care more than 12 months without making reasonable progress toward reunification. In re J.S.L., 177 N.C. App. 151, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006).

Applied in In re Reyes, 136 N.C. App. 812, 526 S.E.2d 499, 2000 N.C. App. LEXIS 160 (2000); In re Stratton, 159 N.C. App. 461, 583 S.E.2d 323, 2003 N.C. App. LEXIS 1503 (2003), appeal dismissed, 357 N.C. 506, 588 S.E.2d 472 (2003); In re J.L.K., 165 N.C. App. 311, 598 S.E.2d 387, 2004 N.C. App. LEXIS 1162 (2004), cert. denied, 359 N.C. 68, 604 S.E.2d 314 (2004); In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006).

Cited in Thrift v. Buncombe County Dep't of Soc. Servs., 137 N.C. App. 559, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000); In re Lambert-Stowers, 146 N.C. App. 438, 552 S.E.2d 278, 2001 N.C. App. LEXIS 948 (2001); In re Hardesty, 150 N.C. App. 380, 563 S.E.2d 79, 2002 N.C. App. LEXIS 481 (2002); In re Johnston, 151 N.C. App. 728, 567 S.E.2d 219, 2002 N.C. App. LEXIS 866 (2002); In re Faircloth, 153 N.C. App. 565, 571 S.E.2d 65, 2002 N.C. App. LEXIS 1273 (2002); Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41, 2003 N.C. LEXIS 605 (2003), cert. denied, 540 U.S. 1177, 124 S. Ct. 1407, 158 L. Ed. 2d 78 (2004); In re Stumbo, 357 N.C. 279, 582 S.E.2d 255, 2003 N.C. LEXIS 747 (2003); In re N. B., 163 N.C. App. 182, 592 S.E.2d 597, 2004 N.C. App. LEXIS 310 (2004), aff'd, — N.C. —, 614 S.E.2d 532 (2005); In re L.D.B., 168 N.C. App. 206, 617 S.E.2d 288, 2005 N.C. App. LEXIS 165 (2005); In re As.L.G., 173 N.C. App. 551, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005); In re S.N.H., 177 N.C. App. 82, 627 S.E.2d 510, 2006 N.C. App. LEXIS 717 (2006); In re D.H., 177 N.C. App. 700, 629 S.E.2d 920, 2006 N.C. App. LEXIS 1195 (2006); In re J.J., — N.C. App. —, 637 S.E.2d 258, 2006 N.C. App. LEXIS 2412 (2006); Owen v. Keeter (In re C.L.K.), — N.C. App. —, 643 S.E.2d 458, 2007 N.C. App. LEXIS 804 (2007); In re C.M., — N.C. App. —, 644 S.E.2d 630, 2007 N.C. App. LEXIS 1152 (2007).

II. NEGLECT.

Standard of Proof for Termination and Removal Distinguished. — There is a substantive difference between the quantum of adequate proof of neglect and dependency for purposes of termination and for purposes of removal. The most significant difference is that while parental rights may not be terminated for threatened future harm, the Department of Social Services may obtain temporary custody of a child when there is a risk of neglect in the future. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

Neglected Juvenile. — Under subdivision (a)(1), a neglected juvenile is defined as a juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker, who has been abandoned, who is not provided necessary medical care, who is not provided necessary remedial care, who lives in an environment injurious to the juvenile's welfare, who has been placed for care or adoption in violation of law, G.S. 7B-101(15). In re Yocum, 158 N.C. App. 198, 580 S.E.2d 399, 2003 N.C. App. LEXIS 1054 (2003).

Although G.S. 7B-101(9), G.S. 7B-1111(a)(6) concerned dependency, those provisions are applicable to termination of parental rights proceedings where neglect is pursued. In re L.W., 175 N.C. App. 387, 623 S.E.2d 626, 2006 N.C. App. LEXIS 55 (2006), review denied, appeal dismissed, 360 N.C. 534, 633 S.E.2d 818 (2006).

Where a parent has failed or is unable to adequately provide for his child's physical and economic needs, whether it be by reason of mental infirmity or by reason of willful conduct on the part of the parent, and it appears that the parent will not or is not able to correct those inadequate conditions within a reasonable time, the court may appropriately conclude that the child is neglected. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

Failure to provide a stable living envi-

ronment and proper food and clothing are clearly evidence of neglect that cannot be ignored. Herrell v. Adcock, 69 N.C. App. 222, 316 S.E.2d 347 (1984).

Failure to Provide Clean Home and Child Care. — Failure of parents, during the three months additional time allowed to them to make improvements, to provide a clean and suitable home for their children and to provide for appropriate child care when they were absent was strong supporting evidence for the conclusion that the children were genuinely neglected within the terms of G.S. 7A-517(21) [see now G.S. 7B-101(15)]. In re Black, 76 N.C. App. 106, 332 S.E.2d 85 (1985).

Nonfeasance as well as malfeasance by a parent can constitute neglect. Herrell v. Adcock, 69 N.C. App. 222, 316 S.E.2d 347 (1984).

Neglect may be manifested in ways less tangible than failure to provide physical necessities. — Therefore, on the question of neglect, the trial judge may consider, in addition, a parent's complete failure to provide the personal contact, love, and affection that inheres in the parental relationship. In re APA, 59 N.C. App. 322, 296 S.E.2d 811 (1982).

Trial court properly terminated the father's parental rights on the ground that the father neglected the father's children, because the father expressed some interest in visitation rights, but only if a paternity test showed that the father was one child's biological father. In re Mills, 152 N.C. App. 1, 567 S.E.2d 168, 2002 N.C. App. LEXIS 905 (2002), cert. denied, 356 N.C. 672, 577 S.E.2d 627 (2003).

This Article provides an appropriate forum to address the "intangible needs" issue, and protects a parent's interest in preserving the family. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

Due process does not require a separate finding regarding fulfillment of a child's intangible and noneconomic needs in order to justify termination for neglect. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

One communication in a two-year period does not evidence the personal contact, love, and affection that inheres in the parental relationship. In re Graham, 63 N.C. App. 146, 303 S.E.2d 624, cert. denied, 309 N.C. 320, 307 S.E.2d 170 (1983).

The fact that a parent provides love, affection and concern, although it may be relevant, should not be determinative in controversies involving child neglect and custody, in that the court could still find the child to be neglected within the meaning of the neglect and termination statutes. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

In determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent; therefore, the fact that the parent loves or is concerned about his child will not necessarily prevent the court from making a determination that the child is neglected. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

A threat of future harm is not sufficient grounds for termination of parental rights. In re Phifer, 67 N.C. App. 16, 312 S.E.2d 684 (1984).

Former G.S. 7A-289.32 (now this section) and former G.S. 7A-517(21) speak in terms of past neglect and make no provision for termination for threatened future harm. It is clear, however, that the legislature was mindful of the plight of children threatened by a risk of future neglect, as shown by the terms of G.S. 7A-544 [see now G.S. 7B-302]. Under that statute, the Department may obtain temporary custody of a child where there is a risk of neglect by the parent or guardian. This supports the position that the legislature was aware of the problem of future harm, and simply did not choose to make risk of neglect a ground for termination of parental rights. In re Phifer, 67 N.C. App. 16, 312 S.E.2d 684 (1984).

Alcohol abuse, without proof of adverse impact upon the child, is not a sufficient basis for an adjudication of termination of parental rights for neglect. In re Phifer, 67 N.C. App. 16, 312 S.E.2d 684 (1984).

A prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect. However, the sufficiency of such a prior adjudication of neglect, standing alone, to support a termination of parental rights will be unlikely when the parents have been deprived of custody for any significant period before the termination proceeding. In re Ballard, 311 N.C. 708, 319 S.E.2d 227 (1984).

Evidence of neglect by a parent prior to losing custody of a child, including an adjudication of such neglect, is admissible in subsequent proceedings to terminate parental rights. Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

As May Neglect Occurring Prior to Previous Order Taking Custody from Parents. — In ruling upon a petition for termination of parental rights for neglect, the trial court may consider neglect of the child by its parents which occurred before the entry of a previous order taking custody from them. This is so even though the parents have not had custody of the child from the time of the prior custody order until the time of the termination proceeding. In re Ballard, 311 N.C. 708, 319 S.E.2d 227 (1984).

But Court Must Also Consider Changed Conditions. — Evidence of neglect by a parent prior to losing custody of a child, including an adjudication of such neglect, is admissible in subsequent proceedings to terminate parental rights. The trial court must also consider any evidence of changed conditions, in light of the evidence of prior neglect and the probability of a repetition of neglect. The determinative factors must be the best interests of the child and the fitness of the parent to care for the child at the time of the termination proceeding. In re Ballard, 311 N.C. 708, 319 S.E.2d 227 (1984).

Where termination of parental rights is sought upon allegations of neglect, the court may consider evidence of neglect occurring before custody has been taken from the parents, but termination may not be based solely on conditions of neglect which may have previously existed but no longer exist. The court must also consider evidence of any change in condition up to the time of the hearing, but this evidence is to be considered in light of the evidence of prior neglect and the probability of repetition of neglect. In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986); In re Parker, 90 N.C. App. 423, 368 S.E.2d 879 (1988).

To Determine Probability of Further Neglect. — In a case involving the termination of parental rights on the ground of neglect, the court may consider a prior adjudication of neglect. It must also review the parents' mental condition and evidence of changed conditions up to the time of the hearing, in light of the evidence of prior neglect, to determine the probability of repetition of neglect. It is not essential, however, that there be evidence of culpable neglect following the initial adjudication. In re Caldwell, 75 N.C. App. 299, 330 S.E.2d 513 (1985).

And Must Independently Determine If Neglect Exists at Time of Hearing. — The key to a valid termination of parental rights on neglect grounds where a prior adjudication of neglect is considered is that the court must make an independent determination of whether neglect authorizing the termination of parental rights existed at the time of the hearing. In re McDonald, 72 N.C. App. 234, 324 S.E.2d 847 (1984), cert. denied, 314 N.C. 115, 332 S.E.2d 490 (1985); Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

To support termination of parental rights under former G.S. 7A-289.32 (see now this section), there must be clear, cogent and convincing evidence that neglect exists at the time of the termination proceeding. In re Parker, 90 N.C. App. 423, 368 S.E.2d 879 (1988).

Trial court erred in terminating mother's parental rights based on neglect because the Department of Social Services presented no evidence that the mother could not, at the time of the hearing, adequately parent her children. Two of the witnesses presented by the Department had not been involved with the family in the two to three years prior to the termination hearing, and a third, the social worker last assigned to the case, presented no evidence that the mother was unfit as a parent at the time of the hearing. In re C.C., 173 N.C. App. 375, 618 S.E.2d 813, 2005 N.C. App. LEXIS 2017 (2005).

Termination of parental rights for neglect may not be based solely on conditions which existed in the distant past but no longer exist. Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

The trial court erred in treating a prior adjudication of neglect as determinative on the issue of neglect at the time of a termination proceeding some three years later. While the court was entitled to consider the prior adjudication in the fact-finding process, new findings were required based on changed conditions in light of the history of neglect by the parents and the probability of a repetition of neglect. In re Garner, 75 N.C. App. 137, 330 S.E.2d 33 (1985).

Failure to Prove Neglect Since Entry of Ex Parte Adjudication 13 Years Previously. — An order sub judice, containing findings that an ex parte adjudication of neglect had been entered 13 years earlier, and that the petitioner had failed to present clear, cogent, and convincing evidence of neglect since that time, did not support termination pursuant to former G.S. 7A-289.32(2) (see now this section). In re Tyson, 76 N.C. App. 411, 333 S.E.2d 554 (1985).

Where a child had not been in the custody of his father for a significant period of time prior to a termination of parental rights hearing, the trial court had to employ a different kind of analysis to determine whether the evidence supported a finding of neglect because requiring the department of social services to show that the child was currently neglected by the father would make termination of parental rights impossible. In re Shermer, 156 N.C. App. 281, 576 S.E.2d 403, 2003 N.C. App. LEXIS 112 (2003).

Burden on Petitioner. — The petitioner seeking termination bears the burden of showing by clear, cogent and convincing evidence that neglect exists at the time of the termination proceeding. Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

Guardian Ad Litem Required for Parent Where Mental Illness is Stated as Grounds for Termination. — Where the allegations contained in a petition or motion to terminate parental rights tend to show that the respondent is incapable of properly caring for his or her child because of mental illness, the trial court is required to appoint a guardian ad litem to represent the respondent at the termination hearing pursuant to G.S. 7B-1101 and subdivision (a)(6) of this section. In re Estes, 157 N.C. App. 513, 579 S.E.2d 496, 2003 N.C. App. LEXIS 734 (2003), cert. denied, 357 N.C. 459, 585 S.E.2d 390 (2003).

Failure to Appoint Guardian Ad Litem. — Trial court erred in terminating a mother's parental rights without appointing a guardian ad litem to represent the mother, because an agency claimed that the mother was unable to care for her child because of mental illness, and where the allegations contained in the petition or motion to terminate parental rights tended to show that the respondent was incapable of properly caring for his or her child because of mental illness, the trial court was required to appoint a guardian ad litem to represent the respondent at the termination hearing. In re Estes, 157 N.C. App. 513, 579 S.E.2d 496, 2003 N.C. App. LEXIS 734 (2003), cert. denied, 357 N.C. 459, 585 S.E.2d 390 (2003).

Child may be found to be neglected if parent does not correct within a reasonable time the conditions giving rise to neglect. In re Parker, 90 N.C. App. 423, 368 S.E.2d 879 (1988).

Termination of parental rights by reason of neglect upheld. In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986).

The following clear, cogent and convincing evidence supported a termination of respondent's parental rights based on a finding that her neglectful conduct continued and existed at the time of the termination hearing: An expert testified that respondent continued to harass her son's caretakers, failed to demonstrate financial responsibility, could not focus properly on her son's needs, missed scheduled visitations, and did not keep DSS informed of changes in her circumstances. In re Brim, 139 N.C. App. 733, 535 S.E.2d 367, 2000 N.C. App. LEXIS 1028 (2000).

The court affirmed the termination of a mother's parental rights for neglect where the trial court found that a prior adjudication of neglect was based on findings that the child "was starving to death" while in the mother's custody and suffered from "failure to thrive," and that during supervised visitations with the child, the mother continued "to try and feed the [minor] child inappropriately both in the manner she tried to feed her and the food she brought to feed the [minor] child." In re Pope, 144 N.C. App. 32, 547 S.E.2d 153, 2001 N.C. App. LEXIS 320 (2001).

Trial court did not abuse its discretion in terminating a mother's parental rights based on neglect where: (1) the mother failed to maintain stable housing and was unemployed, (2) the mother failed to comply with a child support order, (3) the mother had left the child with others, including an incident initiating the child's removal from her custody, (4) the mother failed to provide proper medication for the child, (5) the mother had attempted suicide, had not cooperated with social workers, did not follow through with mental health counseling, and did not complete parenting classes, and (6) the mother only sporadically visited and contacted the child for over five years. In re E.T.S., 175 N.C. App. 32, 623 S.E.2d 300, 2005 N.C. App. LEXIS 2724 (2005).

Neglect Shown. — Evidence, including mother's refusal to enroll in a residential drug treatment facility and her failure to make improvements in her lifestyle which might help her care for and supervise her children in view of her alcohol dependence, supported a finding of neglect or the probability of its repetition at the time of termination hearing. In re Leftwich, 135 N.C. App. 67, 518 S.E.2d 799 (1999).

Where the evidence disclosed that respondent father had never provided a home or other essentials for his two children throughout their entire lifetime, and that he has basically depended upon others to do so, the fact that after the children were placed in foster care respondent made some payments to Department of Social Services for their support did not invalidate the court's findings of neglect under former G.S. 7A-289.32(2) (see now this section). In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986).

Trial court properly terminated the mother's parental rights under G.S. 7B-1111(a)(1), where the court found, based on evidence of the mother's lack of contact with child and lack of support of the child, that she had neglected the child by way of abandonment; the mother had wilfully refused to perform her obligations as a parent, had withheld her presence, love, care, and opportunity to display filial affection from the child, and failed to financially contribute to the support of the child for a significant period of time. In re Humphrey, 156 N.C. App. 533, 577 S.E.2d 421, 2003 N.C. App. LEXIS 236 (2003).

Trial court did not err in terminating the father's parental rights to the minor child, as the father, who at times was incarcerated and who did not live with the mother and the child when not incarcerated, neglected the child by failing to financially support the child, communicate with the child, and visit with the child but a few times and it was in the child's best interest to terminate the father's parental rights so that the mother could put the child up for adoption as she desired. In re Yocum, 158 N.C. App. 198, 580 S.E.2d 399, 2003 N.C. App. LEXIS 1054 (2003).

Evidence that a father, although incarcerated since his child's birth, had not provided any financial support for the child from the compensation he received for his prison employment and had not sought any personal contact with the child or attempted to convey love or affection for the child, nor had he inquired about the child in his infrequent correspondence with the child's mother, sufficiently supported the trial court's findings that the father neglected the child under G.S.7B-1111(a)(1), and these findings supported a termination of the father's parental rights. In re Bradshaw, 160 N.C. App. 677, 587 S.E.2d 83, 2003 N.C. App. LEXIS 1910 (2003).

Having found that the trial court's findings sufficiently supported its conclusion that a father neglected his child, under G.S. 7B-1111(a)(1), allowing termination of the father's parental rights, it was unnecessary for the appellate court to consider whether those findings were also sufficient for termination of the father's parental rights under G.S. 7B-1111(a)(7), based on willful abandonment. In re Bradshaw, 160 N.C. App. 677, 587 S.E.2d 83, 2003 N.C. App. LEXIS 1910 (2003).

Clear, cogent, and convincing evidence existed to support termination of a mother's parental rights for neglect where: (1) her daughter was sexually abused in the mother's home under conditions the mother helped to create; (2) the mother was aware of the sexual abuse, but failed to protect her child; (3) the mother did not continue therapy for the child after repeated sexual abuse, and (4) termination was in the best interest of the child because there was a strong likelihood that the neglect would continue where the mother denied and/or minimized her responsibility for the abuse and neglect, and where she failed to minimize the conditions in her life that led to the child's abuse and neglect. In re Dhermy, 161 N.C. App. 424, 588 S.E.2d 555, 2003 N.C. App. LEXIS 2181 (2003).

Trial court did not abuse its discretion in terminating a mother's parental rights to her daughter pursuant to G.S. 7B-1111; the mother failed to comply with drug treatment and other requirements, and showed little interest in maintaining a relationship with the daughter, as evidenced by the mother's failure to pay to support the child and her failure to consistently visit the child, and therefore the trial court properly determined that the child was neglected. In re Howell, 161 N.C. App. 650, 589 S.E.2d 157, 2003 N.C. App. LEXIS 2262 (2003).

Order terminating mother's parental rights to her four minor children was proper where the children were previously adjudicated neglected, there was a probability of repetition of neglect if returned to the mother, four to five trial placements with the mother had failed, the mother had a history of failing to show a positive response to counseling and educational programs, the mother left a stable job and housing to move to another state where she did not have employment or independent housing, and she had been unable to cope with the pressure of caring for the children at the same time, with such findings being sufficient to establish neglect under G.S. 7B-1111(a)(1). In re L.O.K., 174 N.C. App. 426, 621 S.E.2d 236, 2005 N.C. App. LEXIS 2476 (2005).

Sufficient evidence supported the conclusion that a mother neglected the mother's child under G.S. 7B-101(15) and G.S. 7B-1111(a)(1) because the mother failed to stop substance abuse after the children were removed from the home and failed to meet their basic needs during a trial period. In re C.T., — N.C. App. —, 643 S.E.2d 23, 2007 N.C. App. LEXIS 683 (2007).

Neglect Not Shown. — Trial court erred in concluding that grounds existed under G.S. 7B-1111(a)(1) to terminate the mother's parental rights, where there was no prior adjudication of neglect. There was a prior adjudication of delinquency, but the mother had already lost custody; thus, there was no evidence before the trial court that the mother had neglected the child while the child was in the mother's care. In re J.G.B., 177 N.C. App. 375, 628 S.E.2d 450, 2006 N.C. App. LEXIS 978 (2006).

Allegation that father neglected children was not supported by clear, cogent, and convincing evidence, where the evidence showed that the father had written letters to the children and sent them birthday and Christmas cards, including some money, but that the policy of the Department of Social Services did not permit visitation with an incarcerated parent. In re C.W., — N.C. App. —, 641 S.E.2d 725, 2007 N.C. App. LEXIS 596 (2007).

Termination Not Upheld. — Where the trial court based its conclusion of neglect on its findings relative to past conditions and made no determination resolving conflicts in the evidence as to whether conditions existing at the time of the hearing were indicative of a probability of continued neglect or whether the previous neglect had ameliorated, the trial court found insufficient facts to support its conclusion that respondent's minor children were neglected children and its order terminating respondent's parental rights on that basis. Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

Where, at the time of termination proceedings, father was employed in a steady job for the first time in a number of years, had been alcohol free for over two years, had reduced his child support arrearage from $15,200 to $2,200, and had been paying $750 a month in child support ($500 in arrears and $250 to keep current), insufficient evidence existed to support a finding of neglect within the meaning of subsection (2). Bost v. Van Nortwick, 117 N.C. App. 1, 449 S.E.2d 911 (1994).

Termination of respondent's parental rights was not supported by the evidence where none of the witnesses—the respondent's guardian ad litem, her counselor, and a court appointed clinical psychologist— expressed certainty that her mental illness would prevent her from adequately parenting her children and where the father of one of the children, whom the trial court seemed to have viewed as a threat, had since died. In re Small, 138 N.C. App. 474, 530 S.E.2d 104, 2000 N.C. App. LEXIS 631 (2000).

The trial court's findings were insufficient to terminate the mother's rights since it did not address whether the mother could pay support, address the concerns leading to the child's removal, or list the unmet conditions. In re Locklear, 151 N.C. App. 573, 566 S.E.2d 165, 2002 N.C. App. LEXIS 765 (2002).

In a termination of parental rights proceeding, there was no clear, cogent, or convincing evidence and no finding that a father had neglected his children or that any past neglect was likely to reoccur and the trial court had to consider how conditions had changed from the time it previously found the children were neglected; the father who had been in prison when those previous orders were entered was now out of prison, was no longer involved with the children's mother, who had neglected them, and was able and willing to care for his children. In re Shermer, 156 N.C. App. 281, 576 S.E.2d 403, 2003 N.C. App. LEXIS 112 (2003).

In a termination of parental rights proceeding, evidence that a father had failed to complete certain parts of his case plan was not clear, cogent, or convincing evidence that he neglected his children; because less than two months had elapsed since that plan was adopted, there had not been an adequate time to assess his progress on that case plan. In re Shermer, 156 N.C. App. 281, 576 S.E.2d 403, 2003 N.C. App. LEXIS 112 (2003).

Because the trial court's findings did not support the conclusion that the mother failed to make reasonable progress in correcting the conditions that led to a finding of neglect and the child's removal, the mother's rights were improperly terminated. In re J.T.W., 178 N.C. App. 678, 632 S.E.2d 237, 2006 N.C. App. LEXIS 1677 (2006), rev'd on other grounds, 361 N.C. 341, 643 S.E.2d 579 (2007).

Termination of a mother's parental rights pursuant to G.S. 7B-1111(a)(1) was vacated because the mother was not provided notice of the termination hearing as required by G.S. 7B-1106, as there was no evidence that the addresses to which notices were sent were the mother's dwelling, and this fact, along with the fact that the mother did not attend the hearing or respond in any way, refuted the presumption of valid service under G.S. 1A-1-4(j)(2). In re K.N., — N.C. App. —, 640 S.E.2d 813, 2007 N.C. App. LEXIS 376 (2007).

III. FAILURE TO PAY REASONABLE PORTION OF COST OF CARE.

The phrase "cost of care" in subdivision (4) of former G.S. 7A-289.32 (see now this section) refers to the amount it costs for the Department to care for the child, namely, foster care. Specific findings of fact as to the reasonable needs of the child are not required. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

The requirement of subdivision (4) of former § 7A-289.32 (see now this section) applies irrespective of the parent's wealth or poverty. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

Ability to Pay. — Trial court does not err by failing to make a finding of "ability to pay" where the grounds to terminate are those set forth in G.S. 7B-1111(a)(4) or G.S. 7B-1111(a)(5)d. In re J.D.S., 170 N.C. App. 244, 612 S.E.2d 350, 2005 N.C. App. LEXIS 1013 (2005), cert. denied, — U.S. —, 360 N.C. 64, 623 S.E.2d 584 (2005).

A finding that a parent has ability to pay support is essential to termination for nonsupport under subdivision (4) of former G.S. 7A-289.32 (see now this section) for failing to pay a reasonable portion of the cost of care for the child. In re Ballard, 311 N.C. 708, 319 S.E.2d 227 (1984); Department of Social Servs. v. Johnson, 70 N.C. App. 383, 320 S.E.2d 301 (1984).

Ability to Pay Controls What Is "Reasonable Portion". — In determining what is a "reasonable portion," of child's cost of care, the parent's ability to pay is the controlling characteristic. In re Bradley, 57 N.C. App. 475, 291 S.E.2d 800 (1982); In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984); In re Garner, 75 N.C. App. 137, 330 S.E.2d 33 (1985).

Finding that a parent has ability to pay support is essential to termination for nonsupport pursuant to G.S. 7B-1111(a)(3). In re T.D.P., 164 N.C. App. 287, 595 S.E.2d 735, 2004 N.C. App. LEXIS 811 (2004), aff'd, 359 N.C. 405, 610 S.E.2d 199 (2005).

A parent is required to pay that portion of the cost of foster care that is fair, just, and equitable based upon the parent's ability or means to pay. What is within a parent's "ability" to pay or what is within the "means" of a parent to pay is a difficult standard which requires great flexibility in its application. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984); In re Garner, 75 N.C. App. 137, 330 S.E.2d 33 (1985).

A parent's ability to pay is the controlling characteristic of what is a "reasonable portion" of cost of foster care for the child which the parent must pay. Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

Ability to Pay Controls What Is "Reasonable Portion." — Although what is within a parent's ability to pay or what is within the means of a parent to pay is a difficult standard that requires great flexibility in its application, the requirement of G.S. 7B-1111(a)(3) applies irrespective of the parent's wealth or poverty; the parents' economic status is merely a factor used to determine their ability to pay such costs, but their ability to pay is the controlling characteristic of what is a reasonable amount for them to pay. In re T.D.P., 164 N.C. App. 287, 595 S.E.2d 735, 2004 N.C. App. LEXIS 811 (2004), aff'd, 359 N.C. 405, 610 S.E.2d 199 (2005).

Where parent had opportunity to provide for some of the cost of care of child, and forfeited that opportunity by his or her own misconduct, such parent will not be heard to assert that he or she has no ability or means to contribute to the child's care and is therefore excused from contributing any amount. In re Bradley, 57 N.C. App. 475, 291 S.E.2d 800 (1982).

The court erred in failing to make a specific finding as to an incarcerated parent's ability to pay some amount greater than zero during the relevant time period. In re Garner, 75 N.C. App. 137, 330 S.E.2d 33 (1985).

Rights Not Properly Terminated. — The trial court erred in terminating a father's parental rights on the grounds of non-payment of a reasonable portion of foster care expenses under G.S. 7B-1111(a)(3), because no evidence was presented indicating the father was capable of earning an income while in prison, and the father was never ordered to pay any support at all. In re Clark, 151 N.C. App. 286, 565 S.E.2d 245, 2002 N.C. App. LEXIS 718 (2002), cert. denied, 356 N.C. 302, 570 S.E.2d 501 (2002).

Trial court erroneously terminated mother's parental rights based on a finding under G.S. 7B-1111(a)(3) that she had failed to contribute to the cost of her children's foster care, despite being physically and financially able to do so; the only evidence presented to the trial court on this subject established that she had been employed at various times since 1999 and did not address whether she was employed during the six months preceding the filing of the termination petition or whether she had the financial ability to contribute to the children's support during that time. In re Faircloth, 161 N.C. App. 523, 588 S.E.2d 561, 2003 N.C. App. LEXIS 2179 (2003).

Finding on Ability to Pay Held Not Required. — Where petition did not allege, and the court did not find, that respondent father had not paid a reasonable portion of the cost of child care while his two children were in foster care, the court was not required to make findings as to his ability to pay pursuant to subdivision (4) of former G.S. 7A-289.32. In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986).

Failure to Pay Reasonable Portion of Costs of Care Shown. — Where father paid $90.00 for the support of his four children over a 45-week period, while his earnings ranged between $100.00 and $125.00 per week, and he had enough money to venture $60.00 per week into a hog operation at a time when he knew of his $30.00 per week obligation by virtue of court order, there was ample evidence from which trial court could have concluded that father failed to pay a reasonable portion of the costs of care of the children. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

Findings of fact that minor children had been in the custody of county department of social services since July 1974, that parent had failed to pay any portion of the cost of care for the minor children since June 1979, and that while incarcerated in the North Carolina Prison System, parent had the opportunity to participate in the work-release program but was removed from the program due to his violation of prison regulations by returning from the work-release program in an intoxicated condition were sufficient to support the court's conclusion that parent failed to pay a reasonable portion of the costs of care of his minor children. In re Bradley, 57 N.C. App. 475, 291 S.E.2d 800 (1982).

Where the father of a two-year-old who was incarcerated for robbery and kidnapping earned between 40 cents and a dollar a day but sent nothing to his child in foster care, his parental rights were properly terminated for nonsupport under G.S. 7B-1111(a)(3). In re T.D.P., 164 N.C. App. 287, 595 S.E.2d 735, 2004 N.C. App. LEXIS 811 (2004), aff'd, 359 N.C. 405, 610 S.E.2d 199 (2005).

IV. WILLFUL ABANDONMENT.

"Abandonment" Defined. — Abandonment imports any willful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. Abandonment has also been defined as willful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child. In re APA, 59 N.C. App. 322, 296 S.E.2d 811 (1982).

Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986).

The word "willful" encompasses more than an intention to do a thing; there must also be purpose and deliberation. In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986).

Question of Fact. — Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence. In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986).

Adoption Without Consent of Parent upon Finding of Willful Abandonment. — Prior to October 1, 1985, two procedures were available to enable a petitioning party to adopt a minor child without the consent of the opposing biological parent. First, under this section, a court could terminate the parental rights of a biological parent upon a finding of one of the grounds enumerated therein, and then pursuant to G.S. 48-5, once a district court had entered an order terminating the parental rights of the biological parent, that parent was no longer a necessary party to an adoption proceeding. Second, the court, under G.S. 48-5(d), upon proper motion, was authorized to hold a hearing to determine whether an abandonment as defined in former G.S. 48-2(1)a and (1)b had taken place. However, effective October 1, 1985, these proceedings were merged into one termination of parental rights proceeding under subdivision (8) of former G.S. 7A-289.32 (see now this section) to ascertain whether the parent had willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition. In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986).

Abandonment Not Shown. — There was no support for the trial court's finding that father willfully "withheld his presence, love, care and affection from the children" during six consecutive months immediately preceding petition to terminate parental rights, where during this time he visited the children during the Christmas holiday, attended three of the children's soccer games and told the mother that he wanted to pay his back child support and set up regular visitations. Bost v. Van Nortwick, 117 N.C. App. 1, 449 S.E.2d 911 (1994).

In a termination of parental rights proceeding, the trial court's findings were not sufficient to support its conclusion that a father willfully abandoned his child for six months, under G.S. 7B-1111(7), because during the six months before the termination petition was filed the father was incarcerated. In re Shermer, 156 N.C. App. 281, 576 S.E.2d 403, 2003 N.C. App. LEXIS 112 (2003).

Termination of the natural father's parental rights based on willful abandonment was reversed where the evidence showed that the father was instructed not to contact child during pendency of criminal charges against him for first degree sexual assault involving a minor child — charges which were later dismissed, and that the father made child support payments when he had the money to do so. In re T.C.B., 166 N.C. App. 482, 602 S.E.2d 17, 2004 N.C. App. LEXIS 1732 (2004).

Abandonment was not a proper basis for termination of the father's parental rights where the Department of Social Services failed to allege abandonment as a ground for termination in its petition, and thus the father had no notice that abandonment was going to be an issue during the termination hearing. In re C.W., — N.C. App. —, 641 S.E.2d 725, 2007 N.C. App. LEXIS 596 (2007).

Abandonment Shown. — Termination of father's parental rights was upheld where Department of Social Services presented clear, cogent, and convincing evidence supporting several grounds for termination, including willful abandonment; the department testified that the father had at most only seen the child immediately after birth, and the child was three at time of the termination proceedings. In re R.R., — N.C. App. —, 638 S.E.2d 502, 2006 N.C. App. LEXIS 2506 (2006).

The trial court improperly concluded that respondent did not willfully abandon his child notwithstanding his problems with alcohol where he made two inquiries regarding his child in 1993 and 1994 and one feeble attempt, during the relevant six months, at providing financial support by listing the child's name as his dependent on a work release application such that child support payments could be deducted from his pay but listed the wrong last name for his child and the name of the county as the child's address and failed to make any inquiry when no deductions were made by the Department of Corrections. In re McLemore, 139 N.C. App. 426, 533 S.E.2d 508, 2000 N.C. App. LEXIS 889 (2000).

V. ILLUSTRATIVE CASES.

Mental Illness of Parent. — Department of Social Services failed to prove by clear and convincing evidence that due to mental illness, mother was incapable of providing for the care and supervision of her children, where the only evidence offered by DSS to show that mother was mentally incapable of caring for her children was the testimony of doctor who testified that the fact that someone carries a diagnosis of personality disorder does not mean that that person is incapable of raising children and that mother's pattern of behavior by itself did not mean that she was incapable of taking care of her children. In re Scott, 95 N.C. App. 760, 383 S.E.2d 690, cert. denied, 325 N.C. 708, 388 S.E.2d 459 (1989).

Department of Social Services failed to show by clear and convincing evidence that there was a reasonable probability that mother's mental illness would continue throughout the minority of her children, where doctor could not predict within a reasonable probability that mother's mental illness would so continue and where doctor testified that mother was currently experiencing her longest sustained period of improvement and that she had dealt with the stress of the hearing in a positive manner. In re Scott, 95 N.C. App. 760, 383 S.E.2d 690, cert. denied, 325 N.C. 708, 388 S.E.2d 459 (1989).

Termination of the mother's parental rights was in the child's best interests as the record provided overwhelming evidence that the mother's intentional actions created a substantial risk of serious physical injury to the child; evidence showed that the mother had Munchausen Syndrome by Proxy (MSBP) and that during the two years prior to the child being removed, the mother subjected the child to 25 different emergency room visits, 60 office visits to pediatricians, 143 prescriptions, and 8 admissions to the hospital and the mother made no substantial improvements to correct the conditions as the mother continuously failed to comply with a court order preventing the mother from providing child care services to other minor children while unsupervised and caring for animals and she continued to display the attention-seeking behaviors associated with the disorder. In re Greene, 152 N.C. App. 410, 568 S.E.2d 634, 2002 N.C. App. LEXIS 1068 (2002).

Although a trial court found, inter alia, that a mother suffered from significant mental health issues, it terminated her parental rights pursuant to G.S. 7B-1111(a)(1) because she had neglected her daughter; however, because the mother's mental instability was so intertwined with a child's neglect, the trial court erred in failing to appoint a guardian ad litem for the mother pursuant to G.S. 7B-1101 at a parental rights termination hearing. In re J.D., 164 N.C. App. 176, 605 S.E.2d 643, 2004 N.C. App. LEXIS 744 (2004), cert. denied, 358 N.C. 732, 601 S.E.2d 531 (2004).

Order terminating the parental rights of both parents to four minor children was reversed on appeal, because the trial court erred by failing to appoint a guardian ad litem for the parents, who had significant mental health issues that bore directly on their ability to provide proper care and supervision of their children. In re B.M., 168 N.C. App. 350, 607 S.E.2d 698, 2005 N.C. App. LEXIS 252 (2005).

G.S. 7B-1101.1 requires that a guardian ad litem be appointed in accordance with the provisions of G.S. 1A-1, N.C. R. Civ. P. 17 to represent a parent, meaning that where an allegation is made that parental rights should be terminated, a trial court is required to conduct a hearing to determine whether a guardian ad litem should be appointed to represent the parent, and an allegation under G.S. 7B-1111(a)(6) serves as a triggering mechanism, alerting the trial court that it should conduct a hearing to determine whether a guardian ad litem should be appointed; at the hearing, the trial court must determine whether the parents are incompetent within the meaning of G.S. 35A-1101, such that the individual would be unable to aid in their defense at the termination of parental rights proceeding, and the trial court should always keep in mind that the appointment of a guardian ad litem will divest the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination. In re J.A.A., 175 N.C. App. 66, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

Americans with Disabilities Act did not prevent the state from terminating the mother's parental rights because the mother was mentally retarded. In re C.M.S., — N.C. App. —, 646 S.E.2d 592, 2007 N.C. App. LEXIS 1433 (2007).

Mother was entitled to a guardian ad litem where the petition to terminate her parental rights alleged that depression and personality and emotional problems rendered her unable to parent her child; because the trial failed to appoint a guardian ad litem for the mother, the termination order was reversed and the case was remanded. In re S.B., 166 N.C. App. 494, 602 S.E.2d 694, 2004 N.C. App. LEXIS 1783 (2004).

Mental Retardation. — The appellate court would not incorporate a diligent efforts mandate in a statute devoid of such language; if due diligence is to be a requirement of the mental retardation ground for termination, that is a matter for the legislature, the courts having no right to expand statutory terms. In re Guynn, 113 N.C. App. 114, 437 S.E.2d 532 (1993).

Alcohol Abuse. — Evidence of record supported the trial court's findings of fact, which in turn supported its legal conclusion that the father's protected status as parent was not constitutionally displaced; except for two driving while impaired convictions, there was no evidence that the father drank to the point of intoxication, regularly or ever, the father had driven only once on a public road after his license had been revoked as he drove to the grandmother's house after learning that the children's mother had died, and the trial court could not discern any problem with the father's employment or economic situation as the father had been with the same employer for eight years and had a good record as an employee. Owenby v. Young, 357 N.C. 142, 579 S.E.2d 264, 2003 N.C. LEXIS 427 (2003).

Failure to Show Positive Response to Efforts of DSS. — Record supported judge's finding of parents' failure to show a positive response to the continuing efforts of the Department of Social Services to assist them so as to reestablish the family unit. Herell v. Taylor, 97 N.C. App. 57, 387 S.E.2d 230 (1990).

Where a jailed father asked not to be taken to court to appear at a parental rights termination hearing, it showed that the child was not a priority and that the child was a neglected and abandoned; termination of the father's parental rights was therefore in the child's best interest. Whittington v. Hendren (In re Hendren), 156 N.C. App. 364, 576 S.E.2d 372, 2003 N.C. App. LEXIS 132 (2003).

Findings of Fact Inadequate. — Trial court's findings that father had willfully left children in foster care for more than 12 months and that father had failed to pay a reasonable portion of the cost of caring for children were inadequate because, in large part, they were merely a recitation of allegations that a department of social services made in its petition seeking termination of parental rights and did not provide specific findings of the facts established by the evidence, admissions, and stipulations. In re Anderson, 151 N.C. App. 94, 564 S.E.2d 599, 2002 N.C. App. LEXIS 657 (2002).

Rights Properly Terminated. — The trial court properly terminated respondent mother's parental rights in her two children where the evidence supported findings by the court that the children were neglected children within the meaning of former G.S. 7A-278(4) and that respondent failed to pay any portion of their foster care costs for more than six months preceding the filing of the petition as called for under subdivision (4) of former G.S. 7A-289.32 (see now this section). In re Biggers, 50 N.C. App. 332, 274 S.E.2d 236 (1981).

The following findings supported the court's conclusions that mother's parental rights should be terminated for neglect: (1) The child was in the bottom 5% of children in her age group in weight; (2) the mother failed to supervise her properly; (3) the child was allowed to remain in dirty diapers and to drink out of discarded bottles; (4) the child lived in an environment injurious to her health and welfare; and (5) the mother suffered mental problems resulting in inability to care for herself and her child. In re Caldwell, 75 N.C. App. 137, 330 S.E.2d 513 (1985).

A trial court had sufficient evidence upon which to base its order for termination of parental rights where the evidence included unrefuted testimony that the family home was in a constant state of disarray and uncleanliness, that the mother often seemed incoherent, tending to stare off and to ignore those around her, and that the father stated that he was unwilling to let the children remain in the home because his violent temper made it unsafe for the children to be with him and that he threatened to lock and bar the door and starve the children if they were not removed. In re Black, 76 N.C. App. 106, 332 S.E.2d 85 (1985).

Where prior to removal of children from their home, the mother's boyfriend had abused the children, the children had been treated in the local hospital emergency room for five different incidents of ingestion of foreign materials, and the mother and children had lived in four different locations over an 18-month period, and where mother missed 25 out of 59 scheduled visits while children were in foster care, attended only six out of 22 scheduled parenting classes, was terminated from mental health counseling because of nonattendance, moved her residence seven times, failed to advise Department of Social Services of her whereabouts for a period of 14 months, and married the boyfriend who had been found to have abused her children, the court properly terminated mother's parental rights. In re Parker, 90 N.C. App. 423, 368 S.E.2d 879 (1988).

Facts that father had little if any contact with his daughter in the year before he murdered his daughter's mother; that since the murder, father had been incarcerated; that father had twice given his consent for the child's adoption by his sister and her husband; that father had known that the child was in petitioners' custody and had nevertheless made no effort to contact petitioners, to send support for daughter to petitioners, or to establish any verbal or written communication with the child, supported the trial court's conclusion that father "acted in such a way as to evince a lack of parental concern for the child" and were sufficient to constitute neglect pursuant to former G.S. 7A-289.32(2) and 7A-517(21). Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

Trial court properly considered all of the evidence in concluding as law that minor children were neglected juveniles and then properly terminated the parental rights of the parents pursuant to this section. Smith v. Alleghany County Dep't of Social Servs., 114 N.C. App. 727, 443 S.E.2d 101, cert. denied, 337 N.C. 696, 448 S.E.2d 533 (1994).

The findings overwhelmingly established a basis for surviving respondent mother's motion to dismiss termination action, where there was substantial evidence of neglect including domestic violence between respondent and her live-in boyfriend, inappropriately leaving the child in the care of others, respondent's illegal drug use and distribution in the presence of the child, an overall history of lawlessness, respondent's repeated incarcerations and a prior adjudication of neglect. In re Blackburn, 142 N.C. App. 607, 543 S.E.2d 906, 2001 N.C. App. LEXIS 190 (2001).

Termination of father's parental rights was proper where: (1) the father never had a custodial relationship with his 13 year old child, nor did he have any significant personal or financial relationship with the child other than an occasional letter and a total of $125 in monies and gifts; (2) the relationship was unlikely to change in the future due to the father's lengthy incarceration and the child's unwillingness to see him; and (3) the father's only alternative for providing for the care of the child was through the assistance of his parents, who had no relationship with the child, and even failed to attend the termination of parental rights hearing. In re Williams, 149 N.C. App. 951, 563 S.E.2d 202, 2002 N.C. App. LEXIS 364 (2002).

Evidence that the mother of two minor children had performed practically none of the things required by the court at the time that the children had been placed in foster care a year before, to include the fact that the mother had not even attended the termination hearing despite her attorney's efforts to contact her and to get her to attend, supported trial court's findings terminating the mother's parental rights. In re Frasher, 147 N.C. App. 513, 555 S.E.2d 379, 2001 N.C. App. LEXIS 1191 (2001).

Termination of parental rights was proper because clear, convincing, and cogent evidence showed the mother failed to make reasonable progress in correcting the condition, substance abuse, which led to the removal of her children. In re Mitchell, 148 N.C. App. 483, 559 S.E.2d 237, 2002 N.C. App. LEXIS 43 (2002).

Trial court properly terminated the mother's parental rights where the evidence showed that the mother failed to provide any parental guidance, personal contact, love, or custodial/spiritual support for at least six months prior to the filing of the grandmother's petition and that the mother's neglectful behavior was likely to continue for the foreseeable future because she had a long history of being incarcerated for various criminal offenses as well as a long history of substance abuse and failure to address those problems with necessary treatment. Lechuga v. Ore (In re Ore), 160 N.C. App. 586, 586 S.E.2d 486, 2003 N.C. App. LEXIS 1816 (2003).

Trial court did not abuse its discretion in terminating a father's parental rights because grounds for termination existed under G.S. 7B-1111(a)(5) where, in the three-and-a-half years since the mother told the father that she was pregnant and that he was the father, and until the mother contacted him about child support, the father had expressed no interest in discovering whether the mother had given birth, in determining whether the child was his, or in taking responsibility for the child. In re T.L.B., 167 N.C. App. 298, 605 S.E.2d 249, 2004 N.C. App. LEXIS 2165 (2004).

Trial court properly terminated the parental rights of a mother and father to their child pursuant to G.S. 7B-1111(a)(9), because Michigan had previously terminated the parents' rights to other children, and the parents were unable or unwilling to establish a safe home for the child based on the parents' mental and physical illnesses. In re V.L.B., 168 N.C. App. 679, 608 S.E.2d 787, 2005 N.C. App. LEXIS 394 (2005), cert denied, — N.C. —, 614 S.E.2d 924 (2005).

There were sufficient findings to support the termination of parental rights order, including the fact that the father failed to propose an alternate replacement to take care of the children, that the father failed to provide any contact, love, or affection for the children, and that the father failed to attempt to contact the children while he was incarcerated. In re D.J.D., 171 N.C. App. 230, 615 S.E.2d 26, 2005 N.C. App. LEXIS 1268 (2005).

Mother's parental rights were properly terminated, under G.S. 7B-1111(a)(1) and (2) as she neglected her children and willfully left them in foster care for more than 12 months without showing reasonable progress, after the children had been returned to her once, as clear, cogent and convincing evidence showed she did not (1) complete required parenting, budgeting, and homemaking classes, (2) obtain mental health counseling, (3) have a phone, or (4) keep a clean home, and she offered no specific plan for the children's care while she worked, if they were returned, and the evidence showed her residential instability. In re J.W., 173 N.C. App. 450, 619 S.E.2d 534, 2005 N.C. App. LEXIS 2109 (2005), aff'd, — N.C. —, 625 S.E.2d 780 (2006).

G.S. 7B-1111(a)(2) provides for termination of parental rights if a parent has willfully left a juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile, and willfulness may be found where a parent has made some attempt to regain custody of the child but has failed to exhibit reasonable progress or a positive response toward the diligent efforts of a department of social services; extremely limited progress is not reasonable progress. In re J.W., 173 N.C. App. 450, 619 S.E.2d 534, 2005 N.C. App. LEXIS 2109 (2005), aff'd, — N.C. —, 625 S.E.2d 780 (2006).

Fact that the father could have written but did not do so, that he made no efforts to provide anything for the minor child, that he did not provide any love, nurturing, or support for the minor child, that he would continue to neglect the minor child if she were placed in his care, and that he would be incarcerated until the child reached the age of majority provided clear, cogent, and convincing evidence to support the termination of his parental rights. In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), aff'd, — N.C. —, 625 S.E.2d 779 (2006).

Evidence including the transient state of the mother's housing, the mother's untreated hygiene issues, and the mother's failure to complete parenting classes was sufficient to support termination of the mother's parental rights under G.S. 7B-1111(a)(9). In re L.A.B., 178 N.C. App. 295, 631 S.E.2d 61, 2006 N.C. App. LEXIS 1409 (2006).

While the father complied with a number of elements of his case plan, the termination of father's parental rights under G.S. 7B-1111(a)(2) was supported by evidence that the father continued to reside with the mother who had an untreated substance abuse problem she would not admit to. In re S.N., — N.C. App. —, 636 S.E.2d 316, 2006 N.C. App. LEXIS 2236 (2006).

Father's assignments of error concerning the delay in filing a termination petition and other alleged technical errors did not provide a basis for overturning the trial court's order terminating his parental rights where the father failed to allege any prejudice to him or the child as a result of the technical errors. In re H.T., — N.C. App. —, 637 S.E.2d 923, 2006 N.C. App. LEXIS 2497 (2006).

Mother's parental rights were properly terminated where notice of the petition to terminate was properly and timely served pursuant to G.S. 1A-1-5, the petition alleged three grounds for termination, including neglect, and the petition had incorporated the trial court's prior orders concerning the child, as well as the facts associated with those orders, thereby providing the factual allegations supporting the legal bases. In re H.T., — N.C. App. —, 637 S.E.2d 923, 2006 N.C. App. LEXIS 2497 (2006).

Parental rights were properly terminated under G.S. 7B-1111 because the trial court found that the children were abused under G.S. 7B-101(1) and that they exhibited symptoms of that abuse; further, the Department of Social Services met its burden of proving that termination was in the best interests of the children under G.S. 7B-1110(a). In re L.C., — N.C. App. —, 638 S.E.2d 638, 2007 N.C. App. LEXIS 83 (2007).

Termination of a father's parental rights was affirmed because the trial court's findings regarding the father were properly supported by clear, cogent, and convincing evidence, and its findings supported its conclusions; the trial court found that the father abused two of his children, neglected his children, and willfully left his children in foster care for more than 12 months without showing reasonable progress. In re N.B., — N.C. App. —, 644 S.E.2d 22, 2007 N.C. App. LEXIS 831 (2007).

Termination of a mother's parental rights to her children pursuant to G.S. 7B-1111(a)(8) was affirmed because the trial court's findings fully supported its determination that the mother committed voluntary manslaughter, as the evidence indicated that the child died from injuries arising from abuse, and the trial court properly admitted evidence pursuant to hearsay exceptions, as a medical examiner's report was admissible under G.S. 8C-1-803(8) as a public record, and a police officer was properly allowed to to testify as to statements by the mother's daughter that she saw her mother hit the deceased child on the head pursuant to the excited utterance exception. In re J.S.B., — N.C. App. —, 644 S.E.2d 580, 2007 N.C. App. LEXIS 1041 (2007).

When the mother was adjudicated competent, it established only that the mother regained the capacity to manage the mother's own affairs, not that the mother, facing a termination of parental rights petition, had the capacity to provide proper care and supervision for the child; in terminating the mother's parental rights the court was entitled to find, based on the mother's three-year history of relapses, that there was a reasonable probability that the mother's incapacity resulting from substance abuse disorder would continue. In re A.H., — N.C. App. —, 644 S.E.2d 635, 2007 N.C. App. LEXIS 1159 (2007).

Termination of mother's parental rights under G.S./A 7B-1111(a)(2), was supported by evidence that, other than forensic psychological exam, the mother failed to follow through with any of the other activities pending regarding parenting, therapy, anger management, or medication management. In re C.M.S., — N.C. App. —, 646 S.E.2d 592, 2007 N.C. App. LEXIS 1433 (2007).

Trial court's findings that the father failed to make reasonable progress were based on clear, cogent, and convincing evidence stemming from the period of time between the child's initial removal and the entry of the consent order granting guardianship to the guardians, as required by G.S./A 7B-1111(a)(2); the findings included that the father only sporadically complied with the case plans and failed to show any positive response to assistance efforts, willfully refused to stop using marijuana, and displayed inappropriate behavior and unwarranted hostility toward the department of social services, the foster parent, and the guardians. In re H.L.A.D., — N.C. App. —, 646 S.E.2d 425, 2007 N.C. App. LEXIS 1482 (2007).

Rights Not Properly Terminated. — In a proceeding to terminate parental rights, where the evidence showed that, except for one 10-minute interval when mother left child alone with its father, who abused the child, the mother had not abused or neglected the child, such evidence did not support a termination order. In re Alleghany County Dep't of Social Servs. v. Reber, 75 N.C. App. 467, 331 S.E.2d 256 (1985), aff'd, 315 N.C. 382, 337 S.E.2d 851 (1986).

There was not clear, cogent, and convincing evidence of mental retardation of either parent to justify terminating their parental rights. In re LaRue, 113 N.C. App. 807, 440 S.E.2d 301 (1994).

Evidence held insufficient to support the grounds for termination of parental rights. In re Young, 346 N.C. 244, 485 S.E.2d 612 (1997).

The trial court erred in terminating a father's parental rights on the grounds of the father's incapability of caring for the child pursuant to G.S. 7B-1111(a)(6) (2001); the father was scheduled to be released from prison shortly, and there was no evidence at trial to suggest that respondent suffered from any physical or mental illness or disability that would prevent him from providing proper care and supervision for the child, nor did the trial court make any findings of fact regarding such a condition. In re Clark, 151 N.C. App. 286, 565 S.E.2d 245, 2002 N.C. App. LEXIS 718 (2002), cert. denied, 356 N.C. 302, 570 S.E.2d 501 (2002).

Where the child of respondent mother was removed from her because of the mother's drug use, but, during the 12 months prior to the filing of a petition to terminate her parental rights, the mother successfully completed a drug abuse treatment program, tested negative for drugs on several occasions, attended a drug abuser's support group, maintained regular employment as a nurse, and showed herself to be a fit and proper person for visitation, such evidence showed that the mother had made reasonable progress under the circumstances in correcting the conditions that led to the removal of the child; therefore, the trial court erred in terminating the mother's parental rights. In re Pierce, 356 N.C. 68, 565 S.E.2d 81, 2002 N.C. LEXIS 547 (2002).

Reasonable Progress Shown. — Mother made reasonable progress in correcting the conditions that led to the removal of her children during more than 12 months that the children were in the custody of the Department of Social Services; among other things she attended family education sessions and parenting classes, acquired appropriate housing, and maintained her home. In re C.C., 173 N.C. App. 375, 618 S.E.2d 813, 2005 N.C. App. LEXIS 2017 (2005).

In Determining Whether Adequate Services Were Provided Court Properly Considered Progress Up Until Time of Hearing. — Nothing in the record supported the mother's contention that the trial court erred in terminating the mother's parental rights because the Department of Social Services failed to provide the mother with adequate services upon the mother's reaching the age of majority. The mother reached the age of majority more than a year before the termination hearing and the trial court properly considered evidence of the mother's progress up until the time of the hearing. In re J.G.B., 177 N.C. App. 375, 628 S.E.2d 450, 2006 N.C. App. LEXIS 978 (2006).

VI. WILLFULLY LEAVING CHILD IN FOSTER CARE.

Period of Foster Care Need Not Be Continuous. — In view of the 1985 amendment to subdivision (3) of former G.S. 7A-289.32 (see now this section), which prior to the amendment required the parent to have left the child in foster care "for more than two consecutive years," but was amended to shorten the period to an excess of 18 months (now 12 months) and to eliminate the word "consecutive," the period of foster care need not be 18 continuous months. Herell v. Taylor, 97 N.C. App. 57, 387 S.E.2d 230 (1990).

Two Part Analysis to Be Performed By the Court. — Trial court, to find grounds to terminate a parent's rights under G.S. 7B-1111(a)(2), must perform a two part analysis, as the trial court must determine by clear, cogent and convincing evidence: (1) that a child has been willfully left by the parent in foster care or placement outside the home for over 12 months; and (2) as of the time of the hearing, also as demonstrated by clear, cogent and convincing evidence, that the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. Evidence and findings which support a determination of reasonable progress may parallel or differ from that which supports the determination of willfulness in leaving the child in placement outside the home. In re O.C., 171 N.C. App. 457, 615 S.E.2d 391, 2005 N.C. App. LEXIS 1272 (2005), cert. denied, — N.C. —, 623 S.E.2d 587 (2005).

The grounds which render a putative father's consent to adoption unnecessary under G.S. 48-6(a)(3) are identical to the grounds for terminating his parental rights under subdivision (6) of former G.S. 7A-289.32 (see now this section). While termination of a putative father's rights may precede an adoption petition, prior termination of his rights under this Chapter is not necessary if, under the applicable provisions of Chapter 48, his consent to the adoption is not necessary; his parental rights are then terminated by the final order of adoption under G.S. 48-23. In re Clark, 95 N.C. App. 1, 381 S.E.2d 835 (1989), rev'd on other grounds, 327 N.C. 61, 393 S.E.2d 791 (1990).

Under subdivision (3) of this section as it read prior to amendment in 1985, petitioner had to prove the absence of both substantial progress and positive response in order to justify terminating respondents' parental rights. In re Harris, 87 N.C. App. 179, 360 S.E.2d 485 (1987).

"Willful Abandonment" Compared. — Although the breadth of "willful abandonment" should often encompass "willfully leaving" a child in foster care, the broad finding of willful abandonment is not essential to the more limited determination required under subdivision (3) of this section. In re Harris, 87 N.C. App. 179, 360 S.E.2d 485 (1987).

"Willful" Defined. — In the context of a termination based on willful abandonment, the word "willful" connotes purpose and deliberation; however, under this section willfulness is something less than willful abandonment. In re Nolen, 117 N.C. App. 693, 453 S.E.2d 220 (1995).

Under former G.S. 7A-289.32 (see now this section), willfulness means something less than willful abandonment. In re Oghenekevebe, 123 N.C. App. 434, 473 S.E.2d 393 (1996).

"Willfulness" when terminating parental rights on the grounds of G.S. 7B-1111(a)(2), is something less than "willful" abandonment, is not precluded even if the respondent has made some efforts to regain custody of the children, and may be found where the parent, recognizing her inability to care for the children, voluntarily leaves the children in foster care. In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1, 2004 N.C. App. LEXIS 129 (2004).

Incarceration of respondent, standing alone, neither precludes nor requires finding the respondent willfully left a child in foster care. In re Harris, 87 N.C. App. 179, 360 S.E.2d 485 (1987).

In a termination of parental rights proceeding, the trial court's findings were not sufficient to support its conclusion that a father willfully left his child in foster care for more than 12 months without making reasonable progress to correct the conditions which led to the child's removal under G.S. 7B-1111(2), because there were no findings as to the father's progress or lack thereof during the relevant 12-month period before the termination petition was filed, and the father had been incarcerated during those 12 months and had no involvement in the events which led to the child's removal. In re Shermer, 156 N.C. App. 281, 576 S.E.2d 403, 2003 N.C. App. LEXIS 112 (2003).

Failure to Show Progress. — A court cannot terminate respondents' parental rights under subdivision (3) of former G.S. 7A-289.32 (see now this section) absent the necessary additional conclusion and supporting findings that respondents failed to show substantial progress (now reasonable progress under the circumstances) in correcting the conditions leading to the removal of their children. In re Harris, 87 N.C. App. 179, 360 S.E.2d 485 (1987).

The trial court did not abuse its discretion in concluding that it was in the nine-year-old child's best interests that respondents' parental rights be terminated where voluminous evidence in the record documented the child's special needs, and his mother' unwillingness to meet them, where the evidence supported a finding that the father abused the child, refused to seek counseling to address his emotional problems, and willfully left the child in foster care for more than 12 months without making reasonable progress toward reunification, and where neither parent had contributed financially to the child for many months. In re McMillon, 143 N.C. App. 402, 546 S.E.2d 169, 2001 N.C. App. LEXIS 293 (2001).

The evidence and the trial court's findings regarding respondent's substance abuse did not support the conclusion that mother had failed to make "reasonable progress under the circumstances in correcting those conditions which led to the removal of the child" to foster care, as required by former G.S. 7A-789.32(3), where there was no evidence that the mother had used drugs for over two years, and evidence showed that she had successfully completed drug treatment, including random drug screens, attended Narcotics Anonymous, maintaining contact with her sponsor, and currently worked at a hospital, which required a drug screen before hiring her. In re Pierce, 146 N.C. App. 641, 554 S.E.2d 25 (2001), affirmed, 356 N.C. 68, 565 S.E.2d 81 (2002).

In a case in which after the Department of Social Services had filed a petition alleging that children were abused and neglected as a result of being placed with their grandfather, with whom their mother had placed them when the mother was sent to prison, mother and the children's father stipulated to findings of neglect, leading to the children's transfer to the Department's custody, and where at the time the petition was filed, the mother was living with a boyfriend, and did practically nothing to regain custody, not even attending the termination hearing, there was clear, cogent and convincing evidence to support the trial court's finding that the mother had left the children in foster care for a year without making reasonable progress in correcting the conditions that led to the children's placement in the first place. In re Frasher, 147 N.C. App. 513, 555 S.E.2d 379, 2001 N.C. App. LEXIS 1191 (2001).

Trial court's findings were supported by evidence that the mother left her three children in foster care for over a year without showing reasonable progress; her fourth child's treatment and status were clearly relevant to show neglect. In re Johnston, 151 N.C. App. 728, 567 S.E.2d 219, 2002 N.C. App. LEXIS 866 (2002).

Trial court's finding that parents willfully left their son in foster care for more than 12 months without showing reasonable progress in correcting the conditions which resulted in the removal of their son was supported by clear, cogent, and convincing evidence where: (1) the mother's attendance at a one-day workshop did not evidence any real effort; (2) the mother steadfastly refused to participate in counseling and would not agree to change her methods of disciplining her son, which included whipping her son with a belt to the extent that marks and bruises resulted; and (3) the father completed an anger management class, but he had only a limited understanding of the concepts presented. In re Baker, 158 N.C. App. 491, 581 S.E.2d 144, 2003 N.C. App. LEXIS 1194 (2003).

Termination of mother's parental rights by the trial court was affirmed, as the mother willfully left her juvenile child in foster care after the juvenile was adjudicated as neglected and dependent for more than 12 months, without showing the trial court reasonable progress under her circumstances. In re Clark, 159 N.C. App. 75, 582 S.E.2d 657, 2003 N.C. App. LEXIS 1444 (2003).

Despite some efforts to comply with a trial court's order and Department of Social Service requirements shortly before the termination of parental rights proceeding, a mother's parental rights were terminated regardless of her good intentions where there was sufficient evidence to support the trial court's finding of her lack of progress during the year preceding the Department's petition to terminate her parental rights under G.S. 7B-1111(a)(2) for wilful abandonment; mother's failure to attend therapy sessions, her acts in repeatedly upsetting the child, leaving the child in foster care, failing to show sufficient parental skills, and failing to comply with a prohibition of having unrelated males in the home supported the order terminating the mother's parental rights. In re B.S.D.S., 163 N.C. App. 540, 594 S.E.2d 89, 2004 N.C. App. LEXIS 404 (2004).

Mother's parental rights were terminated, pursuant to G.S. 7B-1111(a)(2), because the mother willfully left her children in foster care for over 12 months, and clear, cogent, and convincing evidence demonstrated that the mother had not made reasonable progress to correct the conditions which led to the removal of the children as the mother failed to comply with a case plan in that she did not complete substance abuse programs, pursue a General Education Degree, complete parenting classes, or obtain employment. In re O.C., 171 N.C. App. 457, 615 S.E.2d 391, 2005 N.C. App. LEXIS 1272 (2005), cert. denied, — N.C. —, 623 S.E.2d 587 (2005).

Evidence was competent to support termination of the mother's parental rights pursuant to G.S. 7B-1111(a)(2) where the finding indicated that the mother willfully left the children in foster care placement outside the home for more than 12 months without showing that reasonable progress had been made to correct those conditions which led to the removal of the children. In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639, 2005 N.C. App. LEXIS 797 (2005).

Finding of any one of the grounds enumerated in G.S. 7B-1111 was sufficient to terminate respondent's parental rights, and a trial court's conclusion of law which stated: "The father has willfully left the child in foster care for more than twelve (12) months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the child" was a sufficient basis to terminate the father's parental rights. In re S.B.M., 173 N.C. App. 634, 619 S.E.2d 583, 2005 N.C. App. LEXIS 2115 (2005).

Finding of any one of the grounds enumerated in G.S. 7B-1111 was sufficient to terminate respondent's parental rights, and a trial court's conclusion of law which stated: "The father has willfully left the child in foster care for more than twelve (12) months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the child" was a sufficient basis to terminate the father's parental rights. In re S.B.M., 173 N.C. App. 634, 619 S.E.2d 583, 2005 N.C. App. LEXIS 2115 (2005).

Department of Social Services failed to present clear, cogent, and convincing evidence that defendant willfully left the children in foster care for more than 12 months without making reasonable progress toward remedying the conditions that led to their removal where, inter alia, the Department never entered into a case plan against which the trial court could have measured the father's progress, the father attempted to remedy the issue of the children's failure to receive letters the father sent, and there was no evidence to support a finding that the father was ordered not to have contact with the children pursuant to a probation violation order. In re C.W., — N.C. App. —, 641 S.E.2d 725, 2007 N.C. App. LEXIS 596 (2007).

There was sufficient evidence that a mother had willfully left a child in foster care for more than 12 months without showing reasonable progress under the circumstances in correcting those conditions that led to the removal of the child under G.S. 7B-1111(a)(2), even though the mother completed group anger management therapy, as she did not attend individual therapy as required by the trial court's order, and she had been convicted of communicating threats. In re T.M., — N.C. App. —, 643 S.E.2d 471, 2007 N.C. App. LEXIS 802 (2007).

Time Period for Reasonable Progress. — The 12-month standard in former G.S. 7A-289.32(3) for determining whether a parent has made reasonable progress in correcting the conditions that led to the removal of the parent's child refers to the 12-month period prior to the filing of the petition to terminate parental rights. In re Pierce, 356 N.C. 68, 565 S.E.2d 81, 2002 N.C. LEXIS 547 (2002).

Where the trial court relied upon the incorrect standard when it found that grounds existed to terminate the mother's parental rights under G.S. 7B-1111(a)(2), a provision that provided that termination could occur if the mother willfully left the children in foster care or placement outside them home for more than 12 months without making reasonable progress in 12 months, the error was harmless, as grounds also existed for termination for neglect under G.S. 7B-1111(a)(1) and for willful abandonment under G.S. 7B-1111(a)(7). In re C.L.C., 171 N.C. App. 438, 615 S.E.2d 704, 2005 N.C. App. LEXIS 1316 (2005), aff'd, 360 N.C. 475, 628 S.E.2d 760 (2006).

Diligence of DSS. — While the affidavit of the Department of Social Services (DSS) for service by publication under former G.S. 7A-289.27 may evidence the "due diligence" necessary for service under that statute, DSS's "due diligence" in serving its petition did not determine whether it made "diligent efforts" to encourage and counsel family relationships for two consecutive years (now 12 months) prior to termination under subdivision (3) of this section. In re Harris, 87 N.C. App. 179, 360 S.E.2d 485 (1987).

Department of Social Service's lone attempt merely to contact incarcerated father hardly approached the requisite diligent efforts to strengthen family ties. In re Harris, 87 N.C. App. 179, 360 S.E.2d 485 (1987).

Showing of Fault Not Required. — A finding of willfulness under this section does not require a showing of fault on the part of the parent; willfulness may be found where the parent, recognizing her inability to care for the child, voluntarily leaves the child in foster care; therefore, where respondent had been afforded almost double the statutory 18-month period in which to demonstrate her willingness to correct the conditions which led to the removal of her children, her failure to do so supported a finding of willfulness regardless of her good intentions. Buncombe County Dep't of Social Servs. v. Burks, 92 N.C. App. 662, 375 S.E.2d 676 (1989).

A finding of willfulness does not require a showing of fault by the parent. In re Oghenekevebe, 123 N.C. App. 434, 473 S.E.2d 393 (1996).

Effect of Counsel's Advice upon Issue of Willfulness. — Where counsel's testimony at respondent/mother's termination hearing affirmed her desire to obtain custody of her children, such testimony negated any prejudicial effect counsel's prior recommendation to mother to leave her children in foster care may have had on the issue of her willfulness in the matter. Buncombe County Dep't of Social Servs. v. Burks, 92 N.C. App. 662, 375 S.E.2d 676 (1989).

Effort to Regain Custody. — A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children. In re Nolen, 117 N.C. App. 693, 453 S.E.2d 220 (1995).

Leaving Held "Willful." — Evidence that although he was apparently not incarcerated during the entire two-year period being considered, father of one child never attempted to contact Department of Social Services (DSS) or child during that period, and that father of the other child had been incarcerated throughout the period, and similarly never contacted DSS, but did call his child once at her foster home, demonstrated that respondents' leaving their children in foster care was "willful." In re Harris, 87 N.C. App. 179, 360 S.E.2d 485 (1987).

Where the record showed that although respondent initially participated in programs designed to improve her situation, she had largely abandoned these efforts, she had not followed through on her program of vocational training, and when the petition in the case was filed, respondent had been traveling, her visitation with the children had been infrequent, and her social worker had difficulty in contacting her, the evidence supported a finding of willfulness under this section. Buncombe County Dep't of Social Servs. v. Burks, 92 N.C. App. 662, 375 S.E.2d 676 (1989).

Where respondent entered several service agreements with DSS since her children were removed yet did not enroll in and complete the Step One program; attended substance abuse counseling only sporadically; did not attend AA meetings regularly; did not complete parenting classes; did not abstain from the use of alcohol; failed to keep DSS informed of where she was living so that DSS could contact her about the children; showed up for visits smelling of alcohol and appearing intoxicated; numerous police officers responded to disturbance calls at respondent's residence; and respondent had more than three and one-half times the statutory period of twelve months in which to take steps to improve her situation, respondent's behavior supported a finding of willfulness. In re Nolen, 117 N.C. App. 693, 453 S.E.2d 220 (1995).

Even though respondent attempted to regain custody of her child, willfulness could still be found under former G.S. 7A-289.32(3) because the child was left in foster care for over twelve months and respondent did not show reasonable progress or a positive response toward the diligent efforts of the Department of Social Services. In re Oghenekevebe, 123 N.C. App. 434, 473 S.E.2d 393 (1996).

Evidence clearly and convincingly established that mentally ill mother willfully left her child in foster care for more than 12 months without showing reasonable progress to correct the conditions which led to the child's placement when she was unwilling to accept any responsibility for her situation and would not appropriately interact with her child. In re Fletcher, 148 N.C. App. 228, 558 S.E.2d 498, 2002 N.C. App. LEXIS 5 (2002).

There was clear, cogent, and convincing evidence to hold that a mother was willful in leaving her children in the custody of the Forsyth County Department of Social Services (DSS) for a time period well beyond the statutory period of 12 months where: (1) she entered a mental hospital, which caused the initial removal of her children, and she did not seek return of their custody for several year, (2) she refused to acknowledge and treat the very conditions that led to her loss of custody and even refused to acknowledge the medical diagnosis of her children; (3) this behavior indicted that, if returned to her custody, she would not pursue treatment for herself or her children; and (4) any attempt to set up a visitation with the children by the diligence of DSS or the children's guardian ad litem was frustrated at the mother's own behest. In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1, 2004 N.C. App. LEXIS 129 (2004).

Termination of parental rights of a mother and father were upheld on appeal, pursuant to G.S. 7B-1111, where the evidence showed that the parents were neglectful in leaving the child for over 12 months in foster care, failing to make any progress toward unification, and engaging in sexual abuse with the child. In re B.D., 174 N.C. App. 234, 620 S.E.2d 913, 2005 N.C. App. LEXIS 2387 (2005), cert. denied, — N.C. —, 628 S.E.2d 245 (2006).

Willful Leaving Not Shown. — Clear, cogent and convincing evidence did not show that the mother had willfully left her child in foster care without making reasonable progress toward resolving the problems which led to the child's foster care placement, in violation of G.S. 7B-1111(a)(2). In re Nesbitt, 147 N.C. App. 349, 555 S.E.2d 659, 2001 N.C. App. LEXIS 1168 (2001).

Evidence did not clearly and convincingly show father willfully left his child in foster care, under G.S. 7B-1111(a)(2), where he attended visits with the child, completed psychological evaluations and treatment, completed parenting classes and maintained contact with the Department of Social Services. In re Fletcher, 148 N.C. App. 228, 558 S.E.2d 498, 2002 N.C. App. LEXIS 5 (2002).

Where none of the court's findings touched directly on the mother's ability to provide her child with proper care, supervision and discipline, and the findings did not support the conclusion that the mother failed to make reasonable progress in correcting the conditions that led to the child's removal, the court erred in finding the mother willfully left the child in foster care for 12 months. In re J.T.W., 178 N.C. App. 678, 632 S.E.2d 237, 2006 N.C. App. LEXIS 1677 (2006), rev'd, 361 N.C. 341, 643 S.E.2d 579 (2007).

Failure to Adequately Consider Mother's Age. — In a termination of parental rights action, the trial court failed to adequately address the mother's age, in terms of whether the mother willfully left the child in foster care for 12-months prior to the filing of the petition. The mother's living in the same foster home as the child did not necessarily constitute willfully leaving the child in foster care. In re J.G.B., 177 N.C. App. 375, 628 S.E.2d 450, 2006 N.C. App. LEXIS 978 (2006).

VII. FAILURE TO ESTABLISH PATERNITY, LEGITIMATE CHILD, OR PROVIDE SUPPORT OR CARE.

What Must Be Proven Under Former § 7A-289.32(6). — The language of former G.S. 7A-289.32(6) dictates that the Department of Social Services must prove that respondents failed to take, not one, but any of the four actions listed in paragraphs a to d thereof. In re Harris, 87 N.C. App. 179, 360 S.E.2d 485 (1987).

Former G.S. 7A-289.32(6)(d) does not require a finding that the putative father had the means and ability to pay child support, it only requires a showing that he in fact did not provide substantial support or consistent care to the child or the mother. In re Hunt, 127 N.C. App. 370, 489 S.E.2d 428 (1997).

Knowledge of Child's Existence on Part of Father at Time of Filing Petition. — Section 48-6(a)(3) reflects the same legislative choices evident in the termination of a putative father's rights under former G.S. 7A-289.32(6); under neither statute is the illegitimate child's future welfare dependent on whether or not the putative father knows of the child's existence at the time the petition is filed. In re Clark, 95 N.C. App. 1, 381 S.E.2d 835 (1989), rev'd on other grounds, 327 N.C. 61, 393 S.E.2d 791 (1990).

Lack of Paternity or Legitimacy Must Be Proved as of Filing Date. — The only logical construction of former G.S. 7A-289.32(6) is that the Department of Social Services carries the burden of proving the lack of paternity or legitimacy as of the petition's filing date. In re Harris, 87 N.C. App. 179, 360 S.E.2d 485 (1987).

A county attorney's allegation of the respondents' "putative" fatherhood in the Department of Social Services' affidavit for publication was not clear, cogent and convincing evidence that respondents failed to comply with subdivision (6) of this section. In re Harris, 87 N.C. App. 179, 360 S.E.2d 485 (1987).

Personal Jurisdiction. — Personal jurisdiction did not require minimum contacts with the State in a petition to terminate the parental rights of a nonresident father of a child born out of wedlock who failed to establish paternity, legitimate his child, or provide substantial financial support or care to the child and mother. In re Baby Boy Dixon, 112 N.C. App. 248, 435 S.E.2d 352 (1993).

Termination Appropriate. — Where father failed to legitimate his child by judicial process, affidavit or marriage and he provided his child with less than $1000 over a three year period, the trial court did not err in terminating his parental rights. In re Hunt, 127 N.C. App. 370, 489 S.E.2d 428 (1997).

Because a trial court improperly interpreted a stipulation regarding legitimacy under G.S. 49-10, it erroneously found that the four factors in G.S. 7B-1111(a)(5) were satisfied; because there was insufficient evidence on the elements outside of the stipulation, a reversal was required. In re I.S., 170 N.C. App. 78, 611 S.E.2d 467, 2005 N.C. App. LEXIS 888 (2005).

Denial of an adoption agency's petition for the termination of a father's parental rights was reversed as the trial court did not find that the father, before the petition was filed, established paternity judicially, legitimated the child either through judicial process or marriage to the mother, or provided the mother with substantial financial support or consistent care. A Child's Hope, LLC v. Doe, 178 N.C. App. 96, 630 S.E.2d 673, 2006 N.C. App. LEXIS 1291 (2006).

VIII. FAILURE TO PAY SUPPORT REQUIRED BY DECREE OR AGREEMENT.

Proof Required Under Subdivision (5). — In a termination action under former G.S. 7A-289.32(5), based upon respondent's willful failure without justification to provide support, petitioner must prove the existence of a support order that was enforceable during the year before the termination petition was filed; consequently, because a proper decree for child support will be based on the supporting parent's ability to pay as well as the child's needs, there is no requirement that petitioner independently prove or that the termination order find as fact respondent's ability to pay support during the relevant statutory time period. In re Roberson, 97 N.C. App. 277, 387 S.E.2d 668 (1990).

Ability to Pay Shown. — Evidence was sufficient to show that father had the ability to pay some support during the six-month period preceding the filing of termination petition, despite his incarceration and his alleged medical disability. In re Becker, 111 N.C. App. 85, 431 S.E.2d 820 (1993).

Willful Failure to Pay Not Shown. — Where the trial court found that father had a serious drinking problem that impaired his ability to pay child support, and the court based its conclusion that father chose not to pay child support on its findings that father had decided to remain sober and commit himself to a business endeavor as the court reasoned he could have applied the same effort he applied to the business project to paying child support, these findings did not support a conclusion that respondent willfully failed to pay child support. Bost v. Van Nortwick, 117 N.C. App. 1, 449 S.E.2d 911 (1994).

Evidence of Inability to Pay. — In an action to terminate parental rights, a parent may present evidence to prove he was unable to pay child support in order to rebut a finding of willful failure to pay under former G.S. 7A-289.32(5). Bost v. Van Nortwick, 117 N.C. App. 1, 449 S.E.2d 911 (1994).

§ 7B-1112. Effects of termination order.

An order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the juvenile and of the juvenile to the parent arising from the parental relationship, except that the juvenile's right of inheritance from the juvenile's parent shall not terminate until a final order of adoption is issued. The parent is not thereafter entitled to notice of proceedings to adopt the juvenile and may not object thereto or otherwise participate therein:

(1) If the juvenile had been placed in the custody of or released for adoption by one parent to a county department of social services or licensed child-placing agency and is in the custody of the agency at the time of the filing of the petition or motion, including a petition or motion filed pursuant to G.S. 7B-1103(6), that agency shall, upon entry of the order terminating parental rights, acquire all of the rights for placement of the juvenile as the agency would have acquired had the parent whose rights are terminated released the juvenile to that agency pursuant to the provisions of Part 7 of Article 3 of Chapter 48 of the General Statutes, including the right to consent to the adoption of the juvenile.

(2) Except as provided in subdivision (1) above, upon entering an order terminating the parental rights of one or both parents, the court may place the juvenile in the custody of the petitioner or movant, or some other suitable person, or in the custody of the department of social services or licensed child-placing agency, as may appear to be in the best interests of the juvenile. (1977, c. 879, s. 8; 1983, c. 870, s. 3; 1995, c. 457, s. 5; 1998-202, s. 6; 1998-229, s. 11; 1999-456, s. 60; 2000-183, s. 12.)

Editor's Note. — This section was originally enacted as G.S. 7B-1111. It has been renumbered as this section at the direction of the Revisor of Statutes.

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

For note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

For article, "Coercive Governmental Intervention and the Family: A Comment on North Carolina's Proposed Standards," see 7 Campbell L. Rev. 145 (1984).

For 1984 survey, "Termination of Parental Rights: Putting Love in Its Place," see 63 N.C.L. Rev. 1177 (1985).

For comment, "Termination of Parental Rights," see 21 Wake Forest L. Rev. 431 (1986).

CASE NOTES

Editor's Note. — *Some of the following cases were decided prior to the enactment of this Chapter.*

No Standing to Bring Legitimation Action After Termination of Parental Rights. — Where father's parental rights had been terminated under G.S. 7B-1112 in 1999, he lacked standing to bring an action under G.S. 49-10, G.S. 49-11 to legitimate the same child to whom his parental rights had been terminated. Gorsuch v. Dees, 173 N.C. App. 223, 618 S.E.2d 747, 2005 N.C. App. LEXIS 1914 (2005).

Subsection (1) of former § 7A-289.33 (see now § 7B-1112) is an exception to the general grant of standing to seek custody under G.S. 50-13.1(a). Krauss v. Wayne County Dep't of Social Servs., 347 N.C. 371, 493 S.E.2d 428 (1997).

Subsection (1) of former G.S. 7A-289.33 (see now G.S. 7B-1112) is a narrow statute, intended to apply only to situations where the County Department of Social Services has custody and the parents' rights are later terminated. Krauss v. Wayne County Dep't of Social Servs., 347 N.C. 371, 493 S.E.2d 428 (1997).

Constitutionally Protected Interest in Children Lost by Termination. — After respondents' parental rights were permanently terminated, they no longer had any constitutionally protected interest in their four minor children. In re Montgomery, 77 N.C. App. 709, 336 S.E.2d 136 (1985).

No Standing to Seek Custody Following Termination of Rights. — Plaintiff did not have standing to seek custody of his biological children as an "other" person under G.S. 50-13.1(a) where his parental rights were previously terminated for neglect. Krauss v. Wayne County Dep't of Social Servs., 347 N.C. 371, 493 S.E.2d 428 (1997).

Rights of Department of Social Services. — Upon entry of an order terminating parental rights, the County Department of Social Services acquires the same rights that it would have acquired if the parent had consented to the adoption of that child under G.S. 48-9(a)(1). Krauss v. Wayne County Dep't of Social Servs., 347 N.C. 371, 493 S.E.2d 428 (1997).

Foster Parents. — In plaintiffs' action to obtain custody of a child placed in their home pursuant to a foster parent agreement, Court of Appeals erred in relying on this section as the controlling statute, since this section sets forth the effects of a court order terminating the parental rights of a natural parent on the grounds of abuse or neglect of a minor child, and such a court order was not involved, as the natural parents of the child had voluntarily released their parental rights and surrendered the child to defendant for adoptive placement; rather, the action was governed by G.S. 48-9.1. Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

Applied in In re Estate of Lunsford, 160 N.C. App. 125, 585 S.E.2d 245, 2003 N.C. App. LEXIS 1764 (2003); In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

§ 7B-1113: Repealed by Session Laws 2005-398, s. 18, effective October 1, 2005.

Editor's Note. — Session Laws 2005-398, s. 19, made the repeal of G.S. 7B-1113, effective October 1, 2005, and applicable to petitions or actions filed on or after that date.

ARTICLE 12.

Guardian Ad Litem Program.

§ 7B-1200. Office of Guardian ad Litem Services established.

There is established within the Administrative Office of the Courts an Office of Guardian ad Litem Services to provide services in accordance with G.S. 7B-601 to abused, neglected, or dependent juveniles involved in judicial proceedings and to assure that all participants in these proceedings are adequately trained to carry out their responsibilities. Each local program shall consist of volunteer guardians ad litem, at least one program attorney, a program coordinator who is a paid State employee, and any clerical staff as the Administrative Office of the Courts in consultation with the local program deems necessary. The Administrative Office of the Courts shall adopt rules and regulations necessary and appropriate for the administration of the program. (1983, c. 761, s. 160; 1987 (Reg. Sess., 1988), c. 1037, s. 32; c. 1090, s. 7; 1998-202, s. 6.)

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

§ 7B-1201. Implementation and administration.

(a) Local Programs. — The Administrative Office of the Courts shall, in cooperation with each chief district court judge and other personnel in the district, implement and administer the program mandated by this Article. Where a local program has not yet been established in accordance with this Article, the district court district shall operate a guardian ad litem program approved by the Administrative Office of the Courts.

(b) Advisory Committee Established. — The Director of the Administrative Office of the Courts shall appoint a Guardian ad Litem Advisory Committee consisting of at least five members to advise the Office of Guardian ad Litem Services in matters related to this program. The members of the Advisory Committee shall receive the same per diem and reimbursement for travel expenses as members of State boards and commissions generally. (1983, c. 761, s. 160; 1987 (Reg. Sess., 1988), c. 1037, s. 33; 1998-202, s. 6.)

§ 7B-1202. Conflict of interest or impracticality of implementation.

If a conflict of interest prohibits a local program from providing representation to an abused, neglected, or dependent juvenile, the court may appoint any member of the district bar to represent the juvenile. If the Administrative Office of the Courts determines that within a particular district court district the implementation of a local program is impractical, or that an alternative plan meets the conditions of G.S. 7B-1203, the Administrative Office of the Courts shall waive the establishment of the program within the district. (1983, c. 761, s. 160; 1987 (Reg. Sess., 1988), c. 1037, s. 34; c. 1090, s. 8; 1998-202, s. 6.)

§ 7B-1203. Alternative plans.

A district court district shall be granted a waiver from the implementation of a local program if the Administrative Office of the Courts determines that the following conditions are met:

(1) An alternative plan has been developed to provide adequate guardian ad litem services for every juvenile consistent with the duties stated in G.S. 7B-601; and

(2) The proposed alternative plan will require no greater proportion of State funds than the district court district's abuse and neglect caseload represents to the State's abuse and neglect caseload. Computation of abuse and neglect caseloads shall include such factors as the juvenile population, number of substantiated abuse and neglect reports, number of abuse and neglect petitions, number of abused and neglected juveniles in care to be reviewed pursuant to G.S. 7B-906, nature of the district's district court caseload, and number of petitions to terminate parental rights.

When an alternative plan is approved pursuant to this section, the Administrative Office of the Courts shall retain authority to monitor implementation of the said plan in order to assure compliance with the requirements of this Article and G.S. 7B-601. In any district court district where the Administrative Office of the Courts determines that implementation of an alternative plan is not in compliance with the requirements of this section, the Administrative Office of the Courts may implement and administer a program authorized by this Article. (1983, c. 761, s. 160; 1987 (Reg. Sess., 1988), c. 1037, s. 35; 1998-202, s. 6.)

§ 7B-1204. Civil liability of volunteers.

Any volunteer participating in a judicial proceeding pursuant to the program authorized by this Article shall not be civilly liable for acts or omissions committed in connection with the proceeding if the volunteer acted in good faith and was not guilty of gross negligence. (1983, c. 761, s. 160; 1998-202, s. 6.)

ARTICLE 13.

Prevention of Abuse and Neglect.

§ 7B-1300. Purpose.

It is the expressed intent of this Article to make the prevention of abuse and neglect, as defined in G.S. 7B-101, a priority of this State and to establish the Children's Trust Fund as a means to that end. (1983, c. 894, s. 1; 1998-202, s. 6.)

Cross References. — As to establishment of School-Based Child and Family Team Initiative, see note under G.S. 143B-366.

Editor's Note. — Session Laws 1998-202, s.

37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

§ 7B-1301. Program on Prevention of Abuse and Neglect.

(a) The State Board of Education, through the Department of Public Instruction, shall implement the Program on Prevention of Abuse and Neglect. The Department of Public Instruction, subject to the approval of the State Board of Education, shall provide the staff and support services for implementing this program.

(b) In order to carry out the purposes of this Article:

(1) The Department of Public Instruction shall review applications and make recommendations to the State Board of Education concerning the awarding of contracts under this Article.

(2) The State Board of Education shall contract with public or private nonprofit organizations, agencies, schools, or with qualified individuals to operate community-based educational and service programs designed to prevent the occurrence of abuse and neglect. Every contract entered into by the State Board of Education shall contain provisions that at least twenty-five percent (25%) of the total funding required for a program be provided by the administering organization in the form of in-kind or other services and that a mechanism for evaluation of services provided under the contract be included in the services to be performed. In addition, every proposal to the Department of Public Instruction for funding under this Article shall include assurances that the proposal has been forwarded to the local department of social services for comment so that the Department of Public Instruction may consider coordination and duplication of effort on the local level as criteria in making recommendations to the State Board of Education.

(3) The State Board of Education, with the assistance of the Department of Public Instruction, shall develop appropriate guidelines and criteria for awarding contracts under this Article. These criteria shall include, but are not limited to: documentation of need within the proposed geographical impact area; diversity of geographical areas of programs funded under this Article; demonstrated effectiveness of the proposed strategy or program for preventing abuse and neglect; reasonableness of implementation plan for achieving stated objectives; utilization of community resources including volunteers; provision for an evaluation component that will provide outcome data; plan for dissemination of the program for implementation in other communities; and potential for future funding from private sources.

(4) The State Board of Education, with the assistance of the Department of Public Instruction, shall develop guidelines for regular monitoring of contracts awarded under this Article in order to maximize the investments in prevention programs by the Children's Trust Fund and to establish appropriate accountability measures for administration of contracts.

(5) The State Board of Education shall develop a State plan for the prevention of abuse and neglect for submission to the Governor, the President of the Senate, and the Speaker of the House of Representatives.

(c) To assist in implementing this Article, the State Board of Education may accept contributions, grants, or gifts in cash or otherwise from persons, associations, or corporations. All monies received by the State Board of Education from contributions, grants, or gifts and not through appropriation by the General Assembly shall be deposited in the Children's Trust Fund. Disbursements of the funds shall be on the authorization of the State Board of Education or that Board's duly authorized representative. In order to maintain an effective expenditure and revenue control, the funds are subject in all respects to State law and regulations, but no appropriation is required to permit expenditure of the funds.

(d) Programs contracted for under this Article are intended to prevent abuse and neglect of juveniles. Abuse and neglect prevention programs are defined to be those programs and services which impact on juveniles and families before any substantiated incident of abuse or neglect has occurred. These programs may include, but are not limited to:

(1) Community-based educational programs on prenatal care, perinatal bonding, child development, basic child care, care of children with special needs, and coping with family stress; and

(2) Community-based programs relating to crisis care, aid to parents, and support groups for parents and their children experiencing stress within the family unit.

(e) No more than twenty percent (20%) of each year's total awards may be utilized for funding State-level programs to coordinate community-based programs. (1983, c. 894, s. 1; 1993 (Reg. Sess., 1994), c. 677, s. 1; 1998-202, s. 6.)

Editor's Note. — Session Laws 2004-124, s. 7.33(a) provides: "The Department of Public Instruction, in carrying out its duties and responsibilities under Article 13 of Chapter 7B of the General Statutes, shall collaborate with the Division of Social Services and with statewide child abuse and neglect prevention experts with regards to the following:

"(1) Best practices in child abuse and neglect prevention programs and policies.

"(2) Exploration of additional revenue sources for the protection of children in this State.

"(3) Educational programs to ensure statewide awareness of the Children's Trust Fund, and its purpose and mission."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

§ 7B-1302. Children's Trust Fund.

(a) There is established a fund to be known as the "Children's Trust Fund," in the Department of State Treasurer, which shall be funded by a portion of the marriage license fee under G.S. 161-11.1 and a portion of the special license plate fee under G.S. 20-81.12. The money in the Fund shall be used by the State Board of Education to fund abuse and neglect prevention programs so authorized by this Article.

(b) The Department of Public Instruction shall report annually on revenues and expenditures of the Children's Trust Fund to the Joint Legislative Commission on Governmental Operations. (1983, c. 894, s. 1; 1998-202, s. 6; 1999-277, s. 5; 2004-124, s. 7.33(b))

Editor's Note. — Session Laws 2004-124, s. 7.33(b), effective July 1, 2004, has been codified as subsection (b) of this section at the direction of the Revisor of Statutes.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

ARTICLE 14.

North Carolina Child Fatality Prevention System.

§ 7B-1400. Declaration of public policy.

The General Assembly finds that it is the public policy of this State to prevent the abuse, neglect, and death of juveniles. The General Assembly further finds that the prevention of the abuse, neglect, and death of juveniles is a community responsibility; that professionals from disparate disciplines have responsibilities for children or juveniles and have expertise that can promote their safety and well-being; and that multidisciplinary reviews of the abuse, neglect, and death of juveniles can lead to a greater understanding of the causes and methods of preventing these deaths. It is, therefore, the intent of the General Assembly, through this Article, to establish a statewide multidisciplinary, multiagency child fatality prevention system consisting of the State Team established in G.S. 7B-1404 and the Local Teams established in G.S. 7B-1406. The purpose of the system is to assess the records of selected cases in which children are being served by child protective services and the records of all deaths of children in North Carolina from birth to age 18 in order to (i) develop a communitywide approach to the problem of child abuse and neglect, (ii) understand the causes of childhood deaths, (iii) identify any gaps or deficiencies that may exist in the delivery of services to children and their families by public agencies that are designed to prevent future child abuse, neglect, or death, and (iv) make and implement recommendations for changes to laws, rules, and policies that will support the safe and healthy development of our children and prevent future child abuse, neglect, and death. (1991, c. 689, s. 233(a); 1993, c. 321, s. 285(a); 1998-202, s. 6.)

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

§ 7B-1401. Definitions.

The following definitions apply in this Article:

(1) Additional Child Fatality. — Any death of a child that did not result from suspected abuse or neglect and about which no report of abuse or neglect had been made to the county department of social services within the previous 12 months.

(2) Local Team. — A Community Child Protection Team or a Child Fatality Prevention Team.

(3) State Team. — The North Carolina Child Fatality Prevention Team.

(4) Task Force. — The North Carolina Child Fatality Task Force.

(5) Team Coordinator. — The Child Fatality Prevention Team Coordinator. (1991, c. 689, s. 233(a); 1993, c. 321, s. 285(a); 1998-202, s. 6.)

Editor's Note. — Session Laws 2007-191, s. 1, provides: "The North Carolina Child Fatality Task Force shall study and analyze the feasibility of the use of safety restraints by passengers on school buses and school activity buses. In conducting the study, the Task Force shall consider:

"(1) A determination whether safety restraints are necessary to enhance the safety of passengers on school buses;

"(2) An evaluation of the cost of requiring passenger restraint systems on buses to be purchased, leased, or contracted for use on or after July 1, 2009;

"(3) An evaluation of the cost of installing passenger restraint systems on buses currently owned and operated by local boards of education; and

"(4) The manner by which the local boards of education may enforce the use of safety restraints by passengers on school buses and school activity buses.

"The Task Force shall report its findings and recommendations, including recommended legislation to the 2008 Regular Session of the 2007 General Assembly on or before May 1, 2008."

§ 7B-1402. Task Force — creation; membership; vacancies.

(a) There is created the North Carolina Child Fatality Task Force within the Department of Health and Human Services for budgetary purposes only.

(b) The Task Force shall be composed of 35 members, 11 of whom shall be ex officio members, four of whom shall be appointed by the Governor, 10 of whom shall be appointed by the Speaker of the House of Representatives, and 10 of whom shall be appointed by the President Pro Tempore of the Senate. The ex officio members other than the Chief Medical Examiner shall be nonvoting members and may designate representatives from their particular departments, divisions, or offices to represent them on the Task Force. The members shall be as follows:

(1) The Chief Medical Examiner;
(2) The Attorney General;
(3) The Director of the Division of Social Services;
(4) The Director of the State Bureau of Investigation;
(5) The Director of the Division of Maternal and Child Health of the Department of Health and Human Services;
(6) The Director of the Governor's Youth Advocacy and Involvement Office;
(7) The Superintendent of Public Instruction;
(8) The Chairman of the State Board of Education;
(9) The Director of the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services;
(10) The Secretary of the Department of Health and Human Services;
(11) The Director of the Administrative Office of the Courts;
(12) A director of a county department of social services, appointed by the Governor upon recommendation of the President of the North Carolina Association of County Directors of Social Services;
(13) A representative from a Sudden Infant Death Syndrome counseling and education program, appointed by the Governor upon recommendation of the Director of the Division of Maternal and Child Health of the Department of Health and Human Services;
(14) A representative from the North Carolina Child Advocacy Institute, appointed by the Governor upon recommendation of the President of the Institute;
(15) A director of a local department of health, appointed by the Governor upon the recommendation of the President of the North Carolina Association of Local Health Directors;
(16) A representative from a private group, other than the North Carolina Child Advocacy Institute, that advocates for children, appointed by the Speaker of the House of Representatives upon recommendation of private child advocacy organizations;
(17) A pediatrician, licensed to practice medicine in North Carolina, appointed by the Speaker of the House of Representatives upon recommendation of the North Carolina Pediatric Society;

(18) A representative from the North Carolina League of Municipalities, appointed by the Speaker of the House of Representatives upon recommendation of the League;

(18a) A representative from the North Carolina Domestic Violence Commission, appointed by the Speaker of the House of Representatives upon recommendation of the Director of the Commission;

(19) One public member, appointed by the Speaker of the House of Representatives;

(20) A county or municipal law enforcement officer, appointed by the President Pro Tempore of the Senate upon recommendation of organizations that represent local law enforcement officers;

(21) A district attorney, appointed by the President Pro Tempore of the Senate upon recommendation of the President of the North Carolina Conference of District Attorneys;

(22) A representative from the North Carolina Association of County Commissioners, appointed by the President Pro Tempore of the Senate upon recommendation of the Association;

(22a) A representative from the North Carolina Coalition Against Domestic Violence, appointed by the President Pro Tempore of the Senate upon recommendation of the Executive Director of the Coalition;

(23) One public member, appointed by the President Pro Tempore of the Senate; and

(24) Five members of the Senate, appointed by the President Pro Tempore of the Senate, and five members of the House of Representatives, appointed by the Speaker of the House of Representatives.

(c) All members of the Task Force are voting members. Vacancies in the appointed membership shall be filled by the appointing officer who made the initial appointment. Terms shall be two years. The members shall elect a chair who shall preside for the duration of the chair's term as member. In the event a vacancy occurs in the chair before the expiration of the chair's term, the members shall elect an acting chair to serve for the remainder of the unexpired term. (1991, c. 689, s. 233(a); 1991 (Reg. Sess., 1992), c. 900, s. 169(b); 1993, c. 321, s. 285(a); 1993 (Reg. Sess., 1994), c. 769, s. 27.8(d); 1996, 2nd Ex. Sess., c. 17, s. 3.2; 1997-443, s. 11A.98; 1997-456, s. 27; 1998-202, s. 6; 1998-212, s. 12.44(a), (b); 2004-186, s. 5.1.)

Editor's Note. — Session Laws 2004-186, s. 5.2, provides: "The public members serving on the Child Fatality Task Force on the effective date of this act shall complete their current terms. The new appointments contained in Section 1 of this act shall take effect at the end of those terms."

§ 7B-1403. Task Force — duties.

The Task Force shall:

(1) Undertake a statistical study of the incidences and causes of child deaths in this State and establish a profile of child deaths. The study shall include (i) an analysis of all community and private and public agency involvement with the decedents and their families prior to death, and (ii) an analysis of child deaths by age, cause, and geographic distribution;

(2) Develop a system for multidisciplinary review of child deaths. In developing such a system, the Task Force shall study the operation of existing Local Teams. The Task Force shall also consider the feasibility and desirability of local or regional review teams and, should it determine such teams to be feasible and desirable, develop guidelines for the operation of the teams. The Task Force shall also examine the laws, rules, and policies relating to confidentiality of and access to

information that affect those agencies with responsibilities for children, including State and local health, mental health, social services, education, and law enforcement agencies, to determine whether those laws, rules, and policies inappropriately impede the exchange of information necessary to protect children from preventable deaths, and, if so, recommend changes to them;

(3) Receive and consider reports from the State Team; and

(4) Perform any other studies, evaluations, or determinations the Task Force considers necessary to carry out its mandate. (1991, c. 689, s. 233(a); 1996, 2nd Ex. Sess., c. 17, s. 3.2; 1998-202, s. 6; 1998-212, s. 12.44(a), (c).)

§ 7B-1404. State Team — creation; membership; vacancies.

(a) There is created the North Carolina Child Fatality Prevention Team within the Department of Health and Human Services for budgetary purposes only.

(b) The State Team shall be composed of the following 11 members of whom nine members are ex officio and two are appointed:

(1) The Chief Medical Examiner, who shall chair the State Team;

(2) The Attorney General;

(3) The Director of the Division of Social Services, Department of Health and Human Services;

(4) The Director of the State Bureau of Investigation;

(5) The Director of the Division of Maternal and Child Health of the Department of Health and Human Services;

(6) The Superintendent of Public Instruction;

(7) The Director of the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, Department of Health and Human Services;

(8) The Director of the Administrative Office of the Courts;

(9) The pediatrician appointed pursuant to G.S. 7B-1402(b) to the Task Force;

(10) A public member, appointed by the Governor; and

(11) The Team Coordinator.

The ex officio members other than the Chief Medical Examiner may designate a representative from their departments, divisions, or offices to represent them on the State Team.

(c) All members of the State Team are voting members. Vacancies in the appointed membership shall be filled by the appointing officer who made the initial appointment. (1991, c. 689, s. 233(a); 1993, c. 321, s. 285(a); 1997-443, s. 11A.99; 1997-456, s. 27; 1998-202, s. 6.)

§ 7B-1405. State Team — duties.

The State Team shall:

(1) Review current deaths of children when those deaths are attributed to child abuse or neglect or when the decedent was reported as an abused or neglected juvenile pursuant to G.S. 7B-301 at any time before death;

(2) Report to the Task Force during the existence of the Task Force, in the format and at the time required by the Task Force, on the State Team's activities and its recommendations for changes to any law, rule, and policy that would promote the safety and well-being of children;

(3) Upon request of a Local Team, provide technical assistance to the Team;

(4) Periodically assess the operations of the multidisciplinary child fatality prevention system and make recommendations for changes as needed;

(5) Work with the Team Coordinator to develop guidelines for selecting child deaths to receive detailed, multidisciplinary death reviews by Local Teams that review cases of additional child fatalities; and

(6) Receive reports of findings and recommendations from Local Teams that review cases of additional child fatalities and work with the Team Coordinator to implement recommendations. (1991, c. 689, s. 233(a); 1993, c. 321, s. 285(a); 1997-443, s. 11A.99; 1997-456, s. 27; 1998-202, s. 6.)

§ 7B-1406. Community Child Protection Teams; Child Fatality Prevention Teams; creation and duties.

(a) Community Child Protection Teams are established in every county of the State. Each Community Child Protection Team shall:

(1) Review, in accordance with the procedures established by the director of the county department of social services under G.S. 7B-1409:
  a. Selected active cases in which children are being served by child protective services; and
  b. Cases in which a child died as a result of suspected abuse or neglect, and
    1. A report of abuse or neglect has been made about the child or the child's family to the county department of social services within the previous 12 months, or
    2. The child or the child's family was a recipient of child protective services within the previous 12 months.

(2) Submit annually to the board of county commissioners recommendations, if any, and advocate for system improvements and needed resources where gaps and deficiencies may exist.

In addition, each Community Child Protection Team may review the records of all additional child fatalities and report findings in connection with these reviews to the Team Coordinator.

(b) Any Community Child Protection Team that determines it will not review additional child fatalities shall notify the Team Coordinator. In accordance with the plan established under G.S. 7B-1408(1), a separate Child Fatality Prevention Team shall be established in that county to conduct these reviews. Each Child Fatality Prevention Team shall:

(1) Review the records of all cases of additional child fatalities.

(2) Submit annually to the board of county commissioners recommendations, if any, and advocate for system improvements and needed resources where gaps and deficiencies may exist.

(3) Report findings in connection with these reviews to the Team Coordinator.

(c) All reports to the Team Coordinator under this section shall include:

(1) A listing of the system problems identified through the review process and recommendations for preventive actions;

(2) Any changes that resulted from the recommendations made by the Local Team;

(3) Information about each death reviewed; and

(4) Any additional information requested by the Team Coordinator. (1993, c. 321, s. 285(a); 1998-202, s. 6.)

§ 7B-1407. Local Teams; composition.

(a) Each Local Team shall consist of representatives of public and nonpublic agencies in the community that provide services to children and their families and other individuals who represent the community. No single team shall encompass a geographic or governmental area larger than one county.

(b) Each Local Team shall consist of the following persons:

(1) The director of the county department of social services and a member of the director's staff;

(2) A local law enforcement officer, appointed by the board of county commissioners;

(3) An attorney from the district attorney's office, appointed by the district attorney;

(4) The executive director of the local community action agency, as defined by the Department of Health and Human Services, or the executive director's designee;

(5) The superintendent of each local school administrative unit located in the county, or the superintendent's designee;

(6) A member of the county board of social services, appointed by the chair of that board;

(7) A local mental health professional, appointed by the director of the area authority established under Chapter 122C of the General Statutes;

(8) The local guardian ad litem coordinator, or the coordinator's designee;

(9) The director of the local department of public health; and

(10) A local health care provider, appointed by the local board of health.

(c) In addition, a Local Team that reviews the records of additional child fatalities shall include the following five additional members:

(1) An emergency medical services provider or firefighter, appointed by the board of county commissioners;

(2) A district court judge, appointed by the chief district court judge in that district;

(3) A county medical examiner, appointed by the Chief Medical Examiner;

(4) A representative of a local child care facility or Head Start program, appointed by the director of the county department of social services; and

(5) A parent of a child who died before reaching the child's eighteenth birthday, to be appointed by the board of county commissioners.

(d) The Team Coordinator shall serve as an ex officio member of each Local Team that reviews the records of additional child fatalities. The board of county commissioners may appoint a maximum of five additional members to represent county agencies or the community at large to serve on any Local Team. Vacancies on a Local Team shall be filled by the original appointing authority.

(e) Each Local Team shall elect a member to serve as chair at the Team's pleasure.

(f) Each Local Team shall meet at least four times each year.

(g) The director of the local department of social services shall call the first meeting of the Community Child Protection Team. The director of the local department of health, upon consultation with the Team Coordinator, shall call the first meeting of the Child Fatality Prevention Team. Thereafter, the chair of each Local Team shall schedule the time and place of meetings, in consultation with these directors, and shall prepare the agenda. The chair shall schedule Team meetings no less often than once per quarter and often enough to allow adequate review of the cases selected for review. Within three months of election, the chair shall participate in the appropriate training developed under this Article. (1993, c. 321, s. 285(a); 1997-443, s. 11A.100; 1997-456, s. 27; 1997-506, s. 52; 1998-202, s. 6.)

§ 7B-1408. Child Fatality Prevention Team Coordinator; duties.

The Child Fatality Prevention Team Coordinator shall serve as liaison between the State Team and the Local Teams that review records of additional child fatalities and shall provide technical assistance to these Local Teams. The Team Coordinator shall:

(1) Develop a plan to establish Local Teams that review the records of additional child fatalities in each county.

(2) Develop model operating procedures for these Local Teams that address when public meetings should be held, what items should be addressed in public meetings, what information may be released in written reports, and any other information the Team Coordinator considers necessary.

(3) Provide structured training for these Local Teams at the time of their establishment, and continuing technical assistance thereafter.

(4) Provide statistical information on all child deaths occurring in each county to the appropriate Local Team, and assure that all child deaths in a county are assessed through the multidisciplinary system.

(5) Monitor the work of these Local Teams.

(6) Receive reports of findings, and other reports that the Team Coordinator may require, from these Local Teams.

(7) Report the aggregated findings of these Local Teams to each Local Team that reviews the records of additional child fatalities and to the State Team.

(8) Evaluate the impact of local efforts to identify problems and make changes. (1993, c. 321, s. 285(a); 1998-202, s. 6.)

§ 7B-1409. Community Child Protection Teams; duties of the director of the county department of social services.

In addition to any other duties as a member of the Community Child Protection Team, and in connection with the reviews under G.S. 7B-1406(a)(1), the director of the county department of social services shall:

(1) Assure the development of written operating procedures in connection with these reviews, including frequency of meetings, confidentiality policies, training of members, and duties and responsibilities of members;

(2) Assure that the Team defines the categories of cases that are subject to its review;

(3) Determine and initiate the cases for review;

(4) Bring for review any case requested by a Team member;

(5) Provide staff support for these reviews;

(6) Maintain records, including minutes of all official meetings, lists of participants for each meeting of the Team, and signed confidentiality statements required under G.S. 7B-1413, in compliance with applicable rules and law; and

(7) Report quarterly to the county board of social services, or as required by the board, on the activities of the Team. (1993, c. 321, s. 285(a); 1998-202, s. 6.)

§ 7B-1410. Local Teams; duties of the director of the local department of health.

In addition to any other duties as a member of the Local Team and in connection with reviews of additional child fatalities, the director of the local department of health shall:

(1) Distribute copies of the written procedures developed by the Team Coordinator under G.S. 7B-1408 to the administrators of all agencies represented on the Local Team and to all members of the Local Team;

(2) Maintain records, including minutes of all official meetings, lists of participants for each meeting of the Local Team, and signed confidentiality statements required under G.S. 7B-1413, in compliance with applicable rules and law;

(3) Provide staff support for these reviews; and

(4) Report quarterly to the local board of health, or as required by the board, on the activities of the Local Team. (1993, c. 321, s. 285(a); 1998-202, s. 6.)

§ 7B-1411. Community Child Protection Teams; responsibility for training of team members.

The Division of Social Services, Department of Health and Human Services, shall develop and make available, on an ongoing basis, for the members of Local Teams that review active cases in which children are being served by child protective services, training materials that address the role and function of the Local Team, confidentiality requirements, an overview of child protective services law and policy, and Team record keeping. (1993, c. 321, s. 285(a); 1997-443, s. 11A.118(a); 1998-202, s. 6.)

§ 7B-1412. Task Force — reports.

The Task Force shall report annually to the Governor and General Assembly, within the first week of the convening or reconvening of the General Assembly. The report shall contain at least a summary of the conclusions and recommendations for each of the Task Force's duties, as well as any other recommendations for changes to any law, rule, or policy that it has determined will promote the safety and well-being of children. Any recommendations of changes to law, rule, or policy shall be accompanied by specific legislative or policy proposals and detailed fiscal notes setting forth the costs to the State. (1991, c. 689, s. 233(a); 1991 (Reg. Sess., 1992), c. 900, s. 169(a); 1993 (Reg. Sess., 1994), c. 769, s. 27.8(a); 1996, 2nd Ex. Sess., c. 17, ss. 3.1, 3.2; 1998-202, s. 6; 1998-212, s. 12.44(a), (d).)

§ 7B-1413. Access to records.

(a) The State Team, the Local Teams, and the Task Force during its existence, shall have access to all medical records, hospital records, and records maintained by this State, any county, or any local agency as necessary to carry out the purposes of this Article, including police investigations data, medical examiner investigative data, health records, mental health records, and social services records. The State Team, the Task Force, and the Local Teams shall not, as part of the reviews authorized under this Article, contact, question, or interview the child, the parent of the child, or any other family member of the child whose record is being reviewed. Any member of a Local Team may share, only in an official meeting of that Local Team, any information available to that member that the Local Team needs to carry out its duties.

(b) Meetings of the State Team and the Local Teams are not subject to the provisions of Article 33C of Chapter 143 of the General Statutes. However, the Local Teams may hold periodic public meetings to discuss, in a general manner not revealing confidential information about children and families, the findings of their reviews and their recommendations for preventive actions. Minutes of all public meetings, excluding those of executive sessions, shall be kept in compliance with Article 33C of Chapter 143 of the General Statutes. Any minutes or any other information generated during any closed session shall be sealed from public inspection.

(c) All otherwise confidential information and records acquired by the State Team, the Local Teams, and the Task Force during its existence, in the exercise of their duties are confidential; are not subject to discovery or introduction into evidence in any proceedings; and may only be disclosed as necessary to carry out the purposes of the State Team, the Local Teams, and the Task Force. In addition, all otherwise confidential information and records created by a Local Team in the exercise of its duties are confidential; are not subject to discovery or introduction into evidence in any proceedings; and may only be disclosed as necessary to carry out the purposes of the Local Team. No member of the State Team, a Local Team, nor any person who attends a meeting of the State Team or a Local Team, may testify in any proceeding about what transpired at the meeting, about information presented at the meeting, or about opinions formed by the person as a result of the meetings. This subsection shall not, however, prohibit a person from testifying in a civil or criminal action about matters within that person's independent knowledge.

(d) Each member of a Local Team and invited participant shall sign a statement indicating an understanding of and adherence to confidentiality requirements, including the possible civil or criminal consequences of any breach of confidentiality.

(e) Cases receiving child protective services at the time of review by a Local Team shall have an entry in the child's protective services record to indicate that the case was received by that Team. Additional entry into the record shall be at the discretion of the director of the county department of social services.

(f) The Social Services Commission shall adopt rules to implement this section in connection with reviews conducted by Community Child Protection Teams. The Commission for Public Health shall adopt rules to implement this section in connection with Local Teams that review additional child fatalities. In particular, these rules shall allow information generated by an executive session of a Local Team to be accessible for administrative or research purposes only. (1991, c. 689, s. 233(a); 1993, c. 321, s. 285(a); 1998-202, s. 6; 2007-182, s. 1.3.)

Effect of Amendments. — Session Laws 2007-182, s. 1.3, effective July 5, 2007, substituted "Commission for Public Health" for "Health Services Commission" in subsection (f).

§ 7B-1414. Administration; funding.

(a) To the extent of funds available, the chairs of the Task Force and State Team may hire staff or consultants to assist the Task Force and the State Team in completing their duties.

(b) Members, staff, and consultants of the Task Force or State Team shall receive travel and subsistence expenses in accordance with the provisions of G.S. 138-5 or G.S. 138-6, as the case may be, paid from funds appropriated to implement this Article and within the limits of those funds.

(c) With the approval of the Legislative Services Commission, legislative staff and space in the Legislative Building and the Legislative Office Building may be made available to the Task Force. (1991, c. 689, s. 233(a); 1998-202, s. 6.)

CASE NOTES

Cited in In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

SUBCHAPTER II. UNDISCIPLINED AND DELINQUENT JUVENILES.

ARTICLE 15.

Purposes; Definitions.

§ 7B-1500. Purpose.

This Subchapter shall be interpreted and construed so as to implement the following purposes and policies:

(1) To protect the public from acts of delinquency.

(2) To deter delinquency and crime, including patterns of repeat offending:

  a. By providing swift, effective dispositions that emphasize the juvenile offender's accountability for the juvenile's actions; and

  b. By providing appropriate rehabilitative services to juveniles and their families.

(3) To provide an effective system of intake services for the screening and evaluation of complaints and, in appropriate cases, where court intervention is not necessary to ensure public safety, to refer juveniles to community-based resources.

(4) To provide uniform procedures that assure fairness and equity; that protect the constitutional rights of juveniles, parents, and victims; and that encourage the court and others involved with juvenile offenders to proceed with all possible speed in making and implementing determinations required by this Subchapter. (1979, c. 815, s. 1; 1987 (Reg. Sess., 1988), c. 1090, s. 1; 1998-202, s. 6.)

Cross References. — As to establishment of School-Based Child and Family Team Initiative established, see note under G.S. 143B-366.

Youth Development Center Staffing — Session Laws 2004-124, s. 16.4(a)-(c), provides: "(a) With the approval of the Office of State Personnel and the Office of State Budget and Management, the Department of Juvenile Justice and Delinquency Prevention may:

"(1) Reclassify existing departmental vacant positions to establish up to 18 new positions in new job classes listed in this subsection. The Department may use departmental salary reserves and salaries from vacant positions to establish these positions. These newly established positions shall be assigned to Stonewall Jackson and Samarkand Youth Development Centers. The positions shall be reclassified as 14 youth development center youth counselors, two youth counselor supervisors, and two licensed mental health clinicians.

"(2) Use up to one hundred eighty-three thousand nine hundred ninety-two dollars ($183,992) of salary reserves to reclassify up to 68 existing positions to 58 youth counselors and 10 youth counselor supervisors.

These new positions will provide the starting point for the potential implementation of a statewide therapeutic staffing model.

"(b) Prior to establishing new positions or reclassifying positions listed in subsection (a) of this section, the Department of Juvenile Justice and Delinquency Prevention shall prepare a long-range plan for establishing a therapeutic staffing model to be used in all youth development centers. The plan shall include:

"(1) A report on the proposed implementation of 18 newpositions and reclassifications identified in subsection (a) of this section. The report shall provide information on (i) the vacant positions to be reallocated to establish new positions, (ii) the amount and source of funds used for these positions and reclassifications, (iii) how the 18 positions will be allocated between Stonewall Jackson and Samark and and their specific duties, and (iv) how the 68 reclassified positions will be allocated among the existing youth development centers.

"(2) An outline of the cost and benefits of the proposed model for juveniles in the custody of the Department and a summary of available research regarding the use of therapeutic staffing models in juvenile facilities.

"(3) An action plan and time line for reclassifying current counselor technicians, behavioral specialists, cottage parents, or other current positions to youth counselor or youth counselor supervisor positions or to other job classes that are progressive steps towards youth counselor positions. The Department shall also estimate the number of current statewide positions likely to be reclassified to youth counselor positions, youth counselor supervisors, or other job classes based on the qualifications of the current staff.

"(4) Job specifications, salary grades, and operating costs for each new job class.

"(5) The recommended staffing for and qualifications of teachers and teacher assistants and the standards for evaluating teacher quality in youth development centers.

"(c) The Department of Juvenile Justice and Delinquency Prevention shall report by December 1, 2004, to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee, the Chairs of the House of Representatives and Senate Appropriations Committees, and the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety on the long-range plan required by this section and the budgetary costs for statewide implementation of the therapeutic staffing model."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Implementation of Treatment Staffing Model at Youth Development Centers. — Session Laws 2005-276, ss. 16.6(a) through (c), as amended by Session Laws 2006-66, s. 15.6(a), provides: "(a) The Department of Juvenile Justice and Delinquency Prevention shall report December 31, 2005, and quarterly thereafter during the 2005-2007 biennium to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety and to the Joint Corrections, Crime Control, and Juvenile Justice Oversight Committee on the treatment staffing model being piloted at Samarkand and Stonewall Jackson Youth Development Centers. The report shall include a list of total positions at each facility by job class, whether the position is vacant or filled, whether positions were filled from internal employees or new employees, and the training and certification status of each position. The report shall also describe the nature of the treatment program, the criteria for evaluating the program, and how the program is performing in comparison to these criteria. The report shall also describe the training approach to be used to train staff in using treatment methods in youth development centers and provide information on current staff training and staff training planned for the next quarter. The Department shall also develop indicators for evaluating staff performance once the model has been implemented.

"(b) The Department of Juvenile Justice and Delinquency Prevention shall report December 31, 2005, and quarterly thereafter during the 2005-2007 biennium to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety and the Joint Corrections, Crime Control, and Juvenile Justice Oversight Committee on the implementation of the treatment staffing model at Dobbs, Dillon, and Juvenile Evaluation Center Youth Development Centers. The Department shall identify the number of positions reallocated to the new treatment job classes and the source of funding for those positions.

"(c) The Department of Juvenile Justice and Delinquency Prevention shall report to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety and the Joint Corrections, Crime Control, and Juvenile Justice Oversight Committee by November 10, 2006, on the final recommended staffing plan for youth development centers for the 2007-2008 fiscal year. The report shall include:

"(1) The latest results of the evaluation of the pilot treatment staffing models at the Samarkand and Stonewall Jackson Youth Development Centers and the progress in implementing the model at other youth development centers.

"(2) The total recommended staffing by position classification for each youth development center. Staffing by shift shall be provided for each housing unit as well as justification for the level and type of staff on each shift.

"(3) The total cost and cost per bed for each youth development center to implement the staffing model.

"(4) The primary basis for the number of staff at each youth development center by classification.

"(5) An identification of other states that have implemented a treatment based staffing model, how the staffing patterns compare to the Department of Juvenile Justice and Delinquency Prevention proposal, and any research on the benefits and outcomes of using the treatment based approach in these states."

Reporting on Treatment Staffing Model at Youth Development Centers. — Session Laws 2007-323, s. 18.6(a)-(c), provides: "(a) The Department of Juvenile Justice and Delinquency Prevention shall continue quarterly reporting during the 2007-2008 fiscal year to the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety and the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee on the implementation of the treatment staffing model at Samarkand and Stonewall Jackson Youth Development Centers, including the latest results of the evaluation of the pilot treatment staffing models at the Centers and the progress in implementing the model at other youth development centers.

"(b) The Department shall implement the staffing treatment model presented to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee as part of the Department's November 14, 2006, report regarding the joint use with the Department of Correction of the Swannanoa Youth Development Center campus.

"The staffing levels of the new youth development centers shall be capped at 66 staff for a 32-bed facility and 198 staff for the 96-bed facility for the 2007-2009 fiscal biennium. Staffing ratios shall be no more than 2.1 staff per every juvenile committed at every other existing youth development center.

"(c) In the April 1, 2008, report, the Department shall include a recommendation on whether the staffing and budget for youth development centers should be modified to reflect the results of the pilot treatment programs."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

For the establishment of a pilot program for a multi-functional juvenile facility, and authorization of the Office of Juvenile Justice (now the Department of Juvenile Justice and Delinquency Prevention) to contract with a private firm for the construction and operation of such a facility, see the Editor's Note under G.S. 143B-516.

Session Laws 1998-202, s. 36, contains a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Legal Periodicals. — For article, "Leandro v. State and the Constitutional Limitation on School Suspensions and Expulsions in North Carolina" see 83 N.C. L. Rev. 1507 (2005).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

The common thread running throughout the Juvenile Code (formerly G.S. 7A-516, et seq.) is that the court must consider the child's best interests in making all placements whether at the dispositional hearing or the review hearing. In re Shue, 63 N.C. App. 76, 303 S.E.2d 636 (1983), modified, 311 N.C. 586, 319 S.E.2d 567 (1984).

The purpose of former § 7A-277 was to give to delinquent children the control and environment which might lead to their reformation and enable them to become law abiding and useful citizens, a support and not a hindrance to the State. In re Whichard, 8 N.C. App. 154, 174 S.E.2d 281 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971).

Juvenile Hearing. — Former Subchapter XI of Chapter 7A, which contained the former North Carolina Juvenile Code, did not classify a juvenile hearing as civil or criminal. State v. Smith, 328 N.C. 161, 400 S.E.2d 405, cert. denied, 502 U.S. 956, 112 S. Ct. 414, 116 L. Ed. 2d 435 (1991).

Constitutional Rights at Juvenile Hearing. — There are certain constitutional rights which a juvenile has at a juvenile hearing which are not required in civil trials, such as the right to counsel if there is a possibility of commitment and the privilege against self incrimination. This would suggest a juvenile hearing is not a civil case. State v. Smith, 328 N.C. 161, 400 S.E.2d 405, cert. denied, 502 U.S. 956, 112 S. Ct. 414, 116 L. Ed. 2d 435 (1991).

The court must consider the welfare of the delinquent child as well as the best interest of the State. In re Hardy, 39 N.C. App. 610, 251 S.E.2d 643 (1979).

State's Interest in Juvenile Proceeding. — The fact that the proceeding is not an ordinary criminal prosecution, but is a juvenile proceeding, does not lessen, but should actually increase, the burden upon the State to see that the child's rights are protected. In re Meyers, 25 N.C. App. 555, 214 S.E.2d 268 (1975).

The district court's authority in juvenile dispositions is limited to utilization of currently existing programs or those for which the funding and machinery for implementation is in place. In re Jackson, 84 N.C. App. 167, 352 S.E.2d 449 (1987).

The former North Carolina Juvenile Code (formerly G.S. 7A-516 et seq.) did not grant the district courts the authority to order the State, through the Division of Youth Services, to develop and implement specific treatment programs and facilities for juveniles. In re Swindell, 326 N.C. 473, 390 S.E.2d 134 (1990).

Court Order May Not Exceed Court's Authority. — When a student has been lawfully suspended or expelled pursuant to G.S. 115C-391 and the school has not provided a suitable alternative educational forum, court-ordered public school attendance is not a dispositional alternative available to the juvenile court judge, absent a voluntary reconsideration of or restructuring of the suspension by the school board to allow the student's restoration to an educational program within its system. In re Jackson, 84 N.C. App. 167, 352 S.E.2d 449 (1987).

Delinquency Proceedings May Result in Commitment. — Juvenile proceedings to determine delinquency, though not the same as criminal prosecutions of an adult, may nevertheless result in commitment to an institution in which the juvenile's freedom is curtailed. In re Meyers, 25 N.C. App. 555, 214 S.E.2d 268 (1975).

Dismissal of Petitions Against Juveniles Treated Unequally. — The trial court erred in not dismissing petitions against six juveniles who received unequal treatment relative to other juveniles who were alleged to have committed the same or similar offenses by design, in that each respondent was prosecuted because he or she, or his or her parents, was unwilling or unable to pay $1,000 compensation to the victim, while the other juveniles, who were similarly situated, were not prosecuted because they, or their parents, were able or willing to pay $1,000 thereto. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

Cited in In re Schrimpsher, 143 N.C. App. 461, 546 S.E.2d 407 (2001).

§ 7B-1501. Definitions.

In this Subchapter, unless the context clearly requires otherwise, the following words have the listed meanings. The singular includes the plural, unless otherwise specified.

(1) Chief court counselor. — The person responsible for administration and supervision of juvenile intake, probation, and post-release supervision in each judicial district, operating under the supervision of the Department of Juvenile Justice and Delinquency Prevention.

(2) Clerk. — Any clerk of superior court, acting clerk, or assistant or deputy clerk.

(3) Community-based program. — A program providing nonresidential or residential treatment to a juvenile under the jurisdiction of the juvenile court in the community where the juvenile's family lives. A community-based program may include specialized foster care, family counseling, shelter care, and other appropriate treatment.

(4) Court. — The district court division of the General Court of Justice.

(5) Repealed by Session Laws 2001-490, s. 2.1, effective June 30, 2001.

(6) Custodian. — The person or agency that has been awarded legal custody of a juvenile by a court.

(7) Delinquent juvenile. — Any juvenile who, while less than 16 years of age but at least 6 years of age, commits a crime or infraction under State law or under an ordinance of local government, including violation of the motor vehicle laws, or who commits indirect contempt by a juvenile as defined in G.S. 5A-31.

(7a) Department. — The Department of Juvenile Justice and Delinquency Prevention created under Article 12 of Chapter 143B of the General Statutes.

(8) Detention. — The secure confinement of a juvenile under a court order.

(9) Detention facility. — A facility approved to provide secure confinement and care for juveniles. Detention facilities include both State and locally administered detention homes, centers, and facilities.

(10) District. — Any district court district as established by G.S. 7A-133.

(11) Holdover facility. — A place in a jail which has been approved by the Department of Health and Human Services as meeting the State standards for detention as required in G.S. 153A-221 providing close supervision where the juvenile cannot converse with, see, or be seen by the adult population.

(12) House arrest. — A requirement that the juvenile remain at the juvenile's residence unless the court or the juvenile court counselor authorizes the juvenile to leave for specific purposes.

(13) Intake. — The process of screening and evaluating a complaint alleging that a juvenile is delinquent or undisciplined to determine whether the complaint should be filed as a petition.

(14) Interstate Compact on Juveniles. — An agreement ratified by 50 states and the District of Columbia providing a formal means of returning a juvenile, who is an absconder, escapee, or runaway, to the juvenile's home state, and codified in Article 28 of this Chapter.

(15) Judge. — Any district court judge.

(16) Judicial district. — Any district court district as established by G.S. 7A-133.

(17) Juvenile. — Except as provided in subdivisions (7) and (27) of this section, any person who has not reached the person's eighteenth birthday and is not married, emancipated, or a member of the armed forces of the United States. Wherever the term "juvenile" is used with reference to rights and privileges, that term encompasses the attorney for the juvenile as well.

(18) Juvenile court. — Any district court exercising jurisdiction under this Chapter.

(18a) Juvenile court counselor. — A person responsible for intake services and court supervision services to juveniles under the supervision of the chief court counselor.

(19) Repealed by Session Laws 2000, c. 137, s. 2, effective July 20, 2000.

(20) Petitioner. — The individual who initiates court action by the filing of a petition or a motion for review alleging the matter for adjudication.

(21) Post-release supervision. — The supervision of a juvenile who has been returned to the community after having been committed to the Department for placement in a youth development center.

(22) Probation. — The status of a juvenile who has been adjudicated delinquent, is subject to specified conditions under the supervision of a juvenile court counselor, and may be returned to the court for violation of those conditions during the period of probation.

(23) Prosecutor. — The district attorney or assistant district attorney assigned by the district attorney to juvenile proceedings.

(24) Protective supervision. — The status of a juvenile who has been adjudicated undisciplined and is under the supervision of a juvenile court counselor.

(25) Teen court program. — A community resource for the diversion of cases in which a juvenile has allegedly committed certain offenses for hearing by a jury of the juvenile's peers, which may assign the juvenile to counseling, restitution, curfews, community service, or other rehabilitative measures.

(26) Repealed by Session Laws 2001-95, s. 1, effective May 18, 2001.

(27) Undisciplined juvenile. —

a. A juvenile who, while less than 16 years of age but at least 6 years of age, is unlawfully absent from school; or is regularly disobedient to and beyond the disciplinary control of the juvenile's parent, guardian, or custodian; or is regularly found in places where it is unlawful for a juvenile to be; or has run away from home for a period of more than 24 hours; or

b. A juvenile who is 16 or 17 years of age and who is regularly disobedient to and beyond the disciplinary control of the juvenile's parent, guardian, or custodian; or is regularly found in places where it is unlawful for a juvenile to be; or has run away from home for a period of more than 24 hours.

(28) Wilderness program. — A rehabilitative residential treatment program in a rural or outdoor setting.

(29) Youth development center. — A secure residential facility authorized to provide long-term treatment, education, and rehabilitative services for delinquent juveniles committed by the court to the Department. (1979, c. 815, s. 1; 1981, c. 336; c. 359, s. 2; c. 469, ss. 1-3; c. 716, s. 1; 1985, c. 648; c. 757, s. 156(q); 1985 (Reg. Sess., 1986), c. 852, s. 16; 1987, c. 162; c. 695; 1987 (Reg. Sess., 1988), c. 1037, ss. 36, 37; 1989 (Reg. Sess., 1990), c. 815, s. 1; 1991, c. 258, s. 3; c. 273, s. 11; 1991 (Reg. Sess., 1992), c. 1030, s. 3; 1993, c. 324, s. 1; c. 516, ss. 1-3; 1997-113, s. 1; 1997-390, ss. 3, 3.2; 1997-443, s. 11A.118(a); 1997-506, s. 30; 1998-202, s. 6; 1998-229, s. 1; 2000-137, s. 2; 2001-95, ss. 1, 2, 5; 2001-487, s. 3; 2001-490, s. 2.1; 2007-168, s. 2.)

Effect of Amendments. — Session Laws 2007-168, s. 2, effective December 1, 2007, and applicable to acts occurring or offenses committed on or after that date, in subdivision (7), substituted a comma for a period and added "or who commits indirect contempt by a juvenile as defined in G.S. 5A-31" at the end.

Legal Periodicals. — For empirical study, 'The Faces Within: An Examination of the Disparate Treatment of Minority Youth Throughout the North Carolina Juvenile Justice System, see 40 Wake Forest L. Rev. 727 (2005).

CASE NOTES

Editor's Note. — *Most of the following cases were decided prior to the enactment of this Chapter.*

Distinction Between Undisciplined and Delinquent Children Is Relevant to State's Objective. — In seeking solutions which provide in each case for the protection, treatment, rehabilitation and correction of the child, it is impellingly relevant to the achievement of the State's objective that distinctions be made between undisciplined children on the one hand and delinquent children on the other. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

Evidence Sufficient to Convict of Crime Is Sufficient to Permit Finding of Delinquency. — Where there was sufficient evidence to convict the accused of the crime alleged in the petition, then there was sufficient evidence to permit a finding that the accused was a delinquent child. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

No Finding of Delinquency Where Evidence Insufficient to Convict Juvenile of Crime. — Where the evidence in a juvenile hearing was insufficient to convict the juvenile of the crime alleged in the petition, subornation of perjury, there could be no finding that the juvenile was a delinquent. In re Roberts, 8 N.C.

App. 513, 174 S.E.2d 667 (1970).

Removal of Probation Violations from Definition of "Delinquent Child". — The amendment of former G.S. 7A-278(2), removing violation of probation from the definition of "delinquent child," indicated an intent that only criminal activity could provide the basis for an adjudication of delinquency. The legislative purpose in removing probation violations as the basis for adjudications of delinquency would be frustrated if the courts were to take those very same violations, treat them as criminal contempt, and then base adjudications of delinquency on the contempt proceedings. In re Jones, 59 N.C. App. 547, 297 S.E.2d 168 (1982).

Lack of Jurisdiction Found. — Because a district court never exercised jurisdiction over defendant for the charge of conspiracy to commit armed robbery, the superior court that convicted him never obtained jurisdiction via transfer of the charge; because the trial court lacked jurisdiction over defendant for the conspiracy charge, his conviction was vacated. State v. Jackson, 165 N.C. App. 763, 600 S.E.2d 16, 2004 N.C. App. LEXIS 1509 (2004).

A motion to dismiss a petition seeking to declare a juvenile a delinquent was properly denied when there was substantial evidence that the juvenile respondent committed a criminal offense or violated a condition of a probationary judgment. In re Byers, 295 N.C. 256, 244 S.E.2d 665 (1978).

Facts Insufficient to Prove Child Delinquent. — On a petition alleging that a child of 12 was delinquent, as defined in former G.S. 7A-517(12) (see now G.S. 7B-1501(7)), where the State established only that the child entered an unlocked door into a lighted store during daylight hours, that he did so in front of at least one known witness, and that he took nothing, the State's evidence failed to establish the elements of the crime charged (breaking and entering with intent to commit larceny) and dismissal of the action was improperly denied. In re Wallace, 57 N.C. App. 593, 291 S.E.2d 796 (1982).

Constitutionality. — The provisions of subdivision (5) of former G.S. 7A-278, defining "undisciplined child" (see now subdivision (27) of this section defining "undisciplined juvenile") were not unconstitutionally vague or indefinite. In re Walker, 14 N.C. App. 356, 188 S.E.2d 731, aff'd, 282 N.C. 28, 191 S.E.2d 702 (1972).

A finding in a juvenile commitment proceeding that a 15-year-old girl was beyond the disciplinary control of her parents or custodian and was therefore a delinquent child in need of the supervision, protection, and custody of the State, was sufficient to bring the girl within the statutory definition of an "undisciplined child" (now see definition of "undisciplined juvenile"). In re Martin, 9 N.C. App. 576, 176 S.E.2d 849 (1970).

Proper Allegation of First Degree Murder. — Petition alleging that "juvenile was delinquent as defined by former G.S. 7A-517(12) [see now this section] in that in Durham County and on or about December 30, 1997, the above named juvenile unlawfully, willfully and feloniously did of malice aforethought kill and murder victim" properly alleged first degree murder under G.S. 14-17, satisfied former G.S. 7A-560 [see now G.S. 7B-402] requirements, and made transfer of case to Superior Court mandatory under former G.S.7A-608 [see now G.S. 7B-2200]. In re K.R.B., 134 N.C. App. 328, 517 S.E.2d 200, 1999 N.C. App. LEXIS 744 (1999), cert. denied, 351 N.C. 188, 541 S.E.2d 713 (1999).

Cited in In re May, 153 N.C. App. 299, 569 S.E.2d 704, 2002 N.C. App. LEXIS 1130 (2002), aff'd, 357 N.C. 423, 584 S.E.2d 271 (2003); In re May, 357 N.C. 423, 584 S.E.2d 271, 2003 N.C. LEXIS 833 (2003); In re W.R., 179 N.C. App. 642, 634 S.E.2d 923, 2006 N.C. App. LEXIS 2028 (2006).

ARTICLE 16.

Jurisdiction.

§ 7B-1600. Jurisdiction over undisciplined juveniles.

(a) The court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be undisciplined. For purposes of determining jurisdiction, the age of the juvenile at the time of the alleged offense governs.

(b) When the court obtains jurisdiction over a juvenile under this section, jurisdiction shall continue until terminated by order of the court, the juvenile reaches the age of 18 years, or the juvenile is emancipated.

(c) The court has jurisdiction over the parent, guardian, or custodian of a juvenile who is under the jurisdiction of the court pursuant to this section, if the parent, guardian, or custodian has been served with a summons pursuant to G.S. 7B-1805. (1979, c. 815, s. 1; 1983, c. 837, s. 1; 1985, c. 459, s. 2; 1987,

c. 409, s. 2; 1995, c. 328, s. 3; c. 462, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 23.2(c); 1998-202, s. 6.)

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

For article on the efficacy of a probable cause requirement in juvenile proceedings, see 59 N.C.L. Rev. 723 (1981).

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

For article, "Re-Imaging Childhood and Reconstructing the Legal Order: the Case for Abolishing the Juvenile Court," see 69 N.C.L. Rev. 1083 (1991).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

This Article vests exclusive, original jurisdiction over any case involving a child in the district court judge and provides in detail for procedures in the district court in cases involving children. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972), decided under former §§ 7A-278 and 7A-279.

Nature of Proceedings. — As the district court division has exclusive original jurisdiction of Juvenile Code matters, actions under ther former Juvenile Code (formerly G.S. 7A-516 et seq.) are not special proceedings. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Petition of Continuing Jurisdiction. — Juvenile court, which acquired jurisdiction over children as of September 26, 1984, when service of summons was completed on parent, and on September 27, 1984, entered an order allowing Department of Social Services (DSS) to retain temporary and legal custody of the children, retained continuing jurisdiction over the children. In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

Jurisdiction over Juveniles. — Where defendant was twelve or thirteen at the time he committed the felony of crime against nature, but had subsequently become an adult, the district court had exclusive original jurisdiction, because for the purposes of determining subject matter jurisdiction over a juvenile, age at the time of the alleged offense governs. State v. Dellinger, 343 N.C. 93, 468 S.E.2d 218 (1996).

Jurisdiction over Neglect and Dependency Proceedings. — Juvenile court, which acquired jurisdiction over the subject matter when the summons was served upon mother, although it was not served upon father, as required by former G.S. 7A-565, had the authority to decide the issue of neglect and dependency of three children. In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

Affidavit Not Required. — Where the court obtained jurisdiction over a juvenile matter pursuant to former G.S. 7A-523, and not Chapter 50A, the Uniform Child Custody Jurisdiction Act, the affidavit referred to in former G.S. 50A-9 was not a prerequisite to its jurisdiction. In re Botsford, 75 N.C. App. 72, 330 S.E.2d 23 (1985).

Power to Order Sex Offender Treatment. — The district court had power to order the Department of Human Resources, Division of Youth Services to give sex offender treatment to an adolescent found delinquent because of sex offenses and subsequently to deny the conditional release of that adolescent because treatment had not been in compliance with that mandate. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

Ordering Division of Youth Services to provide specific treatment for sexual offenders for a delinquent juvenile in its custody, when such treatment was available, was within the scope of the court's statutory authority. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

§ 7B-1601. Jurisdiction over delinquent juveniles.

(a) The court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent. For purposes of determining jurisdiction, the age of the juvenile at the time of the alleged offense governs.

(b) When the court obtains jurisdiction over a juvenile alleged to be delinquent, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years, except as provided otherwise in this Article.

(c) When delinquency proceedings cannot be concluded before the juvenile reaches the age of 18 years, the court retains jurisdiction for the sole purpose of conducting proceedings pursuant to Article 22 of this Chapter and either transferring the case to superior court for trial as an adult or dismissing the petition.

(d) When the court has not obtained jurisdiction over a juvenile before the juvenile reaches the age of 18, for a felony and any related misdemeanors the juvenile allegedly committed on or after the juvenile's thirteenth birthday and prior to the juvenile's sixteenth birthday, the court has jurisdiction for the sole purpose of conducting proceedings pursuant to Article 22 of this Chapter and either transferring the case to superior court for trial as an adult or dismissing the petition.

(e) The court has jurisdiction over delinquent juveniles in the custody of the Department and over proceedings to determine whether a juvenile who is under the post-release supervision of the juvenile court counselor has violated the terms of the juvenile's post-release supervision.

(f) The court has jurisdiction over persons 18 years of age or older who are under the extended jurisdiction of the juvenile court.

(g) The court has jurisdiction over the parent, guardian, or custodian of a juvenile who is under the jurisdiction of the court pursuant to this section if the parent, guardian, or custodian has been served with a summons pursuant to G.S. 7B-1805. (1979, c. 815, s. 1; 1983, c. 837, s. 1; 1985, c. 459, s. 2; 1987, c. 409, s. 2; 1995, c. 328, s. 3; c. 462, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 23.2(c); 1998-202, s. 6; 2000-137, s. 3; 2001-490, s. 2.2.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

For article on the efficacy of a probable cause requirement in juvenile proceedings, see 59 N.C.L. Rev. 723 (1981).

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

For article, "Re-Imaging Childhood and Reconstructing the Legal Order: the Case for Abolishing the Juvenile Court," see 69 N.C.L. Rev. 1083 (1991).

CASE NOTES

***Editor's Note.** — The following cases were decided prior to the enactment of this Chapter.*

This Article vests exclusive, original jurisdiction over any case involving a child in the district court judge and provides in detail for procedures in the district court in cases involving children. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972), decided under former §§ 7A-278 and 7A-279.

Nature of Proceedings. — As the district court division has exclusive original jurisdiction of Juvenile Code matters, actions under ther former Juvenile Code (formerly G.S. 7A-516 et seq.) are not special proceedings. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Petition of Continuing Jurisdiction. — Juvenile court, which acquired jurisdiction over children as of September 26, 1984, when service of summons was completed on parent, and on September 27, 1984, entered an order allowing Department of Social Services (DSS) to retain temporary and legal custody of the children, retained continuing jurisdiction over the children. In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

Jurisdiction over Juveniles. — Where defendant was twelve or thirteen at the time he committed the felony of crime against nature, but had subsequently become an adult, the district court had exclusive original jurisdiction, because for the purposes of determining subject matter jurisdiction over a juvenile, age at the time of the alleged offense governs. State v. Dellinger, 343 N.C. 93, 468 S.E.2d 218 (1996).

Jurisdiction over Neglect and Dependency Proceedings. — Juvenile court, which acquired jurisdiction over the subject matter when the summons was served upon mother, although it was not served upon father, as required by former G.S. 7A-565, had the authority to decide the issue of neglect and dependency of three children. In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

Affidavit Not Required. — Where the court obtained jurisdiction over a juvenile matter pursuant to former G.S. 7A-523, and not Chapter 50A, the Uniform Child Custody Jurisdiction Act, the affidavit referred to in former G.S. 50A-9 was not a prerequisite to its jurisdiction. In re Botsford, 75 N.C. App. 72, 330 S.E.2d 23 (1985).

Power to Order Sex Offender Treatment. — The district court had power to order the Department of Human Resources, Division of Youth Services to give sex offender treatment to an adolescent found delinquent because of sex offenses and subsequently to deny the conditional release of that adolescent because treatment had not been in compliance with that mandate. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

Ordering Division of Youth Services to provide specific treatment for sexual offenders for a delinquent juvenile in its custody, when such treatment was available, was within the scope of the court's statutory authority. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

Lack of Jurisdiction Found. — Because a district court never exercised jurisdiction over defendant for the charge of conspiracy to commit armed robbery, the superior court that convicted him never obtained jurisdiction via transfer of the charge; because the trial court lacked jurisdiction over defendant for the conspiracy charge, his conviction was vacated. State v. Jackson, 165 N.C. App. 763, 600 S.E.2d 16, 2004 N.C. App. LEXIS 1509 (2004).

Adult Convictions. — State court's records relating to defendant's 1995 convictions revealed that they were adult convictions; although a seventeen-year-old could be tried in North Carolina as either a juvenile or an adult, G.S. 7B-2200 and G.S. 7B-2203, North Carolina's district courts possessed exclusive, original jurisdiction over any case involving a juvenile who was alleged to be delinquent, G.S. 7B-1601, thus, if defendant was tried and convicted as a juvenile, he could have been prosecuted only in a North Carolina district court. The judgments underlying defendant's 1995 convictions, however, demonstrated that he was convicted and sentenced in the Superior Court of Surry County, North Carolina, and his 1995 Convictions were therefore necessarily adult convictions. United States v. Allen, 446 F.3d 522, 2006 U.S. App. LEXIS 11193 (4th Cir. 2006).

§ 7B-1602. Extended jurisdiction over a delinquent juvenile under certain circumstances.

(a) When a juvenile is committed to the Department for placement in a youth development center for an offense that would be first degree murder pursuant to G.S. 14-17, first-degree rape pursuant to G.S. 14-27.2, or first-degree sexual offense pursuant to G.S. 14-27.4 if committed by an adult, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 21 years, whichever occurs first.

(b) When a juvenile is committed to the Department for placement in a youth development center for an offense that would be a Class B1, B2, C, D, or E felony if committed by an adult, other than an offense set forth in subsection (a) of this section, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 19 years, whichever occurs first. (1979, c. 815, s. 1; 1981, c. 469, s. 4; 1996, 2nd Ex. Sess., c. 18, s. 23.2(d); 1998-202, s. 6; 2000-137, s. 3; 2001-95, s. 5.)

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Jurisdiction over Neglect and Dependency Proceedings. — Juvenile court, which acquired jurisdiction over the subject matter when the summons was served upon mother, although it was not served upon father, as required by former G.S. 7A-565, had the authority to decide the issue of neglect and dependency of three children. In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

Retention of Continuing Jurisdiction. — Juvenile court, which acquired jurisdiction over children as of September 26, 1984, when service of summons was completed on parent, and on September 27, 1984, entered an order allowing Department of Social Services (DSS) to retain temporary and legal custody of the children, retained continuing jurisdiction over the children. In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

§ 7B-1603. Jurisdiction in certain circumstances.

The court has exclusive original jurisdiction of all of the following proceedings:

(1) Proceedings under the Interstate Compact on the Placement of Children set forth in Article 38 of this Chapter.

(2) Proceedings involving judicial consent for emergency surgical or medical treatment for a juvenile when the juvenile's parent, guardian, custodian, or person who has assumed the status and obligation of a parent without being awarded legal custody of the juvenile by a court refuses to consent for treatment to be rendered.

(3) Proceedings to determine whether a juvenile should be emancipated.

(4) Proceedings in which a juvenile has been ordered pursuant to G.S. 5A-32(b) to appear and show cause why the juvenile should not be held in contempt. (1979, c. 815, s. 1; 1983, c. 837, s. 1; 1985, c. 459, s. 2; 1987, c. 409, s. 2; 1995, c. 328, s. 3; c. 462, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 23.2(c); 1998-202, s. 6; 2007-168, s. 3.)

Effect of Amendments. — Session Laws 2007-168, s. 3, effective December 1, 2007, and applicable to acts occurring or offenses committed on or after that date, inserted "all of" in the introductory language, added subdivision (4), and made related changes.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

For article on the efficacy of a probable cause requirement in juvenile proceedings, see 59 N.C.L. Rev. 723 (1981).

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

For article, "Re-Imaging Childhood and Reconstructing the Legal Order: the Case for Abolishing the Juvenile Court," see 69 N.C.L. Rev. 1083 (1991).

CASE NOTES

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This Article vests exclusive, original jurisdiction over any case involving a child in the district court judge and provides in detail for procedures in the district court in cases involving children. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972), decided under former §§ 7A-278 and 7A-279.

Nature of Proceedings. — As the district court division has exclusive original jurisdiction of Juvenile Code matters, actions under ther former Juvenile Code (formerly G.S. 7A-516 et seq.) are not special proceedings. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Petition of Continuing Jurisdiction. — Juvenile court, which acquired jurisdiction over children as of September 26, 1984, when service of summons was completed on parent, and on September 27, 1984, entered an order allowing Department of Social Services (DSS) to retain temporary and legal custody of the children, retained continuing jurisdiction over the children. In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

Jurisdiction over Juveniles. — Where defendant was twelve or thirteen at the time he committed the felony of crime against nature, but had subsequently become an adult, the district court had exclusive original jurisdiction, because for the purposes of determining subject matter jurisdiction over a juvenile, age at the time of the alleged offense governs. State v. Dellinger, 343 N.C. 93, 468 S.E.2d 218 (1996).

Jurisdiction over Neglect and Dependency Proceedings. — Juvenile court, which acquired jurisdiction over the subject matter when the summons was served upon mother, although it was not served upon father, as required by former G.S. 7A-565, had the authority to decide the issue of neglect and dependency of three children. In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

Affidavit Not Required. — Where the court obtained jurisdiction over a juvenile matter pursuant to former G.S. 7A-523, and not Chapter 50A, the Uniform Child Custody Jurisdiction Act, the affidavit referred to in former G.S. 50A-9 was not a prerequisite to its jurisdiction. In re Botsford, 75 N.C. App. 72, 330 S.E.2d 23 (1985).

Power to Order Sex Offender Treatment. — The district court had power to order the Department of Human Resources, Division of Youth Services to give sex offender treatment to an adolescent found delinquent because of sex offenses and subsequently to deny the conditional release of that adolescent because treatment had not been in compliance with that mandate. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

Ordering Division of Youth Services to provide specific treatment for sexual offenders for a delinquent juvenile in its custody, when such treatment was available, was within the scope of the court's statutory authority. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

§ 7B-1604. Limitations on juvenile court jurisdiction.

(a) Any juvenile, including a juvenile who is under the jurisdiction of the court, who commits a criminal offense on or after the juvenile's sixteenth birthday is subject to prosecution as an adult. A juvenile who is emancipated shall be prosecuted as an adult for the commission of a criminal offense.

(b) A juvenile who is transferred to and convicted in superior court shall be prosecuted as an adult for any criminal offense the juvenile commits after the superior court conviction. (1979, c. 815, s. 1; 1981, c. 469, s. 4; 1983, c. 837, s. 1; 1985, c. 459, s. 2; 1987, c. 409, s. 2; 1995, c. 328, s. 3; c. 462, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 23.2(c); 1998-202, s. 6.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

For article on the efficacy of a probable cause requirement in juvenile proceedings, see 59 N.C.L. Rev. 723 (1981).

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

For article, "Re-Imaging Childhood and Reconstructing the Legal Order: the Case for Abolishing the Juvenile Court," see 69 N.C.L. Rev. 1083 (1991).

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This Article vests exclusive, original jurisdiction over any case involving a child in the district court judge and provides in detail for procedures in the district court in cases involving children. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972), decided under former §§ 7A-278 and 7A-279.

Nature of Proceedings. — As the district court division has exclusive original jurisdiction of Juvenile Code matters, actions under ther former Juvenile Code (formerly G.S. 7A-516 et seq.) are not special proceedings. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

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Jurisdiction over Neglect and Dependency Proceedings. — Juvenile court, which acquired jurisdiction over the subject matter when the summons was served upon mother, although it was not served upon father, as required by former G.S. 7A-565, had the authority to decide the issue of neglect and dependency of three children. In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

Affidavit Not Required. — Where the court obtained jurisdiction over a juvenile matter pursuant to former G.S. 7A-523, and not Chapter 50A, the Uniform Child Custody Jurisdiction Act, the affidavit referred to in former G.S. 50A-9 was not a prerequisite to its jurisdiction. In re Botsford, 75 N.C. App. 72, 330 S.E.2d 23 (1985).

Power to Order Sex Offender Treatment. — The district court had power to order the Department of Human Resources, Division of Youth Services to give sex offender treatment to an adolescent found delinquent because of sex offenses and subsequently to deny the conditional release of that adolescent because treatment had not been in compliance with that mandate. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

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Jurisdiction over Neglect and Dependency Proceedings. — Juvenile court, which acquired jurisdiction over the subject matter when the summons was served upon mother, although it was not served upon father, as required by former G.S. 7A-565, had the authority to decide the issue of neglect and dependency of three children. In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

Retention of Continuing Jurisdiction. — Juvenile court, which acquired jurisdiction over children as of September 26, 1984, when service of summons was completed on parent, and on September 27, 1984, entered an order allowing Department of Social Services (DSS) to retain temporary and legal custody of the children, retained continuing jurisdiction over the children. In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

ARTICLE 17.

Screening of Delinquency and Undisciplined Complaints.

§ 7B-1700. Intake services.

The chief court counselor, under the direction of the Department, shall establish intake services in each judicial district of the State for all delinquency and undisciplined cases.

The purpose of intake services shall be to determine from available evidence whether there are reasonable grounds to believe the facts alleged are true, to determine whether the facts alleged constitute a delinquent or undisciplined offense within the jurisdiction of the court, to determine whether the facts alleged are sufficiently serious to warrant court action, and to obtain assistance from community resources when court referral is not necessary. The juvenile court counselor shall not engage in field investigations to substantiate complaints or to produce supplementary evidence but may refer complainants to law enforcement agencies for those purposes. (1979, c. 815, s. 1; 1998-202, s. 6; 2000-137, s. 3; 2001-490, s. 2.3.)

School-Based Child and Family Team Initiative. — Session Laws 2005-276, s. 6.24, provides for the development and implementation of a School-Based Child and Family Team Initiative. See note at G.S. 115C-105.20.

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Prior Approval for Filing of Petition. — Before a juvenile petition may be filed charging any juvenile with being delinquent or undisciplined, the record must affirmatively disclose that either the intake counselor or the district attorney has approved the filing of such petition. Furthermore, when the district attorney approves the filing of such petition, the record must affirmatively disclose that the intake counselor has theretofore disapproved the filing. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

OPINIONS OF ATTORNEY GENERAL

Authority of Chief Court Counselor. — A local administrative order issued by the Chief District Court Judge prohibiting the diversion of juveniles from the juvenile justice system in cases arising from the public school system would not be consistent with the law, in that it would usurp the statutory authority provided to the chief court counselor by the General Assembly. See opinion of Attorney General to Joel H. Brewer, District Attorney, N.C. General Assembly, 1999 N.C.A.G. 15 (6/9/99), rendered prior to enactment of this Chapter.

§ 7B-1701. Preliminary inquiry.

When a complaint is received, the juvenile court counselor shall make a preliminary determination as to whether the juvenile is within the jurisdiction of the court as a delinquent or undisciplined juvenile. If the juvenile court counselor finds that the facts contained in the complaint do not state a case within the jurisdiction of the court, that legal sufficiency has not been established, or that the matters alleged are frivolous, the juvenile court counselor, without further inquiry, shall refuse authorization to file the complaint as a petition.

When requested by the juvenile court counselor, the prosecutor shall assist in determining the sufficiency of evidence as it affects the quantum of proof and the elements of offenses.

The juvenile court counselor, without further inquiry, shall authorize the complaint to be filed as a petition if the juvenile court counselor finds reasonable grounds to believe that the juvenile has committed one of the following nondivertible offenses:

(1) Murder;
(2) First-degree rape or second degree rape;
(3) First-degree sexual offense or second degree sexual offense;
(4) Arson;
(5) Any violation of Article 5, Chapter 90 of the General Statutes that would constitute a felony if committed by an adult;
(6) First degree burglary;
(7) Crime against nature; or
(8) Any felony which involves the willful infliction of serious bodily injury upon another or which was committed by use of a deadly weapon. (1979, c. 815, s. 1; 1983, c. 251, s. 1; 1998-202, s. 6; 2001-490, s. 2.4.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article on the efficacy of a probable cause requirement in juvenile proceedings, see 59 N.C.L. Rev. 723 (1981).

For empirical study, "The Faces Within: An Examination of the Disparate Treatment of Minority Youth Throughout the North Carolina Juvenile Justice System," see 40 Wake Forest L. Rev. 727 (2005).

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Prior Approval of Filing of Petition Required. — Before a juvenile petition may be filed charging any juvenile with being delinquent or undisciplined, the record must affirmatively disclose that either the intake counselor or the district attorney has approved the filing of such petition. Furthermore, when the district attorney approves the filing of such petition, the record must affirmatively disclose that the intake counselor has theretofore disapproved the filing. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

Limits on Involvement of District Attorney. — The district attorney's involvement in cases charging juveniles with being undisciplined or delinquent, before the juvenile petition is filed, is limited to (1) Assisting the intake counselor, when requested, during the preliminary inquiry in determining the legal sufficiency of the evidence, and (2) reviewing the decision of the intake counselor not approving the filing of a juvenile petition, and affirming the decision of the intake counselor or directing the filing of a petition himself. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

§ 7B-1702. Evaluation.

Upon a finding of legal sufficiency, except in cases involving nondivertible offenses set out in G.S. 7B-1701, the juvenile court counselor shall determine whether a complaint should be filed as a petition, the juvenile diverted pursuant to G.S. 7B-1706, or the case resolved without further action. In making the decision, the counselor shall consider criteria provided by the Department. The intake process shall include the following steps if practicable:

(1) Interviews with the complainant and the victim if someone other than the complainant;

(2) Interviews with the juvenile and the juvenile's parent, guardian, or custodian;

(3) Interviews with persons known to have relevant information about the juvenile or the juvenile's family.

Interviews required by this section shall be conducted in person unless it is necessary to conduct them by telephone. (1979, c. 815, s. 1; 1981, c. 469, s. 5; 1998-202, s. 6; 2000-137, s. 3; 2001-490, s. 2.5.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Prior Approval of Filing of Petition Required. — Before a juvenile petition may be filed charging any juvenile with being delinquent or undisciplined, the record must affirmatively disclose that either the intake counselor or the district attorney has approved the filing of such petition. Furthermore, when the district attorney approves the filing of such petition, the record must affirmatively disclose that the intake counselor has theretofore disapproved the filing. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

Dismissal of Petitions Filed Against Juveniles Treated Unequally. — The trial court erred in not dismissing petitions against six juveniles who received unequal treatment relative to other juveniles who were alleged to have committed the same or similar offenses by design, in that each respondent was prosecuted because he or she, or his or her parents, was unwilling or unable to pay $1,000 compensation to victim, while the other juveniles, who were similarly situated, were not prosecuted because they, or their parents, were able or willing to pay $1,000 to victim. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

§ 7B-1703. Evaluation decision.

(a) The juvenile court counselor shall complete evaluation of a complaint within 15 days of receipt of the complaint, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor. The juvenile court counselor shall decide within this time period whether a complaint shall be filed as a juvenile petition.

(b) Except as provided in G.S. 7B-1706, if the juvenile court counselor determines that a complaint should be filed as a petition, the counselor shall file the petition as soon as practicable, but in any event within 15 days after the complaint is received, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor. The juvenile court counselor shall assist the complainant when necessary with the preparation and filing of the petition, shall include on it the date and the words "Approved for Filing", shall sign it, and shall transmit it to the clerk of superior court.

(c) If the juvenile court counselor determines that a petition should not be filed, the juvenile court counselor shall notify the complainant immediately in writing with reasons for the decision and shall include notice of the complainant's right to have the decision reviewed by the prosecutor. The juvenile court counselor shall sign the complaint after indicating on it:

(1) The date of the determination;
(2) The words "Not Approved for Filing"; and
(3) Whether the matter is "Closed" or "Diverted and Retained".

Except as provided in G.S. 7B-1706, any complaint not approved for filing as a juvenile petition shall be destroyed by the juvenile court counselor after holding the complaint for a temporary period to allow review as provided in G.S. 7B-1705. (1979, c. 815, s. 1; 1998-202, s. 6; 2001-490, s. 2.6.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Prior Approval of Filing of Petition Required. — Before a juvenile petition may be filed charging any juvenile with being delinquent or undisciplined, the record must affirmatively disclose that either the intake counselor or the district attorney has approved the filing of such petition. Furthermore when the district attorney approves the filing of such petition, the record must affirmatively disclose that the intake counselor has theretofore disapproved the filing. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

Dismissal of Petitions Filed Against Juveniles Treated Unequally. — The trial court erred in not dismissing petitions against six juveniles who received unequal treatment relative to other juveniles who were alleged to have committed the same or similar offenses by design, in that each respondent was prosecuted because he or she, or his or her parents, was unwilling or unable to pay $1,000 compensation to victim, while the other juveniles, who were similarly situated, were not prosecuted because they, or their parents, were able or willing to pay $1,000 to victim. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

§ 7B-1704. Request for review by prosecutor.

The complainant has five calendar days, from receipt of the juvenile court counselor's decision not to approve the filing of a petition, to request review by the prosecutor. The juvenile court counselor shall notify the prosecutor immediately of such request and shall transmit to the prosecutor a copy of the complaint. The prosecutor shall notify the complainant and the juvenile court counselor of the time and place for the review. (1979, c. 815, s. 1; 1998-202, s. 6; 2001-490, s. 2.7.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Prior Approval of Filing of Petition Required. — Before a juvenile petition may be filed charging any juvenile with being delinquent or undisciplined, the record must affirmatively disclose that either the intake counselor or the district attorney has approved the filing of such petition. Furthermore when the district attorney approves the filing of such petition, the record must affirmatively disclose that the intake counselor has theretofore disapproved the filing. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

Dismissal of Petitions Filed Against Juveniles Treated Unequally. — The trial court erred in not dismissing petitions against six juveniles who received unequal treatment vis a vis other juveniles who were alleged to have committed the same or similar offenses by design, in that each respondent was prosecuted because he or she, or his or her parents, was unwilling or unable to pay $1,000 compensation to victim, while the other juveniles, who were similarly situated, were not prosecuted because they, or their parents, were able or willing to pay $1,000 to victim. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

§ 7B-1705. Review of determination that petition should not be filed.

No later than 20 days after the complainant is notified, the prosecutor shall review the juvenile court counselor's determination that a juvenile petition should not be filed. Review shall include conferences with the complainant and the juvenile court counselor. At the conclusion of the review, the prosecutor shall: (i) affirm the decision of the juvenile court counselor or direct the filing of a petition and (ii) notify the complainant of the prosecutor's action. (1979, c. 815, s. 1; 1981, c. 469, s. 6; 1998-202, s. 6; 2001-490, s. 2.8.)

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Limits on Involvement of District Attorney. — The district attorney's involvement in cases charging juveniles with being undisciplined or delinquent, before the juvenile petition is filed, is limited to (1) Assisting the intake counselor, when requested, during the preliminary inquiry in determining the legal sufficiency or the evidence, and (2) reviewing the decision of the intake counselor not approving the filing of a juvenile petition, and affirming the decision of the intake counselor or directing the filing of a petition himself. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

Prior Approval of Filing of Petition Required. — Before a juvenile petition may be filed charging any juvenile with being delinquent or undisciplined, the record must affirmatively disclose that either the intake counselor or the district attorney has approved the filing of such petition. Furthermore when the district attorney approves the filing of such petition, the record must affirmatively disclose that the intake counselor has theretofore disapproved the filing. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

Dismissal of Petitions Filed Against Juveniles Treated Unequally. — The trial court erred in not dismissing petitions against six juveniles who received unequal treatment relative to other juveniles who were alleged to have committed the same or similar offenses by design, in that each respondent was prosecuted because he or she, or his or her parents, was unwilling or unable to pay $1,000 compensation to victim, while the other juveniles, who were similarly situated, were not prosecuted because they, or their parents, were able or willing to pay $1,000 to victim. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

§ 7B-1706. Diversion plans and referral.

(a) Unless the offense is one in which a petition is required by G.S. 7B-1701, upon a finding of legal sufficiency the juvenile court counselor may divert the juvenile pursuant to a diversion plan, which may include referring the juvenile to any of the following resources:

(1) An appropriate public or private resource;
(2) Restitution;
(3) Community service;
(4) Victim-offender mediation;
(5) Regimented physical training;
(6) Counseling;
(7) A teen court program, as set forth in subsection (c) of this section.

As part of a diversion plan, the juvenile court counselor may enter into a diversion contract with the juvenile and the juvenile's parent, guardian, or custodian.

(b) Unless the offense is one in which a petition is required by G.S. 7B-1701, upon a finding of legal sufficiency the juvenile court counselor may enter into a diversion contract with the juvenile and the parent, guardian, or custodian;

provided, a diversion contract requires the consent of the juvenile and the juvenile's parent, guardian, or custodian. A diversion contract shall:

(1) State conditions by which the juvenile agrees to abide and any actions the juvenile agrees to take;

(2) State conditions by which the parent, guardian, or custodian agrees to abide and any actions the parent, guardian, or custodian agrees to take;

(3) Describe the role of the juvenile court counselor in relation to the juvenile and the parent, guardian, or custodian;

(4) Specify the length of the contract, which shall not exceed six months;

(5) Indicate that all parties understand and agree that:

a. The juvenile's violation of the contract may result in the filing of the complaint as a petition; and

b. The juvenile's successful completion of the contract shall preclude the filing of a petition.

After a diversion contract is signed by the parties, the juvenile court counselor shall provide copies of the contract to the juvenile and the juvenile's parent, guardian, or custodian. The juvenile court counselor shall notify any agency or other resource from which the juvenile or the juvenile's parent, guardian, or custodian will be seeking services or treatment pursuant to the terms of the contract. At any time during the term of the contract if the juvenile court counselor determines that the juvenile has failed to comply substantially with the terms of the contract, the juvenile court counselor may file the complaint as a petition. Unless the juvenile court counselor has filed the complaint as a petition, the juvenile court counselor shall close the juvenile's file in regard to the diverted matter within six months after the date of the contract.

(c) If a teen court program has been established in the district, the juvenile court counselor, upon a finding of legal sufficiency, may refer to a teen court program, any case in which a juvenile has allegedly committed an offense that would be an infraction or misdemeanor if committed by an adult. However, the juvenile court counselor shall not refer a case to a teen court program (i) if the juvenile has been referred to a teen court program previously, or (ii) if the juvenile is alleged to have committed any of the following offenses:

(1) Driving while impaired under G.S. 20-138.1, 20-138.2, 20-138.3, 20-138.5, or 20-138.7, or any other motor vehicle violation;

(2) A Class A1 misdemeanor;

(3) An assault in which a weapon is used; or

(4) A controlled substance offense under Article 5 of Chapter 90 of the General Statutes, other than simple possession of a Schedule VI drug or alcohol.

(d) The juvenile court counselor shall maintain diversion plans and contracts entered into pursuant to this section to allow juvenile court counselors to determine when a juvenile has had a complaint diverted previously. Diversion plans and contracts are not public records under Chapter 132 of the General Statutes, shall not be included in the clerk's record pursuant to G.S. 7B-3000, and shall be withheld from public inspection or examination. Diversion plans and contracts shall be destroyed when the juvenile reaches the age of 18 years or when the juvenile is no longer under the jurisdiction of the court, whichever is longer.

(e) No later than 60 days after the juvenile court counselor diverts a juvenile, the juvenile court counselor shall determine whether the juvenile and the juvenile's parent, guardian, or custodian have complied with the terms of the diversion plan or contract. In making this determination, the juvenile court counselor shall contact any referral resources to determine whether the juvenile and the juvenile's parent, guardian, or custodian complied with any recommendations for treatment or services made by the resource. If the juvenile and the juvenile's parent, guardian, or custodian have not complied, the juvenile court counselor shall reconsider the decision to divert and may authorize the filing of the complaint as a petition within 10 days after making the determination. If the juvenile court counselor does not file a petition, the juvenile court counselor may continue to monitor the case for up to six months from the date of the diversion plan or contract. At any point during that time period if the juvenile and the juvenile's parent, guardian, or custodian fail to comply, the juvenile court counselor shall reconsider the decision to divert and may authorize the filing of the complaint as a petition. After six months, the juvenile court counselor shall close the diversion plan or contract file. (1979, c. 815, s. 1; 1998-202, s. 6; 2001-490, s. 2.9.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7B-1707. Direct contempt by juvenile.

The preceding sections of this Article do not apply when a juvenile is ordered pursuant to G.S. 5A-32(b) to appear and show cause why the juvenile should not be held in contempt. (2007-168, s. 4.)

Editor's Note. — Session Laws 2007-168, s. 8, makes this section effective December 1, 2007, and applicable to acts occurring or offenses committed on or after that date.

Article 18.

Venue; Petition; Summons.

§ 7B-1800. Venue.

(a) A proceeding in which a juvenile is alleged to be delinquent or undisciplined shall be commenced and adjudicated in the district in which the offense is alleged to have occurred. When a proceeding is commenced in a district other than that of the juvenile's residence, the court shall proceed to adjudication in that district and, if the juvenile is in residential treatment or foster care in that district, the court shall conduct the dispositional hearing in that district as well, unless the judge enters an order, supported by findings of fact, that a transfer would serve the ends of justice or is in the best interests of the juvenile.

(b) Except as provided in subsection (a) of this section, after adjudication, the following procedures shall be available to the court:

(1) The court may transfer the proceeding to the court in the district where the juvenile resides for disposition.

(2) Where the proceeding is not transferred under subdivision (1) of this section, the court shall immediately notify the chief district court judge in the district in which the juvenile resides. If the chief district court judge requests a transfer within five days after receipt of notification, the court shall transfer the proceeding.

(3) Where the proceeding is not transferred under subdivision (1) or (2) of this section, the court, upon motion of the juvenile, shall transfer the proceeding to the court in the district where the juvenile resides for disposition. The court shall advise the juvenile of the juvenile's right to transfer under this section. (1979, c. 815, s. 1; 1998-202, s. 6; 2004-155, s. 1.)

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

This section, as rewritten by Session Laws 2004-154, s. 1, effective October 1, 2004, is applicable to hearings conducted on or after that date.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For empirical study, "The Faces Within: An Examination of the Disparate Treatment of Minority Youth Throughout the North Carolina Juvenile Justice System," see 40 Wake Forest L. Rev. 727 (2005).

§ 7B-1801. Pleading and process.

The pleading in a juvenile action is the petition. The process in a juvenile action is the summons. (1979, c. 815, s. 1; 1998-202, s. 6.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *Some of the following cases were decided prior to the enactment of this Chapter.*

Fatal Variance Between Juvenile Petition and Evidence. — There was a fatal variance between the juvenile petition and the evidence where the petition, which charged a first-degree sexual offense based on the parties' ages, was fatally defective because it did not allege the ages of the victim and the juvenile. In re Griffin, 162 N.C. App. 487, 592 S.E.2d 12, 2004 N.C. App. LEXIS 172 (2004).

Jurisdiction. — The issuance and service of process is the means by which the court obtains jurisdiction; thus, where no summons was issued, the court acquired jurisdiction over neither the persons nor the subject matter of the action, and was without authority to enter order adjudging a juvenile as neglected. In re Mitchell, 126 N.C. App. 432, 485 S.E.2d 623 (1997).

§ 7B-1802. Petition.

The petition shall contain the name, date of birth, and address of the juvenile and the name and last known address of the juvenile's parent, guardian, or custodian. The petition shall allege the facts that invoke jurisdiction over the juvenile. The petition shall not contain information on more than one juvenile.

A petition in which delinquency is alleged shall contain a plain and concise statement, without allegations of an evidentiary nature, asserting facts supporting every element of a criminal offense and the juvenile's commission thereof with sufficient precision clearly to apprise the juvenile of the conduct which is the subject of the allegation.

Sufficient copies of the petition shall be prepared so that copies will be available for the juvenile, for each parent if living separate and apart, for the guardian or custodian if any, for the juvenile court counselor, for the prosecutor, and for any person determined by the court to be a necessary party. (1979, c. 815, s. 1; 1981, c. 469, s. 9; 1998-202, s. 6; 2001-490, s. 2.10.)

CASE NOTES

Fatal Variance Between Juvenile Petition and Evidence. — There was a fatal variance between the juvenile petition and the evidence where the petition, which charged a first-degree sexual offense based on the parties' ages, was fatally defective because it did not allege the ages of the victim and the juvenile. In re Griffin, 162 N.C. App. 487, 592 S.E.2d 12, 2004 N.C. App. LEXIS 172 (2004).

Fatal Defect in Offense Charged. — Since there is no statute included in the North Carolina General Statutes for assault with a deadly weapon with intent to inflict serious injury, the offense listed on the juvenile petition, there was no crime listed on the petition and the petition was fatally defective. In re R.P.M., 172 N.C. App. 782, 616 S.E.2d 627, 2005 N.C. App. LEXIS 1803 (2005).

§ 7B-1803. Receipt of complaints; filing of petition.

(a) All complaints concerning a juvenile alleged to be delinquent or undisciplined shall be referred to the juvenile court counselor for screening and evaluation. Thereafter, if the juvenile court counselor determines that a petition should be filed, the petition shall be drawn by the juvenile court counselor or the clerk, signed by the complainant, and verified before an official authorized to administer oaths. If the circumstances indicate a need for immediate attachment of jurisdiction and if the juvenile court counselor is out of the county or otherwise unavailable to receive a complaint and to draw a petition when it is needed, the clerk shall assist the complainant in communicating the complaint to the juvenile court counselor by telephone and, with the approval of the juvenile court counselor, shall draw a petition and file it when signed and verified. A copy of the complaint and petition shall be transmitted to the juvenile court counselor. Procedures for receiving delinquency and undisciplined complaints and drawing petitions thereon, consistent with this Article and Article 17 of this Chapter, shall be established by administrative order of the chief judge in each judicial district.

(b) If review is requested pursuant to G.S. 7B-1704, the prosecutor shall review a complaint and any decision of the juvenile court counselor not to authorize that the complaint be filed as a petition. If the prosecutor, after review, authorizes a complaint to be filed as a petition, the prosecutor shall prepare the complaint to be filed by the clerk as a petition, recording the day of filing. (1979, c. 815, s. 1; 1981, c. 469, ss. 10, 11; 1998-202, s. 6; 2001-490, s. 2.11.)

Legal Periodicals. — For 1984 survey, "Termination of Parental Rights: Putting Love in Its Place," see 63 N.C.L. Rev. 1177 (1985).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

The primary purpose to be served by signature and verification is to obtain the written and sworn statement of the facts alleged in an official and authoritative form that may be used for any lawful purpose, either in or out of a court of law. In re Green, 67 N.C. App. 501, 313 S.E.2d 193 (1984).

The Juvenile Code requirements that the juvenile delinquency petition be signed and verified are essential to both the validity of the petition and to establishing the jurisdiction of the court. In re Green, 67 N.C. App. 501, 313 S.E.2d 193 (1984).

Signature by District Attorney. — As long as juvenile intake counselor follows the statutory procedures before the signing of the petition, and the assistant district attorney does not encroach upon the important role of the intake counselor, the assistant district attorney may sign the petition as complainant. In re Stowe, 118 N.C. App. 662, 456 S.E.2d 336 (1995).

§ 7B-1804. Commencement of action.

(a) An action is commenced by the filing of a petition in the clerk's office when that office is open, or by a magistrate's acceptance of a petition for filing pursuant to subsection (b) of this section when the clerk's office is closed.

(b) When the office of the clerk is closed and the juvenile court counselor requests a petition alleging a juvenile to be delinquent or undisciplined, a magistrate may draw and verify the petition and accept it for filing, which acceptance shall constitute filing. The magistrate's authority under this subsection is limited to emergency situations when a petition is required in order to obtain a secure or nonsecure custody order. Any petition accepted for filing under this subsection shall be delivered to the clerk's office for processing as soon as that office is open for business. (1979, c. 815, s. 1; 1987, c. 409, s. 3; 1998-202, s. 6; 2001-490, s. 2.12.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7B-1805. Issuance of summons.

(a) Immediately after a petition has been filed alleging that a juvenile is undisciplined or delinquent, the clerk shall issue a summons to the juvenile and to the parent, guardian, or custodian requiring them to appear for a hearing at the time and place stated in the summons. A copy of the petition shall be attached to each summons.

(b) A summons shall be on a printed form supplied by the Administrative Office of the Courts and shall include:

(1) Notice of the nature of the proceeding and the purpose of the hearing scheduled on the summons.

(2) Notice of any right to counsel and information about how to seek the appointment of counsel prior to a hearing.

(3) Notice that, if the court determines at the adjudicatory hearing that the allegations of the petition are true, the court will conduct a dispositional hearing and will have jurisdiction to enter orders affecting substantial rights of the juvenile and of the parent, guardian, or custodian, including orders that:

a. Affect the juvenile's custody;

b. Impose conditions on the juvenile;

c. Require that the juvenile receive medical, psychiatric, psychological, or other treatment and that the parent participate in the treatment;

d. Require the parent to undergo psychiatric, psychological, or other treatment or counseling;

e. Order the parent to pay for treatment that is ordered for the juvenile or the parent; and

f. Order the parent to pay support for the juvenile for any period the juvenile does not reside with the parent or to pay attorneys' fees or other fees or expenses as ordered by the court.

(4) Notice that the parent, guardian, or custodian shall be required to attend scheduled hearings and that failure without reasonable cause to attend may result in proceedings for contempt of court.

(5) Notice that the parent, guardian, or custodian shall be responsible for bringing the juvenile before the court at any hearing the juvenile is required to attend and that failure without reasonable cause to bring the juvenile before the court may result in proceedings for contempt of court.

(c) The summons shall advise the parent, guardian, or custodian that upon service, jurisdiction over the parent, guardian, or custodian is obtained and that failure of the parent, guardian, or custodian to appear or bring the juvenile before the court without reasonable cause or to comply with any order of the court pursuant to Article 27 of this Chapter may cause the court to issue a show cause order for contempt. The summons shall contain the following language in bold type:

"TO THE PARENT(S), GUARDIAN(S), OR CUSTODIAN(S): YOUR FAILURE TO APPEAR IN COURT FOR A SCHEDULED HEARING OR TO COMPLY

WITH AN ORDER OF THE COURT MAY RESULT IN A FINDING OF CRIMINAL CONTEMPT. A PERSON HELD IN CRIMINAL CONTEMPT MAY BE SUBJECT TO IMPRISONMENT OF UP TO 30 DAYS, A FINE NOT TO EXCEED FIVE HUNDRED DOLLARS ($500.00) OR BOTH."

(d) A summons shall be directed to the person summoned to appear and shall be delivered to any person authorized to serve process. (1979, c. 815, s. 1; 1987 (Reg. Sess., 1988), c. 1090, s. 2; 1995, c. 328, s. 1; 1998-202, s. 6.)

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Jurisdiction. — The issuance and service of process is the means by which the court obtains jurisdiction; thus, where no summons was issued, the court acquired jurisdiction over neither the persons nor the subject matter of the action, and was without authority to enter order adjudging a juvenile as neglected. In re Mitchell, 126 N.C. App. 432, 485 S.E.2d 623 (1997).

§ 7B-1806. Service of summons.

The summons and petition shall be personally served upon the parent, the guardian, or custodian and the juvenile not less than five days prior to the date of the scheduled hearing. The time for service may be waived in the discretion of the court.

If the parent, guardian, or custodian entitled to receive a summons cannot be found by a diligent effort, the court may authorize service of the summons and petition by mail or by publication. The cost of the service by publication shall be advanced by the petitioner and may be charged as court costs as the court may direct.

The court may issue a show cause order for contempt against a parent, guardian, or custodian who is personally served and fails without reasonable cause to appear and to bring the juvenile before the court.

The provisions of G.S. 15A-301(a), (c), (d), and (e) relating to criminal process apply to juvenile process; provided the period of time for return of an unserved summons is 30 days. (1979, c. 815, s. 1; 1998-202, s. 6.)

Legal Periodicals. — For comment on due process in juvenile proceedings, see 3 N.C. Cent. L.J. 255 (1972).

For survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

Trial Court Is Without Jurisdiction Where No Notice Was Served. — A trial court did not have jurisdiction to enter orders in a juvenile delinquency proceeding where no summons, petition or other notice was ever served on the juvenile or her parents, guardian or custodian prior to any of the hearings. In re McAllister, 14 N.C. App. 614, 188 S.E.2d 723 (1972).

Trial Court Properly Exercised Personal Jurisdiction over Juvenile. — Trial court properly exercised personal jurisdiction over the juvenile on a simple assault petition, as the juvenile's and the juvenile's parent's presence at the hearing on that petition as well as the juvenile's participation in the hearing without objection constituted a general appearance for the purposes of waiving any defect in service. In re Hodge, 153 N.C. App. 102, 568 S.E.2d 878, 2002 N.C. App. LEXIS 1086 (2002).

Trial court did not lack personal jurisdiction over defendant juvenile even though service of process was not made five days prior to the hearing as required by G.S. 7B-1806, where neither defendant nor his counsel contested service of process or personal jurisdiction at any of the numerous hearings they participated in. In re D.S.B., 179 N.C. App. 577, 634 S.E.2d 633, 2006 N.C. App. LEXIS 1961 (2006).

Statement on return that service was accomplished implies that it was done in the manner required by law. In re Leggett, 67 N.C. App. 745, 314 S.E.2d 144 (1984).

It is the service of summons, rather than the return of the officer, that confers jurisdiction. In re Leggett, 67 N.C. App. 745, 314 S.E.2d 144 (1984); In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

Failure of Record to Show Time and Manner of Service. — Failure of a record of a juvenile delinquency proceeding to show the exact time and manner of service of the summons and petition upon the juvenile and his parents was not fatal where the record affirmatively showed that the juvenile and his mother were in fact accorded sufficient notice of the hearing at which he was adjudicated delinquent to provide adequate opportunity to prepare, that at least seven days prior to the hearing he had been represented by privately employed counsel, and that he was represented by such counsel at the hearing, which had already been once continued. In re Collins, 12 N.C. App. 142, 182 S.E.2d 662 (1971).

Service on Only One Parent Required. — In order to have a child declared dependent, it is not necessary to serve the petition on both parents, but only on one of them or the guardian or custodian. In re Yow, 40 N.C. App. 688, 253 S.E.2d 647, cert. denied, 297 N.C. 610, 257 S.E.2d 223 (1979).

In order to have a child declared dependent, it is not necessary to serve the petition on both parents, but only on one of them. In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

U.S. Const., Amend. XIV did not proscribe a finding of dependency binding upon the mother of a child so that his custody could be placed with a suitable person, where the mother was not served with any notice before the first hearing, but where the facts showed that his father was served with notice, and it was found as a fact that the mother's address was unknown and no evidence to dispute the finding was in the record. In re Yow, 40 N.C. App. 688, 253 S.E.2d 647, cert. denied, 297 N.C. 610, 257 S.E.2d 223 (1979).

Jurisdiction Acquired by Service on One Parent. — Juvenile court, which acquired jurisdiction over the subject matter when the summons was served upon mother, although it was not served upon father as required by this section, had the authority to decide the issue of neglect and dependency of three children. In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988).

§ 7B-1807. Notice to parent and juvenile of scheduled hearings.

The clerk shall give to all parties, including both parents of the juvenile, the juvenile's guardian or custodian, and any other person who has assumed the status and obligation of a parent without being awarded legal custody of the juvenile by a court, five days' written notice of the date and time of all scheduled hearings unless the party is notified in open court or the court orders otherwise. (1998-202, s. 6.)

CASE NOTES

Cited in In re May, 153 N.C. App. 299, 569 S.E.2d 704, 2002 N.C. App. LEXIS 1130 (2002), aff'd, 357 N.C. 423, 584 S.E.2d 271 (2003).

§ 7B-1808. First appearance for felony cases.

(a) A juvenile who is alleged in the petition to have committed an offense that would be a felony if committed by an adult shall be summoned to appear before the court for a first appearance within 10 days of the filing of the petition. If the juvenile is in secure or nonsecure custody, the first appearance shall take place at the initial hearing required by G.S. 7B-1906. Unless the juvenile is in secure or nonsecure custody, the court may continue the first appearance to a time certain for good cause.

(b) At the first appearance, the court shall:

(1) Inform the juvenile of the allegations set forth in the petition;

(2) Determine whether the juvenile has retained counsel or has been assigned counsel;

(3) If applicable, inform the juvenile of the date of the probable cause hearing, which shall be within 15 days of the first appearance; and

(4) Inform the parent, guardian, or custodian that the parent, guardian, or custodian is required to attend all hearings scheduled in the matter and may be held in contempt of court for failure to attend any scheduled hearing.

If the juvenile is not represented by counsel, counsel for the juvenile shall be appointed in accordance with rules adopted by the Office of Indigent Services. (1998-202, s. 6; 2000-144, s. 20; 2001-487, s. 4.)

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, G.S. 7A-498 et seq.

Article 19.

Temporary Custody; Secure and Nonsecure Custody; Custody Hearings.

§ 7B-1900. Taking a juvenile into temporary custody.

Temporary custody means the taking of physical custody and providing personal care and supervision until a court order for secure or nonsecure custody can be obtained. A juvenile may be taken into temporary custody without a court order under the following circumstances:

(1) By a law enforcement officer if grounds exist for the arrest of an adult in identical circumstances under G.S. 15A-401(b).

(2) By a law enforcement officer or a juvenile court counselor if there are reasonable grounds to believe that the juvenile is an undisciplined juvenile.

(3) By a law enforcement officer, by a juvenile court counselor, by a member of the Black Mountain Center, Alcohol Rehabilitation Center, and Juvenile Evaluation Center Joint Security Force established pursuant to G.S. 122C-421, or by personnel of the Department if there are reasonable grounds to believe the juvenile is an absconder from any residential facility operated by the Department or from an approved detention facility. (1979, c. 815, s. 1; 1985, c. 408, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 1; 1994, Ex. Sess., c. 27, s. 2; 1995, c. 391, s. 1; 1997-443, s. 11A.118(a); 1998-202, s. 6; 2000-137, s. 3; 2001-490, s. 2.13.)

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article on the efficacy of a probable cause requirement in juvenile proceedings, see 59 N.C.L. Rev. 723 (1981).

For article on rights and interests of parent, child, family and state, see 4 Campbell L. Rev. 85 (1981).

For comment, "The Child Abuse Amendments of 1984: Congress Is Calling North Carolina to Respond to the Baby Doe Dilemma," 20 Wake Forest L. Rev. 975 (1984).

For empirical study, "The Faces Within: An Examination of the Disparate Treatment of Minority Youth Throughout the North Carolina Juvenile Justice System," see 40 Wake Forest L. Rev. 727 (2005).

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Custody Did Not Violate Family Rights to Privacy and Integrity. — Department of

Social Services employee did not act outside of the authority conferred on her by statute, or violate plaintiffs' rights to family privacy and integrity, by placing child in foster home or making telephone calls seeking information about child, after receiving reports that child was beaten by her father or otherwise abused. Renn v. Garrison, 100 F.3d 344 (4th Cir. 1996).

§ 7B-1901. Duties of person taking juvenile into temporary custody.

(a) A person who takes a juvenile into custody without a court order under G.S. 7B-1900(1) or (2) shall proceed as follows:

(1) Notify the juvenile's parent, guardian, or custodian that the juvenile has been taken into temporary custody and advise the parent, guardian, or custodian of the right to be present with the juvenile until a determination is made as to the need for secure or nonsecure custody. Failure to notify the parent, guardian, or custodian that the juvenile is in custody shall not be grounds for release of the juvenile.

(2) Release the juvenile to the juvenile's parent, guardian, or custodian if the person having the juvenile in temporary custody decides that continued custody is unnecessary. In the case of a juvenile unlawfully absent from school, if continued custody is unnecessary, the person having temporary custody may deliver the juvenile to the juvenile's school or, if the local city or county government and the local school board adopt a policy, to a place in the local school administrative unit.

(3) If the juvenile is not released, request that a petition be drawn pursuant to G.S. 7B-1803 or G.S. 7B-1804. Once the petition has been drawn and verified, the person shall communicate with the juvenile court counselor. If the juvenile court counselor approves the filing of the petition, the juvenile court counselor shall contact the judge or the person delegated authority pursuant to G.S. 7B-1902 if other than the juvenile court counselor, for a determination of the need for continued custody.

(b) A juvenile taken into temporary custody under this Article shall not be held for more than 12 hours, or for more than 24 hours if any of the 12 hours falls on a Saturday, Sunday, or legal holiday, unless a petition or motion for review has been filed and an order for secure or nonsecure custody has been entered.

(c) If the juvenile is not released, request that a petition be drawn pursuant to G.S. 7B-1803 or G.S. 7B-1804. Once the petition has been drawn and verified, the person shall communicate with the juvenile court counselor. If the juvenile court counselor approves the filing of the petition, the juvenile court counselor shall contact the judge or the person delegated authority pursuant to G.S. 7B-1902 if other than the juvenile court counselor, for a determination of the need for continued custody. (1979, c. 815, s. 1; 1981, c. 335, ss. 1, 2; 1994, Ex. Sess., c. 17, s. 1; c. 27, s. 3; 1995, c. 391, s. 2; 1998-202, s. 6; 2001-490, s. 2.14.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For comment, "The Child Abuse Amendments of 1984: Congress Is Calling North Carolina to Respond to the Baby Doe Dilemma," 20 Wake Forest L. Rev. 975 (1984).

§ 7B-1902. Authority to issue custody orders; delegation.

In the case of any juvenile alleged to be within the jurisdiction of the court, when the court finds it necessary to place the juvenile in custody, the court may order that the juvenile be placed in secure or nonsecure custody pursuant to criteria set out in G.S. 7B-1903.

Any district court judge may issue secure and nonsecure custody orders pursuant to G.S. 7B-1903. The chief district court judge may delegate the court's authority to the chief court counselor or the chief court counselor's counseling staff by administrative order filed in the office of the clerk of superior court. The administrative order shall specify which persons may be contacted for approval of a secure or nonsecure custody order. The chief district court judge shall not delegate the court's authority to detain or house juveniles in holdover facilities pursuant to G.S. 7B-1905 or G.S. 7B-2513. (1979, c. 815, s. 1; 1981, c. 425; 1983, c. 590, s. 1; 1998-202, s. 6.)

Editor's Note. — The reference in the second paragraph to G.S. 7B-2513 was substituted for G.S. 7B-2512 following its recodification at the direction of the Revisor of Statutes.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7B-1903. Criteria for secure or nonsecure custody.

(a) When a request is made for nonsecure custody, the court shall first consider release of the juvenile to the juvenile's parent, guardian, custodian, or other responsible adult. An order for nonsecure custody shall be made only when there is a reasonable factual basis to believe the matters alleged in the petition are true, and that:

(1) The juvenile is a runaway and consents to nonsecure custody; or

(2) The juvenile meets one or more of the criteria for secure custody, but the court finds it in the best interests of the juvenile that the juvenile be placed in a nonsecure placement.

(b) When a request is made for secure custody, the court may order secure custody only where the court finds there is a reasonable factual basis to believe that the juvenile committed the offense as alleged in the petition, and that one of the following circumstances exists:

(1) The juvenile is charged with a felony and has demonstrated that the juvenile is a danger to property or persons.

(2) The juvenile has demonstrated that the juvenile is a danger to persons and is charged with either (i) a misdemeanor at least one element of which is assault on a person or (ii) a misdemeanor in which the juvenile used, threatened to use, or displayed a firearm or other deadly weapon.

(2a) The juvenile has demonstrated that the juvenile is a danger to persons and is charged with a violation of G.S. 20-138.1 or G.S. 20-138.3.

(3) The juvenile has willfully failed to appear on a pending delinquency charge or on charges of violation of probation or post-release supervision, providing the juvenile was properly notified.

(4) A delinquency charge is pending against the juvenile, and there is reasonable cause to believe the juvenile will not appear in court.

(5) The juvenile is an absconder from (i) any residential facility operated by the Department or any detention facility in this State or (ii) any comparable facility in another state.

(6) There is reasonable cause to believe the juvenile should be detained for the juvenile's own protection because the juvenile has recently suffered or attempted self-inflicted physical injury. In such case, the juvenile must have been refused admission by one appropriate hospital, and the period of secure custody is limited to 24 hours to determine the need for inpatient hospitalization. If the juvenile is placed in secure custody, the juvenile shall receive continuous supervision and a physician shall be notified immediately.

(7) The juvenile is alleged to be undisciplined by virtue of the juvenile's being a runaway and is inappropriate for nonsecure custody place-

ment or refuses nonsecure custody, and the court finds that the juvenile needs secure custody for up to 24 hours, excluding Saturdays, Sundays, and State holidays, or where circumstances require, for a period not to exceed 72 hours to evaluate the juvenile's need for medical or psychiatric treatment or to facilitate reunion with the juvenile's parents, guardian, or custodian.

(8) The juvenile is alleged to be undisciplined and has willfully failed to appear in court after proper notice; the juvenile shall be brought to court as soon as possible and in no event should be held more than 24 hours, excluding Saturdays, Sundays, and State holidays or where circumstances require for a period not to exceed 72 hours.

(c) When a juvenile has been adjudicated delinquent, the court may order secure custody pending the dispositional hearing or pending placement of the juvenile pursuant to G.S. 7B-2506.

(d) The court may order secure custody for a juvenile who is alleged to have violated the conditions of the juvenile's probation or post-release supervision, but only if the juvenile is alleged to have committed acts that damage property or injure persons.

(e) If the criteria for secure custody as set out in subsection (b), (c), or (d) of this section are met, the court may enter an order directing an officer or other authorized person to assume custody of the juvenile and to take the juvenile to the place designated in the order. (1979, c. 815, s. 1; 1981, c. 426, ss. 1-4; c. 526; 1983, c. 590, ss. 2-6; 1987, c. 101; 1987 (Reg. Sess., 1988), c. 1090, s. 3; 1989, c. 550; 1998-202, s. 6; 2000-137, s. 3; 2001-158, s. 1; 2007-493, s. 31.)

Editor's Note. — Session Laws 2007-493, s. 33, provides: "Sections 26, 27, 28, 29, 30, and 31 of this act become effective December 1, 2007, and apply to offenses committed on or after that date. The remainder of this act is effective when it becomes law. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Session Laws 2007-493, s. 31, effective December 1, 2007, and applicable to offenses committed on or after that date, added subdivision (b)(2a). For applicability provision, see Editor's note.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article on rights and interest of parent, child, family and state, see 4 Campbell L. Rev. 85 (1981).

For article, "Coercive Governmental Intervention and the Family: A Comment on North Carolina's Proposed Standards," see 7 Campbell L. Rev. 145 (1984).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

Secure Custody Not Authorized Solely for Alleged Probation Violation. — Subsection (c) of this section does not authorize issuance of a secure custody order for a juvenile who has previously been adjudicated delinquent simply because the juvenile is now alleged to have violated the terms of her probation. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Jurisdiction Required. — Subdivision (d) of this section requires that the trial court have jurisdiction before exercising the powers granted thereunder. In re Transp. of Juveniles, 102 N.C. App. 806, 403 S.E.2d 557 (1991).

Standard of Proof for Termination and Removal Distinguished. — There is a substantive difference between the quantum of adequate proof of neglect and dependency for purposes of termination and for purposes of removal. The most significant difference is that while parental rights may not be terminated for threatened future harm, the Department of Social Services may obtain temporary custody of a child when there is a risk of neglect in the future. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

The task at the temporary custody or removal stage is to determine whether the child is exposed to a substantial risk of physical injury because the parent is unable to provide adequate protection. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

Removal of Child Upheld. — Evidence held sufficient to show that seven-year old child was exposed to a substantial risk of physical injury because of her mother's inability to maintain secure living arrangements for her, so as to permit the Department of Social Services to remove her from her mother's custody until such accommodations could be provided. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

§ 7B-1904. Order for secure or nonsecure custody.

The custody order shall be in writing and shall direct a law enforcement officer or other authorized person to assume custody of the juvenile and to make due return on the order. The official executing the order shall give a copy of the order to the juvenile's parent, guardian, or custodian. If the order is for secure custody, copies of the petition and custody order shall accompany the juvenile to the detention facility or holdover facility of the jail. A message of the Division of Criminal Information, State Bureau of Investigation, stating that a juvenile petition and secure custody order relating to a specified juvenile are on file in a particular county shall be authority to detain the juvenile in secure custody until a copy of the juvenile petition and secure custody order can be forwarded to the juvenile detention facility. The copies of the juvenile petition and secure custody order shall be transmitted to the detention facility no later than 72 hours after the initial detention of the juvenile.

An officer receiving an order for custody which is complete and regular on its face may execute it in accordance with its terms and need not inquire into its regularity or continued validity, nor does the officer incur criminal or civil liability for its execution. (1979, c. 815, s. 1; 1989, c. 124; 1998-202, s. 6.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7B-1905. Place of secure or nonsecure custody.

(a) A juvenile meeting the criteria set out in G.S. 7B-1903(a), may be placed in nonsecure custody with a department of social services or a person designated in the order for temporary residential placement in:

(1) A licensed foster home or a home otherwise authorized by law to provide such care;

(2) A facility operated by a department of social services; or

(3) Any other home or facility approved by the court and designated in the order.

In placing a juvenile in nonsecure custody, the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile. If the court finds that the relative is willing and able to provide proper care and supervision, the court shall order placement of the juvenile with the relative unless the court finds that placement with the relative would be contrary to the best interest of the juvenile. Placement of a juvenile outside of this State shall be in accordance with the Interstate Compact on the Placement of Children set forth in Article 38 of this Chapter.

(b) Pursuant to G.S. 7B-1903(b), (c), or (d), a juvenile may be temporarily detained in an approved detention facility which shall be separate from any jail, lockup, prison, or other adult penal institution, except as provided in subsection (c) of this section. It shall be unlawful for a county or any unit of government to operate a juvenile detention facility unless the facility meets the standards and rules adopted by the Department of Health and Human Services.

(c) A juvenile who has allegedly committed an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult may be detained in secure custody in a holdover facility up to 72 hours, if the court, based on information provided by the juvenile court counselor, determines that no acceptable alternative placement is available and the protection of the public requires the juvenile be housed in a holdover facility. (1979, c. 815, s. 1; 1983, c. 639, ss. 1, 2; 1997-390, s. 4; 1997-443, s. 11A.118(a); 1998-202, s. 6; 1998-229, s. 3; 1999-423, s. 14; 2001-490, s. 2.15.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

The trial court had jurisdiction to enter a temporary nonsecure custody order where there was a reasonable factual basis to believe that one child had been sexually abused and hospitalized for depression and the other child had been physically abused and was hospitalized for stress disorder. In re Van Kooten, 126 N.C. App. 764, 487 S.E.2d 160 (1997), appeal dismissed, 347 N.C. 576, 502 S.E.2d 618 (1998).

§ 7B-1906. Secure or nonsecure custody hearings.

(a) No juvenile shall be held under a secure custody order for more than five calendar days or under a nonsecure custody order for more than seven calendar days without a hearing on the merits or an initial hearing to determine the need for continued custody. A hearing conducted under this subsection may not be continued or waived. In every case in which an order has been entered by an official exercising authority delegated pursuant to G.S. 7B-1902, a hearing to determine the need for continued custody shall be conducted on the day of the next regularly scheduled session of district court in the city or county where the order was entered if the session precedes the expiration of the applicable time period set forth in this subsection. If the session does not precede the expiration of the time period, the hearing may be conducted at another regularly scheduled session of district court in the district where the order was entered.

(b) As long as the juvenile remains in secure or nonsecure custody, further hearings to determine the need for continued secure custody shall be held at intervals of no more than 10 calendar days. A subsequent hearing on continued nonsecure custody shall be held within seven business days, excluding Saturdays, Sundays, and legal holidays when the courthouse is closed for transactions, of the initial hearing required in subsection (a) of this section and hearings thereafter shall be held at intervals of no more than 30 calendar days. In the case of a juvenile alleged to be delinquent, further hearings may be waived only with the consent of the juvenile, through counsel for the juvenile.

(c) The court shall determine whether a juvenile who is alleged to be delinquent has retained counsel or has been assigned counsel; if the juvenile is not represented by counsel, counsel for the juvenile shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services.

(d) At a hearing to determine the need for continued custody, the court shall receive testimony and shall allow the juvenile and the juvenile's parent, guardian, or custodian an opportunity to introduce evidence, to be heard in their own behalf, and to examine witnesses. The State shall bear the burden at every stage of the proceedings to provide clear and convincing evidence that restraints on the juvenile's liberty are necessary and that no less intrusive alternative will suffice. The court shall not be bound by the usual rules of evidence at the hearings.

(e) The court shall be bound by criteria set forth in G.S. 7B-1903 in determining whether continued custody is warranted.

(f) The court may impose appropriate restrictions on the liberty of a juvenile who is released from secure custody, including:

(1) Release on the written promise of the juvenile's parent, guardian, or custodian to produce the juvenile in court for subsequent proceedings;
(2) Release into the care of a responsible person or organization;
(3) Release conditioned on restrictions on activities, associations, residence, or travel if reasonably related to securing the juvenile's presence in court; or
(4) Any other conditions reasonably related to securing the juvenile's presence in court.

(g) If the court determines that the juvenile meets the criteria in G.S. 7B-1903 and should continue in custody, the court shall issue an order to that effect. The order shall be in writing with appropriate findings of fact. The findings of fact shall include the evidence relied upon in reaching the decision and the purposes which continued custody is to achieve.

(h) The hearing to determine the need to continue custody may be conducted by audio and video transmission which allows the court and the juvenile to see and hear each other. If the juvenile has counsel, the juvenile may communicate fully and confidentially with the juvenile's attorney during the proceeding. Prior to the use of audio and video transmission, the procedures and type of equipment for audio and video transmission shall be submitted to the Administrative Office of the Courts by the chief district court judge and approved by the Administrative Office of the Courts. (1979, c. 815, s. 1; 1981, c. 469, s. 13; 1987 (Reg. Sess., 1988), c. 1090, s. 4; 1994, Ex. Sess., c. 27, s. 1; 1997-390, ss. 5, 6; 1998-202, s. 6; 1998-229, s. 4; 2000-144, s. 21; 2003-337, s. 10.)

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, G.S. 7A-498 et seq.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

The determination of "reasonable efforts" under former § 7A-577(h) is a conclusion of law because it requires the exercise of judgment; appellate review of a trial court's conclusions of law is limited to whether they are supported by findings of fact. In re Helms, 127 N.C. App. 505, 491 S.E.2d 672 (1997).

Reasonable Efforts Shown. — The DSS made reasonable efforts to prevent child's removal from her home where the DSS entered into four different protection plans with the mother regarding the care and protection of the child in an effort by DSS to stabilize the child's home environment and protect her from violent individuals and drugs, and to encourage the mother to apply for food stamps, AFDC, and Medicaid. In re Helms, 127 N.C. App. 505, 491 S.E.2d 672 (1997).

Hearing on five petitions alleging abuse, neglect, and/or dependency was clearly denominated a hearing to determine the need for continued custody. The judge therefore had the discretion to either continue nonsecure custody or to return the children to their home; he did not have the authority to dismiss the petitions because in so doing he made an unauthorized determination of the merits of the case. There is no express statutory authority allowing the judge to dismiss the petitions at a five-day hearing. In re Guarante, 109 N.C. App. 598, 427 S.E.2d 883 (1993).

§ 7B-1907. Telephonic communication authorized.

All communications, notices, orders, authorizations, and requests authorized or required by G.S. 7B-1901, 7B-1903, and 7B-1904 may be made by telephone when other means of communication are impractical. All written orders pursuant to telephonic communication shall bear the name and the title of the person communicating by telephone, the signature and the title of the official entering the order, and the hour and the date of the authorization. (1979, c. 815, s. 1; 1998-202, s. 6.)

ARTICLE 20.

Basic Rights.

§ 7B-2000. Juvenile's right to counsel; presumption of indigence.

(a) A juvenile alleged to be within the jurisdiction of the court has the right to be represented by counsel in all proceedings. Counsel for the juvenile shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services, unless counsel is retained for the juvenile, in any proceeding in which the juvenile is alleged to be (i) delinquent or (ii) in contempt of court when alleged or adjudicated to be undisciplined.

(b) All juveniles shall be conclusively presumed to be indigent, and it shall not be necessary for the court to receive from any juvenile an affidavit of indigency. (1979, c. 815, s. 1; 1998-202, s. 6; 2000-144, s. 22.)

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, G.S. 7A-498 et seq.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

For article on rights and interests of parent, child, family and state, see 4 Campbell L. Rev. 85 (1981).

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

A juvenile appellant is presumed indigent. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

§ 7B-2001. Appointment of guardian.

In any case when no parent, guardian, or custodian appears in a hearing with the juvenile or when the court finds it would be in the best interests of the juvenile, the court may appoint a guardian of the person for the juvenile. The guardian shall operate under the supervision of the court with or without bond and shall file only such reports as the court shall require. Unless the court orders otherwise, the guardian:

(1) Shall have the care, custody, and control of the juvenile or may arrange a suitable placement for the juvenile.
(2) May represent the juvenile in legal actions before any court.
(3) May consent to certain actions on the part of the juvenile in place of the parent or custodian, including (i) marriage, (ii) enlisting in the armed forces, and (iii) enrollment in school.
(4) May consent to any necessary remedial, psychological, medical, or surgical treatment for the juvenile.

The authority of the guardian shall continue until the guardianship is terminated by court order, until the juvenile is emancipated pursuant to Subchapter IV of this Chapter, or until the juvenile reaches the age of majority. (1979, c. 815, s. 1; 1997-390, s. 7; 1998-202, s. 6.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Removal of Guardian. — A legal guardian of a child's person, unlike a mere custodian, is not removable for a mere change of circumstances; unfitness or neglect of duty must be shown. In re Williamson, 77 N.C. App. 53, 334 S.E.2d 428 (1985), cert. denied, 316 N.C. 194, 341 S.E.2d 584 (1986).

§ 7B-2002. Payment of court-appointed attorney.

An attorney appointed pursuant to G.S. 7B-2000 or pursuant to any other provision of this Subchapter shall be paid a reasonable fee in accordance with rules adopted by the Office of Indigent Defense Services. The court may require payment of the attorneys' fees from a person other than the juvenile as provided in G.S. 7A-450.1, 7A-450.2, and 7A-450.3. A person who does not comply with the court's order of payment may be found in civil contempt as provided in G.S. 5A-21. (1979, c. 815, s. 1; 1983, c. 726, ss. 2, 3; 1987 (Reg. Sess., 1988), c. 1090, s. 6; 1991, c. 575, s. 1; 1998-202, s. 6; 2000-144, s. 23.)

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, G.S. 7A-498 et seq.

ARTICLE 21.

Law Enforcement Procedures in Delinquency Proceedings.

§ 7B-2100. Role of the law enforcement officer.

A law enforcement officer who takes a juvenile into temporary custody should select the most appropriate course of action to the situation, the needs of the juvenile, and the protection of the public safety. The officer may:

(1) Release the juvenile, with or without first counseling the juvenile;
(2) Release the juvenile to the juvenile's parent, guardian, or custodian;
(3) Refer the juvenile to community resources;
(4) Seek a petition; or
(5) Seek a petition and request a custody order. (1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

Legal Periodicals. — For article on rights and interests of parent, child, family and state, see 4 Campbell L. Rev. 85 (1981).

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Showup. — The legislature did not intend to preclude the use of the showup in juvenile investigations without a court order. This technique serves the important law enforcement objective of efficiency and protects the juvenile from more intrusive identification techniques.

In re Stallings, 318 N.C. 565, 350 S.E.2d 327 (1986), rehearing dismissed, 319 N.C. 669, 356 S.E.2d 339 (1987).

§ 7B-2101. Interrogation procedures.

(a) Any juvenile in custody must be advised prior to questioning:

(1) That the juvenile has a right to remain silent;

(2) That any statement the juvenile does make can be and may be used against the juvenile;

(3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and

(4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

(b) When the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney. If an attorney is not present, the parent, guardian, or custodian as well as the juvenile must be advised of the juvenile's rights as set out in subsection (a) of this section; however, a parent, guardian, or custodian may not waive any right on behalf of the juvenile.

(c) If the juvenile indicates in any manner and at any stage of questioning pursuant to this section that the juvenile does not wish to be questioned further, the officer shall cease questioning.

(d) Before admitting into evidence any statement resulting from custodial interrogation, the court shall find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights. (1979, c. 815, s. 1; 1998-202, s. 6.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *Most of the following cases were decided prior to the enactment of this Chapter.*

Applicability of Section. — Whether defendant is a juvenile delinquent is irrelevant to a consideration of whether he is entitled to the protections of former G.S. 7A-595. State v. Fincher, 309 N.C. 1, 305 S.E.2d 685 (1983).

The rights afforded under this section to be informed of Miranda rights, as well as to have a parent, guardian, or custodian present during questioning, apply only to a person defined to be a juvenile under G.S. 7A-517 (see now G.S. 7B-101), i.e., a person under the age of eighteen who is neither married, emancipated, nor in the military. State v. Brantley, 129 N.C. App. 725, 501 S.E.2d 676 (1998).

"Guardian." — Confession of 13-year-old, taken in the presence of his aunt, was properly admitted in evidence; though the aunt was not his legal guardian or custodian, because she clothed, housed, and fed him, and enrolled him in school, she acted as his "guardian" for purposes of this section. State v. Jones, 147 N.C. App. 527, 556 S.E.2d 644, 2001 N.C. App. LEXIS 1239 (2001), cert. denied and appeal dismissed, 355 N.C. 351, 562 S.E.2d 427 (2002).

Despite juvenile's contention that his aunt was his guardian, his suppression motion was properly denied, as she was not considered a "party listed" under G.S. 7B-2101, and the aunt never lived with the juvenile, did not have custody of him, nor acted on his behalf as a parent or his guardian. State v. Oglesby, 174 N.C. App. 658, 622 S.E.2d 152, 2005 N.C. App. LEXIS 2624 (2005).

"Aunt" Was Not Enumerated Relation. — Denial of defendant's motion to suppress defendant's statement to officers was proper because, although defendant was age 16 at the time of the interrogation, and detectives did not cease questioning when defendant requested to phone defendant's aunt, an "aunt" was not enumerated relation in G.S. 7B-2101 and defendant had no right to have her present during questioning. State v. Oglesby, 361 N.C. 550, 648 S.E.2d 819, 2007 N.C. LEXIS 812 (2007).

Former § 7A-595 set out mandatory procedures which to be followed when juvenile is interrogated by a law-enforcement officer. In re

Riley, 61 N.C. App. 749, 301 S.E.2d 750 (1983).

Miranda Rights Explanation. — An interrogating officer need not explain the Miranda rights (Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966)) in any greater detail than what is required by Miranda, even when the suspect is a minor. State v. Flowers, 128 N.C. App. 697, 497 S.E.2d 94 (1998).

Miranda Rights Should Have Been Given During 30-Minute Questioning by School Staff in Police Officer's Presence. — Juvenile defendant should have been read Miranda rights where defendant was repeatedly questioned over a period of 30 minutes by the principal, the assistant principal, and a school resources officer, and was kept under the police officer's supervision while the principal and assistant principal questioned other students; nothing indicated that defendant was free to leave and a person in defendant's place would have believed that he or she was restrained in their movement to the degree associated with a formal arrest. In re W.R., 179 N.C. App. 642, 634 S.E.2d 923, 2006 N.C. App. LEXIS 2028 (2006).

Juvenile's rights under this section arise only if the juvenile is in custody. State v. Smith, 317 N.C. 100, 343 S.E.2d 518 (1986), overruled in part on other grounds, State v. Buchanan, 353 N.C. 332, 543 S.E.2d 823 (2001).

Right of Juvenile to Have Parent Present. — Under U.S. Const., Amends. V and VI, an accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. A juvenile's right, pursuant to subdivision (a)(3) of former G.S. 7A-595, to have a parent present during custodial interrogation is entitled to similar protection. State v. Smith, 317 N.C. 100, 343 S.E.2d 518 (1986), overruled in part on other grounds, State v. Buchanan, 353 N.C. 332, 543 S.E.2d 823 (2001).

When juvenile invoked the right to have a parent present during the interrogation, all interrogation should have ceased; since it did not, the trial court erred by denying the juvenile's motion to suppress the statement, which was elicited in violation of G.S. 7B-2101(d). State v. Branham, 153 N.C. App. 91, 569 S.E.2d 24, 2002 N.C. App. LEXIS 1078 (2002).

Where juvenile defendant was not informed of his right to have a parent, guardian or custodian present during questioning, there can be no finding that such defendant knowingly, willingly, and understandingly waived this privilege. State v. Fincher, 309 N.C. 1, 305 S.E.2d 685 (1983).

The failure to advise juvenile defendant of his right to have a parent, custodian or guardian present during questioning is not an error of constitutional magnitude, because this privilege is statutory in origin and does not emanate from the Constitution. Therefore, the standard set forth in G.S. 15A-1443(a) must be applied to determine whether the erroneous admission into evidence of defendant's statements to police officers was sufficient to warrant a new trial. State v. Fincher, 309 N.C. 1, 305 S.E.2d 685 (1983).

There was no custodial interrogation where juvenile defendant was repeatedly told he was not under arrest and was free to leave at any time, and where he signed a statement wherein he stated that he was not under arrest and was giving a statement voluntarily. State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

Law enforcement officials are not required to inform a juvenile that his parents or attorney are actually present before taking his voluntary confession, and their failure to do so does not render the juvenile's confession involuntary as a matter of law or otherwise inadmissible. State v. Gibson, 342 N.C. 142, 463 S.E.2d 193 (1995).

The following warnings were sufficient to satisfy former § 7A-595 and Miranda, even though the juvenile statute contains no requirement of indigency or financial need in order to obtain a court-appointed attorney: "You have the right to remain silent . . . Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer one will be appointed for you before questioning if you wish. You have the right to have your parent, guardian, or custodian with you during questioning. If you decide to answer questions now without a lawyer, parent, guardian or custodian present, you will still have the right to stop answering questions at any time until you talk to a lawyer, parent, guardian, or custodian." State v. McKeithan, 140 N.C. App. 422, 537 S.E.2d 526, 2000 N.C. App. LEXIS 1205 (2000).

The failure to warn in accordance with this section must be raised in a motion to suppress and must be argued in the trial court. State v. Jenkins, 311 N.C. 194, 317 S.E.2d 345 (1984).

Parent May Not Waive Rights of Juvenile. — Finding that respondent's mother freely, understandingly, and knowingly waived respondent's juvenile rights is not equivalent to a finding that respondent knowingly and understandingly waived his rights. Furthermore, a parent, guardian, or custodian may not waive any right on behalf of the juvenile. In re Ewing, 83 N.C. App. 535, 350 S.E.2d 887 (1986).

When a juvenile's confession was obtained without the juvenile's parent being present because the parent had voluntarily absented himself from the interrogation, the fact that the parent voluntarily absented himself did not allow the confession to be admissible against the juvenile, under subdivisions (a)(3) and (b) of this section, because the parent could not waive the juvenile's right to have the parent present during the interrogation. In re Butts, 157 N.C. App. 609, 582 S.E.2d 279, 2003 N.C. App. LEXIS 928 (2003), review improvidently allowed, appeal dismissed sub nom. In re T.R.B., 358 N.C. 370, 595 S.E.2d 146 (2004).

Failure to Object at Trial Waives Argument on Appeal. — In a capital murder trial, defendant's failure to object at trial to the State's introduction of his out-of-court statement on grounds that he was not advised of his rights under subsection (a) of former G.S. 7A-595 waived his right to complain of its admission on appeal. State v. Stokes, 319 N.C. 1, 352 S.E.2d 653 (1987).

Findings Required. — This section clearly provides that before any statement flowing from custodial interrogation is admitted the judge must make the required findings. In re Riley, 61 N.C. App. 749, 301 S.E.2d 750 (1983).

This section requires the trial court to find as a fact that the juvenile knowingly, willingly, and understandingly waived his juvenile rights prior to admitting any statement made by the juvenile during a custodial interrogation. In re Ewing, 83 N.C. App. 535, 350 S.E.2d 887 (1986).

When a juvenile challenged the admission of his confession because it was obtained without the juvenile's parent present, as the parent had voluntarily absented himself from the juvenile's interrogation, it was error for the trial court to fail to determine whether the juvenile was in custody when the confession was obtained. In re Butts, 157 N.C. App. 609, 582 S.E.2d 279, 2003 N.C. App. LEXIS 928 (2003), review improvidently allowed, appeal dismissed sub nom. In re T.R.B., 358 N.C. 370, 595 S.E.2d 146 (2004).

Where the court's statement contained nothing that could be construed as a factual finding that juvenile's confession was made in the presence of his parent, guardian, custodian or attorney, as required by subsection (b) of former G.S. 7A-595, the case would be remanded for a finding on compliance with former G.S. 7A-595(b). In re Young, 78 N.C. App. 440, 337 S.E.2d 185 (1985).

Confession Held Inadmissible. — Juvenile's confession which resulted from police-initiated custodial interrogation in the absence of counsel or a parent after the juvenile invoked his right to have a parent present during questioning was erroneously admitted. State v. Smith, 317 N.C. 100, 343 S.E.2d 518 (1986), overruled in part on other grounds, State v. Buchanan, 353 N.C. 332, 543 S.E.2d 823 (2001).

Admission of Statement of Juvenile. — Although the trial record did not contain the findings required by former G.S. 7A-595(d), admission of defendant's statement at trial was not prejudicial because it was not inculpatory. It merely gave somewhat differing versions of the defendant's whereabouts on the day in question. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Subsequent Statement Admissible Where Defendant Initiated Communication. — Defendant's subsequent statement was admissible where defendant stated that he did not wish to answer any questions, but then, upon considering his mother's statement, he turned to the police officer and nodded his head affirmatively, after which the detective asked defendant if he then wished to answer questions without a lawyer present and the defendant answered "yes." State v. Johnson, 136 N.C. App. 683, 525 S.E.2d 830, 2000 N.C. App. LEXIS 164 (2000).

An Unambiguous Invocation of Defendant's Right to Silence. — Trial court did not commit plain error by admitting the portion of defendant's statement concerning a jeep which his brother co-defendant shot at where the agent witness's testimony indicated that defendant's statement was not an unambiguous invocation of his right to silence. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 149 L. Ed. 2d 305 (2001), cert. denied, 532 U.S. 931, 121 S. Ct. 1380, 149 L. Ed. 2d 305 (2001).

Waiver of Rights. — The additional language added to the adult rights form adequately conveyed the substance of juvenile defendant's right to have his mother present during questioning; it was clear defendant understood this right, and his actions were a knowing and intelligent waiver of the right. State v. Miller, 344 N.C. 658, 477 S.E.2d 915 (1996).

A defendant's youth or subnormal mental capacity does not necessarily render him incapable of waiving his rights knowingly and voluntarily. State v. Flowers, 128 N.C. App. 697, 497 S.E.2d 94 (1998).

A juvenile knowingly, voluntarily, and understandingly waived her rights, where she admitted to her family and then to a police officer that she and her boyfriend stole money from her grandparents, and after being taken into custody waived her right to have a parent or guardian present and signed a waiver of rights form. State v. Brantley, 129 N.C. App. 725, 501 S.E.2d 676 (1998).

There is no statutory duty to explain a person's rights to a juvenile in greater detail than what is required by former G.S.

7A-595(a). State v. Flowers, 128 N.C. App. 697, 497 S.E.2d 94 (1998).

Applicability to Statements Resulting from Custodial Interrogation. — This section pertains only to statements obtained from a juvenile defendant as the result of custodial interrogation. State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

A technical violation of former § 7A-595(a)(3) did not taint a valid waiver of rights by 14 year old defendant 2 days later. State v. Bunnell, 340 N.C. 74, 455 S.E.2d 426 (1995).

The purpose of the requirement in former § 7A-595(d) is to establish the basis for admitting the statement. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — *The opinion below was rendered prior to the enactment of this chapter.*

Waiver of Right to Have Attorney Present. — A juvenile, less than 14 years of age, may waive his right to have an attorney present during interrogation. See opinion of Attorney General to Sgt. James Preston Simmons, Elkin Police Department, 49 N.C.A.G. 88 (1979).

§ 7B-2102. Fingerprinting and photographing juveniles.

(a) A law enforcement officer or agency shall fingerprint and photograph a juvenile who was 10 years of age or older at the time the juvenile allegedly committed a nondivertible offense as set forth in G.S. 7B-1701, when a complaint has been prepared for filing as a petition and the juvenile is in physical custody of law enforcement or the Department.

(a1) A county juvenile detention facility shall photograph a juvenile who has been committed to that facility. The county detention facility shall release any photograph it makes or receives pursuant to this section to the Department, upon the Department's request. The duty of confidentiality in subsection (d) of this section applies to the Department, except as provided in G.S. 7B-3102.

(b) If a law enforcement officer or agency does not take the fingerprints or a photograph of the juvenile pursuant to subsection (a) of this section or the fingerprints or photograph have been destroyed pursuant to subsection (e) of this section, a law enforcement officer or agency shall fingerprint and photograph a juvenile who has been adjudicated delinquent if the juvenile was 10 years of age or older at the time the juvenile committed an offense that would be a felony if committed by an adult.

(c) A law enforcement officer, facility, or agency who fingerprints or photographs a juvenile pursuant to this section shall do so in a proper format for transfer to the State Bureau of Investigation and the Federal Bureau of Investigation. After the juvenile, who was 10 years of age or older at the time of the offense, is adjudicated delinquent of an offense that would be a felony if committed by an adult, fingerprints obtained pursuant to this section shall be transferred to the State Bureau of Investigation and placed in the Automated Fingerprint Identification System (AFIS) to be used for all investigative and comparison purposes. Photographs obtained pursuant to this section shall be placed in a format approved by the State Bureau of Investigation and may be used for all investigative or comparison purposes. The State Bureau of Investigation shall release any photograph it receives pursuant to this section to the Department, upon the Department's request. The duty of confidentiality in subsection (d) of this section applies to the Department, except as provided in G.S. 7B-3102.

(d) Fingerprints and photographs taken pursuant to this section are not public records under Chapter 132 of the General Statutes, shall not be included in the clerk's record pursuant to G.S. 7B-3000, shall be withheld from public inspection or examination, and shall not be eligible for expunction pursuant to G.S. 7B-3200. Fingerprints and photographs taken pursuant to this section shall be maintained separately from any juvenile record, other than the electronic file maintained by the State Bureau of Investigation.

(d1) Repealed by Session Laws 2007-458, s. 1, effective October 1, 2007.

(e) If a juvenile is fingerprinted and photographed pursuant to subsection (a) of this section, the custodian of records shall destroy all fingerprints and photographs at the earlier of the following:

(1) The juvenile court counselor or prosecutor does not file a petition against the juvenile within one year of fingerprinting and photographing the juvenile pursuant to subsection (a) of this section;

(2) The court does not find probable cause pursuant to G.S. 7B-2202; or

(3) The juvenile is not adjudicated delinquent of any offense that would be a felony or a misdemeanor if committed by an adult.

The chief court counselor shall notify the local custodian of records, and the local custodian of records shall notify any other record-holding agencies, when a decision is made not to file a petition, the court does not find probable cause, or the court does not adjudicate the juvenile delinquent. (1996, 2nd Ex. Sess., c. 18, s. 23.2(a); 1998-202, s. 6; 2000-137, s. 3; 2001-490, s. 2.16; 2003-297, s. 2; 2007-458, ss. 1, 3(a), (b).)

Effect of Amendments. — Session Laws 2007-458, ss. 1, 3(a) and (b), effective October 1, 2007, deleted subsection (d1) which allowed the court to release photographs of juvenile escapees; designated the former second sentence of subsection (a) as subsection (a1), and in subsection (a1), deleted "if the juvenile was at least 10 years old at the time that juvenile allegedly committed a nondivertible offense as set forth in G.S. 7B-1701" at the end of the first sentence and added the last two sentences; and added the last sentence in subsection (c).

CASE NOTES

Juvenile Not in Custody for Purposes of Being Informed of Juvenile or Miranda Rights. — As the juvenile was not subject to a restraint on his freedom of movement of the degree associated with a formal arrest, the juvenile was not in custody for the purposes of being informed of juvenile or Miranda rights, and the trial court correctly determined that there was no requirement that the juvenile be informed of, or waive, such rights prior to the interview with the detective. In re Hodge, 153 N.C. App. 102, 568 S.E.2d 878, 2002 N.C. App. LEXIS 1086 (2002).

Cited in In re M.E.B., 153 N.C. App. 278, 569 S.E.2d 683, 2002 N.C. App. LEXIS 1135 (2002).

§ 7B-2103. Authority to issue nontestimonial identification order where juvenile alleged to be delinquent.

Except as provided in G.S. 7B-2102, nontestimonial identification procedures shall not be conducted on any juvenile without a court order issued pursuant to this Article unless the juvenile has been charged as an adult or transferred to superior court for trial as an adult in which case procedures applicable to adults, as set out in Articles 14 and 23 of Chapter 15A of the General Statutes, shall apply. A nontestimonial identification order authorized by this Article may be issued by any judge of the district court or of the superior court upon request of a prosecutor. As used in this Article, "nontestimonial identification" means identification by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical examination, handwriting exemplars, voice samples, photographs, and lineups or similar identification procedures requiring the presence of a juvenile. (1979, c. 815, s. 1; 1981, c. 454, s. 1; 1998-202, s. 6.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

The purpose of former § 7A-596 was to empower officials to conduct the same identification procedures on juveniles as on adults. In re Stallings, 318 N.C. 565, 350 S.E.2d 327 (1986), rehearing dismissed, 319 N.C. 669, 356 S.E.2d 339 (1987).

Applicability to Juvenile Committing Crime Prior to Effective Date of Section. — Application of the provisions of former G.S. 7A-596 and former G.S. 7A-598 to take the fingerprints of a juvenile accused of a crime committed prior to their effective date does not offend N.C. Const., Art. I, § 16, which forbids the enactment of any ex post facto law or a like prohibition found in U.S. Const., Art. I, § 10. In re Stedman, 305 N.C. 92, 286 S.E.2d 527 (1982), overruled on other grounds, State v. Dellinger, 343 N.C. 93, 468 S.E.2d 218 (1996).

Section 15A-502(c) and former G.S. 7A-596 are procedural statutes, and a change in the evidentiary or procedural law between the time of the offense and the time of trial does not preclude the State from utilizing the new procedure even though at the time of the offense it was unavailable. In re Stedman, 305 N.C. 92, 286 S.E.2d 527 (1982), overruled on other grounds, State v. Dellinger, 343 N.C. 93, 468 S.E.2d 218 (1996).

In determining whether evidence obtained in violation of former § 7A-596 should be excluded, the court will consider the following factors: (a) The importance of the particular interest violated; (b) the extent of the deviation from lawful conduct; (c) the extent to which the violation was willful; (d) the extent to which exclusion will tend to deter future violations of the statute. State v. Norris, 77 N.C. App. 525, 335 S.E.2d 764 (1985). But see In re Stallings, 318 N.C. 565, 350 S.E.2d 327 (1986).

The procedural standards for juveniles must be at least as strict as those for adults, when the legislature has given no guidance otherwise. State v. Norris, 77 N.C. App. 525, 335 S.E.2d 764 (1985). But see In re Stallings, 318 N.C. 565, 350 S.E.2d 327 (1986).

Showups. — The legislature did not intend to preclude the use of the showup in juvenile investigations without a court order. This technique serves the important law enforcement objective of efficiency and protects the juvenile from more intrusive identification techniques. In re Stallings, 318 N.C. 565, 350 S.E.2d 327 (1986), rehearing dismissed, 319 N.C. 669, 356 S.E.2d 339 (1987), disapproving the rule stated in State v. Norris, 77 N.C. App. 525, 335 S.E.2d 764 (1985).

Error in Lineup Harmless. — Though detective's actions did not comply with this section, defendant did not produce any evidence which tended to show that his subsequent confession was the direct result of the photo lineup; thus, any error was harmless. State v. Green, 124 N.C. App. 269, 477 S.E.2d 182 (1996), cert. denied and appeal denied, 345 N.C. 644, 483 S.E.2d 714 (1997), aff'd, 348 N.C. 588, 502 S.E.2d 819 (1998), cert. denied, 525 U.S. 1111, 119 S. Ct. 883, 142 L. Ed. 2d 783 (1999).

§ 7B-2104. Time of application for nontestimonial identification order.

A request for a nontestimonial identification order may be made prior to taking a juvenile into custody or after custody and prior to the adjudicatory hearing. (1979, c. 815, s. 1; 1981, c. 454, s. 2; 1998-202, s. 6.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Expanded Time Period for Juveniles. — Under G.S. 15A-272, time of application focuses on the arrest of the suspect, while former G.S. 7A-597 (see now this section) focuses on taking the juvenile into custody, indicating an expanded time period when procedural protection of juveniles is necessary. State v. Norris, 77 N.C. App. 525, 335 S.E.2d 764 (1985).

§ 7B-2105. Grounds for nontestimonial identification order.

(a) Except as provided in subsection (b) of this section, a nontestimonial identification order may issue only on affidavit or affidavits sworn to before the court and establishing the following grounds for the order:

(1) That there is probable cause to believe that an offense has been committed that would be a felony if committed by an adult;

(2) That there are reasonable grounds to suspect that the juvenile named or described in the affidavit committed the offense; and

(3) That the results of specific nontestimonial identification procedures will be of material aid in determining whether the juvenile named in the affidavit committed the offense.

(b) A nontestimonial identification order to obtain a blood specimen from a juvenile may issue only on affidavit or affidavits sworn to before the court and establishing the following grounds for the order:

(1) That there is probable cause to believe that an offense has been committed that would be a felony if committed by an adult;

(2) That there is probable cause to believe that the juvenile named or described in the affidavit committed the offense; and

(3) That there is probable cause to believe that obtaining a blood specimen from the juvenile will be of material aid in determining whether the juvenile named in the affidavit committed the offense. (1979, c. 815, s. 1; 1997-80, s. 11; 1998-202, s. 6.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. *— The following case was decided prior to the enactment of this Chapter.*

Applicability to Juvenile Committing Crime Prior to Effective Date of Section. — Application of the provisions of G.S. 7A-596 [see now G.S. 7B-2103] and this section to take the fingerprints of a juvenile accused of a crime committed prior to their effective date does not offend N.C. Const., Art. I, § 16, which forbids the enactment of any ex post facto law or a like prohibition found in U.S. Const., Art. I, § 10. In re Stedman, 305 N.C. 92, 286 S.E.2d 527 (1982), overruled on other grounds, State v. Dellinger, 343 N.C. 93, 468 S.E.2d 218 (1996).

§ 7B-2106. Issuance of order.

Upon a showing that the grounds specified in G.S. 7B-2105 exist, the judge may issue an order following the same procedure as in the case of adults under G.S. 15A-274, 15A-275, 15A-276, 15A-277, 15A-278, 15A-279, 15A-280, and 15A-282. (1979, c. 815, s. 1; 1998-202, s. 6.)

CASE NOTES

Editor's Note. *— The following case was decided prior to the enactment of this Chapter.*

Purpose of References to Statutes. — Reference to the designated statutes in Article 14 of Chapter 15A for adult defendants is essential to comply with the new code provisions for juveniles. For example, trial judges should pay particular attention to G.S. 15A-278, which specifies the necessary contents for the order. In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7B-2107. Nontestimonial identification order at request of juvenile.

A juvenile in custody for or charged with an offense which if committed by an adult would be a felony offense may request that nontestimonial identification procedures be conducted. If it appears that the results of specific nontestimonial identification procedures will be of material aid to the juvenile's defense, the judge to whom the request was directed must order the State to conduct the identification procedures. (1979, c. 815, s. 1; 1997-80, s. 12; 1998-202, s. 6.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7B-2108. Destruction of records resulting from nontestimonial identification procedures.

The results of any nontestimonial identification procedures shall be retained or disposed of as follows:

(1) If a petition is not filed against a juvenile who has been the subject of nontestimonial identification procedures, all records of the evidence shall be destroyed.

(2) If the juvenile is not adjudicated delinquent or convicted in superior court following transfer, all records resulting from a nontestimonial order shall be destroyed. Further, in the case of a juvenile who is under 13 years of age and who is adjudicated delinquent for an offense that would be less than a felony if committed by an adult, all records shall be destroyed.

(3) If a juvenile 13 years of age or older is adjudicated delinquent for an offense that would be a felony if committed by an adult, all records resulting from a nontestimonial order may be retained in the court file. Special precautions shall be taken to ensure that these records will be maintained in a manner and under sufficient safeguards to limit their use to inspection by law enforcement officers for comparison purposes in the investigation of a crime.

(4) If the juvenile is transferred to and convicted in superior court, all records resulting from nontestimonial identification procedures shall be processed as in the case of an adult.

(5) Any evidence seized pursuant to a nontestimonial order shall be retained by law enforcement officers until further order is entered by the court.

(6) Destruction of nontestimonial identification records pursuant to this section shall be performed by the law enforcement agency having possession of the records. Following destruction, the law enforcement agency shall make written certification to the court of the destruction. (1979, c. 815, s. 1; 1994, Ex. Sess., c. 22, s. 28; 1998-202, s. 6.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7B-2109. Penalty for willful violation.

Any person who willfully violates provisions of this Article which prohibit conducting nontestimonial identification procedures without an order issued by the court shall be guilty of a Class 1 misdemeanor. (1979, c. 815, s. 1; 1993, c. 539, s. 5; 1994, Ex. Sess., c. 24, s. 14(c); 1998-202, s. 6.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

ARTICLE 22.

Probable Cause Hearing and Transfer Hearing.

§ 7B-2200. Transfer of jurisdiction of juvenile to superior court.

After notice, hearing, and a finding of probable cause the court may, upon motion of the prosecutor or the juvenile's attorney or upon its own motion, transfer jurisdiction over a juvenile to superior court if the juvenile was 13 years of age or older at the time the juvenile allegedly committed an offense that would be a felony if committed by an adult. If the alleged felony constitutes a Class A felony and the court finds probable cause, the court shall transfer the case to the superior court for trial as in the case of adults. (1979, c. 815, s. 1; 1991 (Reg. Sess., 1992), c. 842, s. 1; 1994, Ex. Sess., c. 22, s. 25; 1998-202, s. 6.)

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

Legal Periodicals. — For article, "The Jurisdictional Dilemma of the Juvenile Court," see 51 N.C.L. Rev. 195 (1972).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

For article on the efficacy of a probable cause requirement in juvenile proceedings, see 59 N.C.L. Rev. 723 (1981).

For empirical study, "The Faces Within: An Examination of the Disparate Treatment of Minority Youth Throughout the North Carolina Juvenile Justice System," see 40 Wake Forest L. Rev. 727 (2005).

CASE NOTES

Editor's Note. — *Most of the following cases were decided prior to the enactment of this Chapter.*

Doli Incapax Abolished. — Although the doctrine of doli incapax may still apply in other contexts, former G.S. 7A-608, as amended in 1994, expresses legislative intent to supersede the doctrine of doli incapax in the context of the transfer of a juvenile, between the ages of thirteen and fourteen, to superior court for trial. State v. Green, 124 N.C. App. 269, 477 S.E.2d 182 (1996), cert. denied and appeal denied, 345 N.C. 644, 483 S.E.2d 714 (1997), aff'd, 348 N.C. 588, 502 S.E.2d 819 (1998), cert. denied, 525 U.S. 1111, 119 S. Ct. 883, 142 L. Ed. 2d 783 (1999).

Age Requirement Strictly Construed. — The court rejected the defendant's contention that the transfer statutes should be construed to prohibit transfer to superior court of a juvenile who is developmentally, socially, psychologically, and emotionally younger than 13. In re Wright, 137 N.C. App. 104, 527 S.E.2d 70, 2000 N.C. App. LEXIS 265 (2000).

Juvenile Rights. — When read in pari materia, former G.S. 7A-609, 7A-610, and former G.S. 7A-608 were intended by the legislature to provide a juvenile the right to a hearing on the issue of whether his case should be transferred to the Superior Court for trial as an adult and the rights to be represented by counsel in accordance with former G.S. 7A-584, to testify as a witness in his own behalf, to call and examine witnesses, and to produce other evidence in his own behalf. State v. T.D.R., 347 N.C. App. 489, 495 S.E.2d 700 (1998).

Transfer of Case Is Within Discretion of Judge. — The decision on whether the case will be transferred to the superior court is left solely within the sound discretion of the district court judge who conducts the probable cause hearing. The exercise of that discretion is not subject to review in the absence of a showing of gross abuse. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977).

No Right to Particular Trial Division. — Neither the juvenile defendant nor the State has the right to have a felony case disposed of in a particular trial division of the General Court of Justice. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977).

Detailed Findings of Fact as to Probable Cause Not Required. — The North Carolina statutes relating to juveniles do not require that a determination of probable cause be supported by detailed findings of fact. In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305, appeal dismissed, 285 N.C. 758, 209 S.E.2d 279 (1974).

Findings of Fact Not Required for Transfer. — The judge is not required to make findings of fact to support his conclusion that the needs of the juvenile or the best interest of the State would be served by transferring the case to the superior court division. It is only required that if he elects to order the transfer, he must state his reasons therefor. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977).

Birthday Rule. — The modern "birthday rule", under which a person attains a given age on the anniversary date of his or her birth is more reflective of common practice and understanding as to when a person reaches a given age. In re Robinson, 120 N.C. App. 874, 464 S.E.2d 86 (1995).

Fractions of days may not be considered in determining when a juvenile can be transferred to superior court for trial pursuant to this section. In re Robinson, 120 N.C. App. 874, 464 S.E.2d 86 (1995).

Jurisdiction Not Proper. — Because a district court never exercised jurisdiction over defendant for the charge of conspiracy to commit armed robbery, the superior court that convicted him never obtained jurisdiction via transfer of the charge; because the trial court lacked jurisdiction over defendant for the conspiracy charge, his conviction was vacated. State v. Jackson, 165 N.C. App. 763, 600 S.E.2d 16, 2004 N.C. App. LEXIS 1509 (2004).

Transfer Not Proper. — Where juvenile turned eighteen while a case against him was pending in the Court of Appeals, the district court's jurisdiction automatically terminated and the superior court lacked subject matter jurisdiction, because the district court did not properly transfer the case to its jurisdiction. State v. Dellinger, 343 N.C. 93, 468 S.E.2d 218 (1996).

Transfer Proper. — Petition alleging that "juvenile was delinquent as defined by former G.S. 7A-517(12) [see now G.S. 7B-1501] in that in Durham County and on or about December 30, 1997, the above named juvenile unlawfully, willfully and feloniously did of malice aforethought kill and murder victim" properly alleged first degree murder under G.S. 14-17, satisfied former G.S. 7A-560 [see now G.S. 7B-402] requirements, and made transfer of case to Superior Court mandatory under former G.S.7A-608 [see now this section]. In re K.R.B., 134 N.C. App. 328, 517 S.E.2d 200, 1999 N.C. App. LEXIS 744 (1999), cert. denied, 351 N.C. 188, 541 S.E.2d 713 (1999).

No Right to Appeal Transfer Decision Upon Guilty Plea. — Under G.S. 15A-1444, defendant had no right to appeal a transfer decision upon a plea of guilty because the appeal did not fall within any of the categories of appeal permitted under G.S. 15A-1444; moreover, defendant did not petition for a writ of certiorari and G.S. 7B-2603(d) did not establish an exception to G.S. 15A-1444(e). State v. Evans, — N.C. App. —, 646 S.E.2d 859, 2007 N.C. App. LEXIS 1600 (2007).

Adult Convictions. — State court's records relating to defendant's 1995 convictions revealed that they were adult convictions; although a seventeen-year-old could be tried in North Carolina as either a juvenile or an adult, G.S. 7B-2200 and G.S. 7B-2203 (North Carolina's district courts possessed exclusive, original jurisdiction over any case involving a juvenile who was alleged to be delinquent, G.S. 7B-1601, thus, if defendant was tried and convicted as a juvenile, he could have been prosecuted only in a North Carolina district court. The judgments underlying defendant's 1995 convictions, however, demonstrated that he was convicted and sentenced in the Superior Court of Surry County, North Carolina, and his 1995 Convictions were therefore necessarily adult convictions. United States v. Allen, 446 F.3d 522, 2006 U.S. App. LEXIS 11193 (4th Cir. 2006).

§ 7B-2201. Fingerprinting juvenile transferred to superior court.

When jurisdiction over a juvenile is transferred to the superior court, the juvenile shall be fingerprinted and the juvenile's fingerprints shall be sent to the State Bureau of Investigation. (1981, c. 862, s. 2; 1998-202, s. 6.)

§ 7B-2202. Probable cause hearing.

(a) The court shall conduct a hearing to determine probable cause in all felony cases in which a juvenile was 13 years of age or older when the offense was allegedly committed. The hearing shall be conducted within 15 days of the date of the juvenile's first appearance. The court may continue the hearing for good cause.

(b) At the probable cause hearing:

(1) A prosecutor shall represent the State;
(2) The juvenile shall be represented by counsel;
(3) The juvenile may testify, call, and examine witnesses, and present evidence; and
(4) Each witness shall testify under oath or affirmation and be subject to cross-examination.

(c) The State shall by nonhearsay evidence, or by evidence that satisfies an exception to the hearsay rule, show that there is probable cause to believe that the offense charged has been committed and that there is probable cause to believe that the juvenile committed it, except:

(1) A report or copy of a report made by a physicist, chemist, firearms identification expert, fingerprint technician, or an expert or technician in some other scientific, professional, or medical field, concerning the results of an examination, comparison, or test performed in connection with the case in issue, when stated in a report by that person, is admissible in evidence;
(2) If there is no serious contest, reliable hearsay is admissible to prove value, ownership of property, possession of property in a person other than the juvenile, lack of consent of the owner, possessor, or custodian of property to the breaking or entering of premises, chain of custody, and authenticity of signatures.

(d) Counsel for the juvenile may waive in writing the right to the hearing and stipulate to a finding of probable cause.

(e) If probable cause is found and transfer to superior court is not required by G.S. 7B-2200, upon motion of the prosecutor or the juvenile's attorney or upon its own motion, the court shall either proceed to a transfer hearing or set a date for that hearing. If the juvenile has not received notice of the intention to seek transfer at least five days prior to the probable cause hearing, the court, at the request of the juvenile, shall continue the transfer hearing.

(f) If the court does not find probable cause for a felony offense, the court shall:

(1) Dismiss the proceeding, or
(2) If the court finds probable cause to believe that the juvenile committed a lesser included offense that would constitute a misdemeanor if committed by an adult, either proceed to an adjudicatory hearing or set a date for that hearing. (1979, c. 815, s. 1; 1981, c. 469, ss. 15, 16; 1994, Ex. Sess., c. 22, s. 26; 1998-202, s. 6.)

Legal Periodicals. — For comment on due process in juvenile proceedings, see 3 N.C. Cent. L.J. 255 (1972).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

Purpose. — A probable cause hearing is not conducted for the purposes of discovery; its purpose is to determine whether there is probable cause to believe that a crime has been committed and that the juvenile respondent committed it. A further purpose of the probable cause hearing prescribed by former G.S. 7A-609 is to determine whether the juvenile's case should be transferred to superior court for trial as an adult. In re Bass, 77 N.C. App. 110, 334 S.E.2d 779 (1985).

Legislative Intent. — The legislature intended that rights accorded a juvenile by former G.S. 7Aj-609 also should be accorded a juvenile with regard to the District Court's consideration and decision as whether to transfer jurisdiction over the juvenile to Superior Court for trial as an adult. State v. T.D.R., 347

N.C. App. 489, 495 S.E.2d 700 (1998).

Subsection (a) of former § 7A-609 requires that a probable cause hearing be conducted in all cases in which a minor 14 years of age or older is charged with a felony before the court may transfer the case to the superior court for trial or proceed with an adjudicatory hearing in the district court. In re Bass, 77 N.C. App. 110, 334 S.E.2d 779 (1985).

Burden on Juvenile. — The burden is upon juvenile to show a reasonable possibility that a different result would have been reached at his adjudicatory hearing had he been afforded a probable cause hearing. In re Bass, 77 N.C. App. 110, 334 S.E.2d 779 (1985).

Transfer of Case Is Within Discretion of Judge. — The decision on whether the case will be transferred to the superior court is left solely within the sound discretion of the district court judge who conducts the probable cause hearing. The exercise of that discretion is not subject to review in the absence of a showing of gross abuse. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977).

Juvenile Rights. — When read in pari materia, former G.S. 7A-608, 7A-609 and 7A-610 were intended by the legislature to provide a juvenile the right to a hearing on the issue of whether his case should be transferred to the Superior Court for trial as an adult and the rights to be represented by counsel in accordance with former G.S. 7A-584, to testify as a witness in his own behalf, to call and examine witnesses, and to produce other evidence in his own behalf. State v. T.D.R., 347 N.C. App. 489, 495 S.E.2d 700 (1998).

No Right to Particular Trial Division. — Neither the juvenile defendant nor the State has the right to have a felony case disposed of in a particular trial division of the General Court of Justice. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977).

Findings of Fact Not Required for Transfer. — The judge is not required to make findings of fact to support his conclusion that the needs of the juvenile or the best interest of the State would be served by transferring the case to the superior court division. It is only required that if he elects to order the transfer, he must state his reasons therefor. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977).

Juvenile Not Placed in Jeopardy Where Only Probable Cause Determined. — Where there was only a determination of probable cause in a hearing before the district court, even though the district court order referred to the hearing as having been adjudicatory and dispositional, the juveniles were not placed in jeopardy by the hearing in the district court before the case's transfer to the superior court. In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305, appeal dismissed, 285 N.C. 758, 209 S.E.2d 279 (1974).

§ 7B-2203. Transfer hearing.

(a) At the transfer hearing, the prosecutor and the juvenile may be heard and may offer evidence, and the juvenile's attorney may examine any court or probation records, or other records the court may consider in determining whether to transfer the case.

(b) In the transfer hearing, the court shall determine whether the protection of the public and the needs of the juvenile will be served by transfer of the case to superior court and shall consider the following factors:

(1) The age of the juvenile;
(2) The maturity of the juvenile;
(3) The intellectual functioning of the juvenile;
(4) The prior record of the juvenile;
(5) Prior attempts to rehabilitate the juvenile;
(6) Facilities or programs available to the court prior to the expiration of the court's jurisdiction under this Subchapter and the likelihood that the juvenile would benefit from treatment or rehabilitative efforts;
(7) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; and
(8) The seriousness of the offense and whether the protection of the public requires that the juvenile be prosecuted as an adult.

(c) Any order of transfer shall specify the reasons for transfer. When the case is transferred to superior court, the superior court has jurisdiction over that felony, any offense based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan of that felony, and any greater or lesser included offense of that felony.

(d) If the court does not transfer the case to superior court, the court shall either proceed to an adjudicatory hearing or set a date for that hearing. (1979, c. 815, s. 1; 1983, c. 532, s. 1; 1994, Ex. Sess., c. 22, s. 27; 1998-202, s. 6.)

CASE NOTES

Editor's Note. *— Most of the following cases were decided prior to the enactment of this Chapter.*

Constitutionality. — Defendants contention that former G.S. 7A-610 (see now this section) failed to guarantee due process because it was vague and overbroad was without merit. State v. Green, 124 N.C. App. 269, 477 S.E.2d 182 (1996), cert. denied and appeal denied, 345 N.C. 644, 483 S.E.2d 714 (1997), aff'd, 348 N.C. 588, 502 S.E.2d 819 (1998), cert. denied, 525 U.S. 1111, 119 S. Ct. 883, 142 L. Ed. 2d 783 (1999).

This section is not void for vagueness since it puts a person of ordinary intelligence on notice that 13-year-old offenders will either have their cases transferred to superior court or are in jeopardy of having their cases transferred if the juvenile court deems it warranted, and it also provides the juvenile court judge with sufficient guidance and criteria to make discretionary transfer rulings. State v. Green, 348 N.C. 588, 502 S.E.2d 819 (1998), cert. denied, 525 U.S. 1111, 119 S. Ct. 883, 142 L. Ed. 2d 783 (1999).

Purpose. — A probable cause hearing is not conducted for the purposes of discovery; its purpose is to determine whether there is probable cause to believe that a crime has been committed and that the juvenile respondent committed it. A further purpose of the probable cause hearing prescribed by former G.S. 7A-610 (see now this section) is to determine whether the juvenile's case should be transferred to superior court for trial as an adult. In re Bass, 77 N.C. App. 110, 334 S.E.2d 779 (1985).

Legislative Intent. — The legislature intended that rights accorded a juvenile by former G.S. 7A-610 (see now this section) also should be accorded a juvenile with regard to the District Court's consideration and decision as whether to transfer jurisdiction over the juvenile to Superior Court for trial as an adult. State v. T.D.R., 347 N.C. App. 489, 495 S.E.2d 700 (1998).

Juvenile Rights. — When read in pari materia, former G.S. 7A-608, 7A-609 and 7A-610 were intended by the legislature to provide a juvenile the right to a hearing on the issue of whether his case should be transferred to the Superior Court for trial as an adult and the rights to be represented by counsel in accordance with former G.S. 7A-584, to testify as a witness in his own behalf, to call and examine witnesses, and to produce other evidence in his own behalf. State v. T.D.R., 347 N.C. App. 489, 495 S.E.2d 700 (1998).

Findings of Fact Not Required for Transfer. — The judge is not required to make findings of fact to support his conclusion that the needs of the juvenile or the best interest of the State would be served by transferring the case to the superior court division. It is only required that if he elects to order the transfer, he must state his reasons therefor. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977), decided under former § 7A-280.

Transfer of Case Is Within Discretion of Judge. — The decision on whether the case will be transferred to the superior court is left solely within the sound discretion of the district court judge who conducts the probable cause hearing. The exercise of that discretion is not subject to review in the absence of a showing of gross abuse. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977), decided under former § 7A-280.

No Right to Particular Trial Division. — Neither the juvenile defendant nor the State has the right to have a felony case disposed of in a particular trial division of the General Court of Justice. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977), decided under former § 7A-280.

The decision to transfer a juvenile's case to superior court lies solely within the sound discretion of the district court judge and is not subject to review absent a showing of gross abuse of discretion. State v. Green, 124 N.C. App. 269, 477 S.E.2d 182 (1996), cert. denied and appeal denied, 345 N.C. 644, 483 S.E.2d 714 (1997), aff'd, 348 N.C. 588, 502 S.E.2d 819 (1998), cert. denied, 525 U.S. 1111, 119 S. Ct. 883, 142 L. Ed. 2d 783 (1999).

Transfer Within Statutory Guidelines. — Juvenile court judge acted within statutory guidelines in transferring a 13-year-old defendant to superior court to stand trial on charges of first-degree sexual offense, attempted first-degree rape, and first-degree burglary, where the judge considered the seriousness of the offenses, the fact that the victim was a stranger to the juvenile, the community's need to be aware of and protected from such serious crimes, defendant's history of assaultive behavior, his acknowledgment of difficulty in controlling his temper, and the strong evidence of his guilt, considering his confession. State v. Green, 348 N.C. 588, 502 S.E.2d 819 (1998), cert. denied, 525 U.S. 1111, 119 S. Ct. 883, 142 L. Ed. 2d 783 (1999).

Evidence Supported Transfer. — The trial court's order transferring first degree sex offense charges against 13-year-old to the Superior Court was supported by sufficient evidence and findings; and due consideration of juvenile's age, maturity, condition or needs for treatment was given although not required. In re Wright, 137 N.C. App. 104, 527 S.E.2d 70, 2000 N.C. App. LEXIS 265 (2000).

The juvenile court abused its discretion in transferring felony charges to superior court under former G.S. 7A-610 where the transfer order was deficient because it failed to adequately state reasons for the transfer, as required by the section and State v. Green, 348 N.C. 588, 502 S.E. 2d 819 (1998); nor did it reflect that consideration was given to the needs of the juvenile, to his rehabilitative potential, and to the family support he received. In re J.L.W., 136 N.C. App. 596, 525 S.E.2d 500, 2000 N.C. App. LEXIS 118 (2000).

Adult Convictions. — State court's records relating to defendant's 1995 convictions revealed that they were adult convictions; although a seventeen-year-old could be tried in North Carolina as either a juvenile or an adult, G.S. 7B-2200 and G.S. 7B-2203, North Carolina's district courts possessed exclusive, original jurisdiction over any case involving a juvenile who was alleged to be delinquent, G.S. 7B-1601, thus, if defendant was tried and convicted as a juvenile, he could have been prosecuted only in a North Carolina district court. The judgments underlying defendant's 1995 convictions, however, demonstrated that he was convicted and sentenced in the Superior Court of Surry County, North Carolina, and his 1995 Convictions were therefore necessarily adult convictions. United States v. Allen, 446 F.3d 522, 2006 U.S. App. LEXIS 11193 (4th Cir. 2006).

§ 7B-2204. Right to pretrial release; detention.

Once the order of transfer has been entered, the juvenile has the right to pretrial release as provided in G.S. 15A-533 and G.S 15A-534. The release order shall specify the person or persons to whom the juvenile may be released. Pending release, the court shall order that the juvenile be detained in a detention facility while awaiting trial. The court may order the juvenile to be held in a holdover facility at any time the presence of the juvenile is required in court for pretrial hearings or trial, if the court finds that it would be inconvenient to return the juvenile to the detention facility.

Should the juvenile be found guilty, or enter a plea of guilty or no contest to a criminal offense in superior court and receive an active sentence, then immediate transfer to the Department of Correction shall be ordered. Until such time as the juvenile is transferred to the Department of Correction, the juvenile may be detained in a holdover facility. The juvenile may not be detained in a detention facility pending transfer to the Department of Correction.

The juvenile may be kept by the Department of Correction as a safekeeper until the juvenile is placed in an appropriate correctional program. (1979, c. 815, s. 1; 1987, c. 144; 1991, c. 352, s. 1; 1998-202, s. 6.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

ARTICLE 23.

Discovery.

§ 7B-2300. Disclosure of evidence by petitioner.

(a) Statement of the Juvenile. — Upon motion of a juvenile alleged to be delinquent, the court shall order the petitioner:

(1) To permit the juvenile to inspect and copy any relevant written or recorded statements within the possession, custody, or control of the petitioner made by the juvenile or any other party charged in the same action; and

(2) To divulge, in written or recorded form, the substance of any oral statement made by the juvenile or any other party charged in the same action.

(b) Names of Witnesses. — Upon motion of the juvenile, the court shall order the petitioner to furnish the names of persons to be called as witnesses. A copy of the record of witnesses under the age of 16 shall be provided by the petitioner to the juvenile upon the juvenile's motion if accessible to the petitioner.

(c) Documents and Tangible Objects. — Upon motion of the juvenile, the court shall order the petitioner to permit the juvenile to inspect and copy books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or portions thereof:

(1) Which are within the possession, custody, or control of the petitioner, the prosecutor, or any law enforcement officer conducting an investigation of the matter alleged; and

(2) Which are material to the preparation of the defense, are intended for use by the petitioner as evidence, or were obtained from or belong to the juvenile.

(d) Reports of Examinations and Tests. — Upon motion of a juvenile, the court shall order the petitioner to permit the juvenile to inspect and copy results of physical or mental examinations or of tests, measurements, or experiments made in connection with the case, within the possession, custody, or control of the petitioner. In addition upon motion of a juvenile, the court shall order the petitioner to permit the juvenile to inspect, examine, and test, subject to appropriate safeguards, any physical evidence or a sample of it or tests or experiments made in connection with the evidence in the case if it is available to the petitioner, the prosecutor, or any law enforcement officer conducting an investigation of the matter alleged, and if the petitioner intends to offer the evidence at trial.

(e) Except as provided in subsections (a) through (d) of this section, this Article does not require the production of reports, memoranda, or other internal documents made by the petitioner, law enforcement officers, or other persons acting on behalf of the petitioner in connection with the investigation or prosecution of the case or of statements made by witnesses or the petitioner to anyone acting on behalf of the petitioner.

(f) Nothing in this section prohibits a petitioner from making voluntary disclosures in the interest of justice. (1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7B-2301. Disclosure of evidence by juvenile.

(a) Names of Witnesses. — Upon motion of the petitioner, the court shall order the juvenile to furnish to the petitioner the names of persons to be called as witnesses.

(b) Documents and Tangible Objects. — If the court grants any relief sought by the juvenile under G.S. 7B-2300, upon motion of the petitioner, the court shall order the juvenile to permit the petitioner to inspect and copy books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or portions thereof which are within the possession, custody, or control of the juvenile and which the juvenile intends to introduce in evidence.

(c) Reports of Examinations and Tests. — If the court grants any relief sought by the juvenile under G.S. 7B-2300, upon motion of the petitioner, the court shall order the juvenile to permit the petitioner to inspect and copy results of physical or mental examinations or of tests, measurements, or experiments made in connection with the case within the possession and control of the juvenile which the juvenile intends to introduce in evidence or which were prepared by a witness whom the juvenile intends to call if the results relate to the witness's testimony. In addition, upon motion of a petitioner, the court shall order the juvenile to permit the petitioner to inspect, examine, and test, subject to appropriate safeguards, any physical evidence or a sample of it if the juvenile intends to offer the evidence or tests or experiments made in connection with the evidence in the case. (1979, c. 815, s. 1; 1998-202, s. 6.)

§ 7B-2302. Regulation of discovery; protective orders.

(a) Upon written motion of a party and a finding of good cause, the court may at any time order that discovery or inspection be denied, restricted, or deferred.

(b) The court may permit a party seeking relief under subsection (a) of this section to submit supporting affidavits or statements to the court for in camera inspection. If thereafter the court enters an order granting relief under subsection (a) of this section, the material submitted in camera must be available to the Court of Appeals in the event of an appeal. (1979, c. 815, s. 1; 1998-202, s. 6.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7B-2303. Continuing duty to disclose.

If a party, subject to compliance with an order issued pursuant to this Article, discovers additional evidence prior to or during the hearing or decides to use additional evidence, and if the evidence is or may be subject to discovery or inspection under this Article, the party shall promptly notify the other party of the existence of the additional evidence or of the name of each additional witness. (1979, c. 815, s. 1; 1998-202, s. 6.)

Article 24.

Hearing Procedures.

§ 7B-2400. Amendment of petition.

The court may permit a petition to be amended when the amendment does not change the nature of the offense alleged. If a motion to amend is allowed, the juvenile shall be given a reasonable opportunity to prepare a defense to the amended allegations. (1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. *— The following cases were decided prior to the enactment of this Chapter.*

Allowing Amendment Discretionary. — Where petition sufficiently alleged the offense of larceny, and amendment in no way changed the nature of the offense, but simply identified more specifically the owner of the property allegedly stolen, allowing the amendment under these circumstances was within the sound discretion of the court. In re Jones, 11 N.C. App. 437, 181 S.E.2d 162, appeal dismissed, 279 N.C. 616, 184 S.E.2d 267 (1971), decided under former § 7A-285.

Construction. — The North Carolina Supreme Court construed former G.S. 7A-627 (see now this section) to permit a juvenile petition to be amended only if the amended petition does not charge the juvenile with a different offense. In re Davis, 114 N.C. App. 253, 441 S.E.2d 696 (1994).

§ 7B-2401. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

The provisions of G.S. 15A-1001, 15A-1002, and 15A-1003 apply to all cases in which a juvenile is alleged to be delinquent. No juvenile committed under this section may be placed in a situation where the juvenile will come in contact with adults committed for any purpose. (1979, c. 815, s. 1; 1998-202, s. 6.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7B-2402. Open hearings.

All hearings authorized or required pursuant to this Subchapter shall be open to the public unless the court closes the hearing or part of the hearing for good cause, upon motion of a party or its own motion. If the court closes the hearing or part of the hearing to the public, the court may allow any victim, member of a victim's family, law enforcement officer, witness or any other person directly involved in the hearing to be present at the hearing.

In determining good cause to close a hearing or part of a hearing, the court shall consider the circumstances of the case, including, but not limited to, the following factors:

(1) The nature of the allegations against the juvenile;
(2) The age and maturity of the juvenile;
(3) The benefit to the juvenile of confidentiality;
(4) The benefit to the public of an open hearing; and
(5) The extent to which the confidentiality of the juvenile's file will be compromised by an open hearing.

No hearing or part of a hearing shall be closed by the court if the juvenile requests that it remain open. (1979, c. 815, s. 1; 1998-202, s. 6; 1998-229, s. 5.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

Exclusion of Public. — It has never been the practice in juvenile proceedings wholly to exclude parents, relatives or friends, or to refuse juveniles the benefit of counsel. Even so, such proceedings are usually conducted without admitting the public generally. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), aff'd sub nom. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

It is a discretionary matter with the trial judge whether the general public (which includes newspaper reporters) is excluded from a juvenile hearing. In re Potts, 14 N.C. App.

387, 188 S.E.2d 643, cert. denied, 281 N.C. 622, 190 S.E.2d 471 (1972).

Open Hearing in Juvenile Action. — There was no abuse of discretion in denying the parties' motion to close juvenile proceeding on involuntary manslaughter charges to public where the trial court conducted a thorough hearing on the issue, hearing arguments from both parties and testimony from a detective and respondent's mother. In re K.T.L., 177 N.C. App. 365, 629 S.E.2d 152, 2006 N.C. App. LEXIS 965 (2006).

§ 7B-2402.1. Restraint of juveniles in courtroom.

At any hearing authorized or required by this Subchapter, the judge may subject a juvenile to physical restraint in the courtroom only when the judge finds the restraint to be reasonably necessary to maintain order, prevent the juvenile's escape, or provide for the safety of the courtroom. Whenever practical, the judge shall provide the juvenile and the juvenile's attorney an opportunity to be heard to contest the use of restraints before the judge orders the use of restraints. If restraints are ordered, the judge shall make findings of fact in support of the order. (2007-100, s. 1.)

Editor's Note. — Session Laws 2007-100, s. 2, made this section effective October 1, 2007, and applicable to all hearings conducted on or after that date.

§ 7B-2403. Adjudicatory hearing.

The adjudicatory hearing shall be held within a reasonable time in the district at the time and place the chief district court judge designates. (1979, c. 815, s. 1; 1998-202, s. 6; 1998-229, s. 5.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

For empirical study, "The Faces Within: An Examination of the Disparate Treatment of Minority Youth Throughout the North Carolina Juvenile Justice System," see 40 Wake Forest L. Rev. 727 (2005).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

Exclusion of Public. — It has never been the practice in juvenile proceedings wholly to exclude parents, relatives or friends, or to refuse juveniles the benefit of counsel. Even so, such proceedings are usually conducted without admitting the public generally. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), aff'd sub nom. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

It is a discretionary matter with the trial judge whether the general public (which includes newspaper reporters) is excluded from a juvenile hearing. In re Potts, 14 N.C. App. 387, 188 S.E.2d 643, cert. denied, 281 N.C. 622, 190 S.E.2d 471 (1972).

§ 7B-2404. Participation of the prosecutor.

A prosecutor shall represent the State in contested delinquency hearings including first appearance, detention, probable cause, transfer, adjudicatory, dispositional, probation revocation, post-release supervision, and extended jurisdiction hearings. (1979, c. 815, s. 1; 1981, c. 469, s. 12; 1998-202, s. 6.)

§ 7B-2405. Conduct of the adjudicatory hearing.

The adjudicatory hearing shall be a judicial process designed to determine whether the juvenile is undisciplined or delinquent. In the adjudicatory hearing, the court shall protect the following rights of the juvenile and the juvenile's parent, guardian, or custodian to assure due process of law:

(1) The right to written notice of the facts alleged in the petition;
(2) The right to counsel;
(3) The right to confront and cross-examine witnesses;
(4) The privilege against self-incrimination;
(5) The right of discovery; and
(6) All rights afforded adult offenders except the right to bail, the right of self-representation, and the right of trial by jury. (1979, c. 815, s. 1; 1998-202, s. 6.)

Legal Periodicals. — For note on juries in the juvenile justice system, see 48 N.C.L. Rev. 666 (1970).

For comment on due process in juvenile proceedings, see 3 N.C. Cent. L.J. 255 (1972).

For survey of 1972 case law on the right to counsel for the "undisciplined child," see 51 N.C.L. Rev. 1023 (1973).

For article on rights and interests of parent, child, family and state, see 4 Campbell L. Rev. 85 (1981).

CASE NOTES

I. General Consideration.
II. Due Process Rights.

I. GENERAL CONSIDERATION.

Editor's Note. — *Most of the following cases were decided prior to the enactment of this Chapter.*

Juvenile Proceedings Are Designed to Foster Individualized Disposition. — Juvenile proceedings are something less than a full blown determination of criminality. They are designed to foster individualized disposition of juvenile offenders under protection of the courts in accordance with constitutional safeguards. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev'd on other grounds, 291 N.C. 640, 231 S.E.2d 614 (1977).

Juvenile proceedings are not criminal prosecutions. Nor is a finding of delinquency in a juvenile proceeding synonymous with conviction of a crime. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), aff'd sub nom., McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); In re Jones, 11 N.C. App. 437, 181 S.E.2d 162, appeal dismissed, 279 N.C. 616, 184 S.E.2d 267 (1971); State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972); In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

But Such Proceedings Are Criminal for Purposes of U.S. Const., Amend. V. — Juvenile proceedings must be regarded as "criminal" for purposes of U.S. Const., Amend. V, the privilege against self-incrimination. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

Juvenile delinquency hearings place juveniles in danger of confinement, and, therefore, the proceedings are to be treated as criminal proceedings, and conducted with due process in accord with constitutional safeguards of U.S. Const., Amend. V. In re Chavis, 31 N.C. App. 579, 230 S.E.2d 198 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 203 (1977).

And Double Jeopardy Rule Applies. — Although distinctions between juvenile proceedings and criminal prosecutions still exist, they are sufficiently similar in nature that the double jeopardy provisions of the United States and North Carolina Constitutions are applicable to them. Accordingly, jeopardy attaches to the initial petition once an adjudicatory hearing on the merits is held. In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

Duty of District Court. — It is the constant duty of the district court to give each child subject to its jurisdiction such oversight and control as will be conducive to the welfare of the child and to the best interest of the State, and to ensure that the juvenile be carefully afforded all constitutional safeguards at every stage of the hearings. In re Eldridge, 9 N.C. App. 723, 177 S.E.2d 313 (1970).

Trial Judge May Question Witnesses. — The trial judge in a juvenile delinquency proceeding may question the witnesses to elicit relevant testimony and to aid in arriving at the truth. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

And May Give Opinion on Evidence. — The provisions of former G.S. 1-180 prohibiting a court from giving an opinion on the evidence do not apply in a juvenile delinquency proceeding where no jury is present. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

Standards for Evaluation of Evidence. — The North Carolina Juvenile Code gives defendants in juvenile adjudication hearings, with certain exceptions, all rights afforded adult offenders, and thus the juvenile respondents are entitled to have the evidence presented in their adjudicatory hearing evaluated by the same standards as apply in criminal proceedings against adults. In re Meaut, 51 N.C. App. 153, 275 S.E.2d 200 (1981).

A juvenile respondent is entitled to have evidence evaluated by the same standards as apply in criminal proceedings against adults. In re Dulaney, 74 N.C. App. 587, 328 S.E.2d 904 (1985); In re Howett, 76 N.C. App. 142, 331 S.E.2d 701 (1985); In re Bass, 77 N.C. App. 110, 334 S.E.2d 779 (1985).

When a parent is absent from a termination proceeding and the trial court preserves the adversarial nature of the proceeding by allowing the parent's counsel to cross examine witnesses, with the questions and answers being recorded, the parent must demonstrate some actual prejudice in order to prevail upon appeal. In re Murphy, 105 N.C. App. 651, 414 S.E.2d 396, aff'd, 332 N.C. 663, 422 S.E.2d 577 (1992).

A motion to dismiss a juvenile petition is recognized by North Carolina statutory and case law. In re Grubb, 103 N.C. App. 452, 405 S.E.2d 797 (1991); In re J.A., 103 N.C. App. 720, 407 S.E.2d 873 (1991).

In order to withstand a motion to dismiss the charges contained in a juvenile petition, there must be substantial evidence of each of the material elements of the offense charged; the evidence must be considered in the light most favorable to the state, and the state is entitled to every reasonable inference of fact which may be drawn from the evidence. In re Bass, 77 N.C. App. 110, 334 S.E.2d 779 (1985).

Restitution Order Held Unauthorized. — Where juvenile was not petitioned or adjudicated for the delinquent act of damaging the personal property of a certain victim, the court was without authority to order him to pay any restitution to her. In re Hull, 89 N.C. App. 138, 365 S.E.2d 221 (1988).

Applied in In re Lineberry, 154 N.C. App. 246, 572 S.E.2d 229, 2002 N.C. App. LEXIS 1456 (2002); In re T.E.F., 359 N.C. 570, 614 S.E.2d 296, 2005 N.C. LEXIS 642 (2005).

Cited in In re Eades, 143 N.C. App. 712, 547 S.E.2d 146, 2001 N.C. App. LEXIS 334 (2001).

II. DUE PROCESS RIGHTS.

Juveniles Are Entitled to Constitutional Safeguards. — A juvenile cited under a petition to appear for an inquiry into his alleged delinquency is entitled to the constitutional safeguards of due process and fairness. In re Jones, 11 N.C. App. 437, 181 S.E.2d 162, appeal dismissed, 279 N.C. 616, 184 S.E.2d 267 (1971).

A juvenile is entitled to certain constitutional safeguards and fairness. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

Juveniles in delinquency proceedings are entitled to constitutional safeguards similar to those afforded adult criminal defendants. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev'd on other grounds, 291 N.C. 640, 231 S.E.2d 614 (1977).

Scope of juvenile due process is not as extensive as that incident to adversary adjudication for adult criminal defendants. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev'd on other grounds, 291 N.C. 640, 231 S.E.2d 614 (1977).

Requirements of Due Process. — So long as proceedings in the juvenile court meet the requirements of due process, they are constitutionally sound and must be upheld. This means that: (1) The basic requirements of due process and fairness must be satisfied in a juvenile court adjudication of delinquency. (2) U.S. Const., Amend. XIV applies to prohibit the use of a coerced confession of a juvenile. (3) Notice must be given in juvenile proceedings which would be deemed constitutionally adequate in a civil or criminal proceeding; that is, notice must be given the juvenile and his parents sufficiently in advance of scheduled court proceedings to afford them reasonable opportunity to prepare, and the notice must set forth the alleged misconduct with particularity. (4) In juvenile proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to counsel and, if unable to afford counsel, to the appointment of same. (5) Juvenile proceedings to determine delinquency, as a result of which the juvenile may be committed to a State institution, must be regarded as "criminal" for purposes of U.S. Const., Amend. V, the privilege against self-incrimination. The privilege applies in juvenile proceedings the same as in adult criminal cases. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), aff'd sub nom. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

Due process for a juvenile includes written notice of specific charges in advance of hearing; notification to child and parent of the right to counsel and that, if necessary, counsel will be appointed; the privilege against self-incrimination; proof of the offense charged beyond a reasonable doubt; and determination of delinquency based on sworn testimony subject to cross-examination in the absence of a valid confession. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev'd on other grounds, 291 N.C. 640, 231 S.E.2d 614 (1977).

Due process safeguards include notice of the charge or charges upon which the petition is based. In re Jones, 11 N.C. App. 437, 181 S.E.2d 162, appeal dismissed, 279 N.C. 616, 184 S.E.2d 267 (1971).

Privilege Against Self-Incrimination. — Juvenile who was adjudicated to be a delinquent because of his sexual assault of another child could not be required, as a condition of his probation, to admit to the underlying offense, for purposes of treatment, without being granted use immunity or some other protection from the use of such an admission against him because the privilege against self-incrimination applied to juveniles, under subdivision (4) of this section. In re Butts, 157 N.C. App. 609, 582 S.E.2d 279, 2003 N.C. App. LEXIS 928 (2003), review improvidently allowed, appeal dismissed sub nom. In re T.R.B., 358 N.C. 370, 595 S.E.2d 146 (2004).

Counsel Is Required in Delinquency Proceedings. — The due process clause of U.S. Const., Amend. XIV requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child. In re Garcia, 9 N.C. App. 691, 177 S.E.2d 461 (1970).

But counsel is not constitutionally required at the hearing on an undisciplined child petition. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

And This Distinction Does Not Deny Equal Protection. — Allowing a child to be adjudged undisciplined and placed on probation without benefit of counsel, while at the same time requiring counsel before a child may be adjudged delinquent, does not deny equal protection of the laws to the undisciplined child. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

Trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

Absent a statute providing for a jury trial, it is almost universally held that in juvenile court delinquency proceedings the alleged delinquent has no right under the pertinent state or federal Constitution to demand that the issue of his delinquency be determined by a jury. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), aff'd sub nom. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

Dual Role as Judge and Prosecutor Is Unconstitutional. — Due process rights of a juvenile were violated where the trial judge examined the witnesses for the State because of the absence of the district attorney or other counsel to represent the State. In re Thomas, 45 N.C. App. 525, 263 S.E.2d 355 (1980).

The presiding judge in a juvenile proceeding that could lead to detention should not assume the role of prosecuting attorney where the juvenile is represented by counsel and the hearing is adversary in nature. Such procedure would clearly violate due process in adult criminal prosecutions, nor would a dual role of judge and prosecutor measure up to the essentials of due process and fair treatment in juvenile proceedings where detention could result. In re Thomas, 45 N.C. App. 525, 263 S.E.2d 355 (1980).

Limitation on Right to Confront Witness. — Although former G.S. 7A-631 guaranteed respondent the right to confront and cross-examine witnesses, the right to confront witnesses in civil cases is subject to "due limitations." In re Barkley, 61 N.C. App. 267, 300 S.E.2d 713 (1983).

Where excluded party's presence during testimony might intimidate witness and influence his answers, due to that party's position of authority over the testifying witness, any right under this Article to confront the witnesses is properly limited. In re Barkley, 61 N.C. App. 267, 300 S.E.2d 713 (1983).

§ 7B-2406. Continuances.

The court for good cause may continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile. (1979, c. 815, s. 1; 1987 (Reg. Sess., 1988), c. 1090, s. 9; 1998-202, s. 6.)

CASE NOTES

Continuance For the State. — Trial court did not abuse its discretion by ordering a juvenile into custody and continuing his disposition hearing with regard to charges of breaking and entering, trespass, and injury to real property, because a fourth charge arose during the juvenile's adjudication hearing as he was seen by a court counselor mouthing the words "I'm going to kick your ass" to a witness who had just testified against him, therefore, the State was entitled to more time to prepare since the fourth charge of intimidating a witness was added. In re R.D.R., 175 N.C. App. 397, 623 S.E.2d 341, 2006 N.C. App. LEXIS 52 (2006).

The grounds for a motion for a continuance must be fully established. In re Lail, 55 N.C. App. 238, 284 S.E.2d 731 (1981) (decided under prior law).

Motion Based upon Absence of Witness. — When the motion for a continuance is based upon the absence of a witness, the motion should be supported by an affidavit indicating the facts to be proved by the witness. In re Lail, 55 N.C. App. 238, 284 S.E.2d 731 (1981) (decided under prior law).

§ 7B-2407. When admissions by juvenile may be accepted.

(a) The court may accept an admission from a juvenile only after first addressing the juvenile personally and:

(1) Informing the juvenile that the juvenile has a right to remain silent and that any statement the juvenile makes may be used against the juvenile;

(2) Determining that the juvenile understands the nature of the charge;

(3) Informing the juvenile that the juvenile has a right to deny the allegations;

(4) Informing the juvenile that by the juvenile's admissions the juvenile waives the juvenile's right to be confronted by the witnesses against the juvenile;

(5) Determining that the juvenile is satisfied with the juvenile's representation; and

(6) Informing the juvenile of the most restrictive disposition on the charge.

(b) By inquiring of the prosecutor, the juvenile's attorney, and the juvenile personally, the court shall determine whether there were any prior discussions involving admissions, whether the parties have entered into any arrangement with respect to the admissions and the terms thereof, and whether any improper pressure was exerted. The court may accept an admission from a juvenile only after determining that the admission is a product of informed choice.

(c) The court may accept an admission only after determining that there is a factual basis for the admission. This determination may be based upon any of the following information: a statement of the facts by the prosecutor; a written statement of the juvenile; sworn testimony which may include reliable hearsay; or a statement of facts by the juvenile's attorney. (1979, c. 815, s. 1; 1998-202, s. 6.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article, "Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment," see 67 N.C.L. Rev. 257 (1989).

CASE NOTES

Editor's Note. — *Most of the following cases were decided prior to the enactment of this Chapter.*

Acceptance of Admission. — In a juvenile hearing to determine delinquency, which may lead to commitment to a State institution, an admission by the juvenile of the allegations of the petition must be made with awareness of the consequences of the admission and must be made understandingly and voluntarily, and these facts must affirmatively appear in the record of the proceeding. In re Chavis, 31 N.C. App. 579, 230 S.E.2d 198 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 203 (1977); In re Johnson, 32 N.C. App. 492, 232 S.E.2d 486 (1977).

Applicability. — Where a juvenile's court supervision was revoked for probation violations, it was not error to fail to make the specific inquiries enumerated in G.S. 7B-2407 because G.S. 7B-2407 did not apply to the juvenile's admission, or admissions by the juvenile through the juvenile's attorney, that the juvenile violated conditions of court supervision. In re D.J.M., — N.C. App. —, 638 S.E.2d 610, 2007 N.C. App. LEXIS 68 (2007).

Court which initially adjudged the juvenile to be delinquent erred in accepting the juvenile's admission. In re Kenyon N., 110 N.C. App. 294, 429 S.E.2d 447 (1993).

An admission by the juvenile to the allegations of the petition is equivalent to a plea of guilty by an adult in a criminal prosecution. In re Johnson, 32 N.C. App. 492, 232 S.E.2d 486 (1977).

Court to Make Individual Inquiries. — It is the duty of the trial judge in carrying out the requirements of this section to give each child individual attention, as it is impossible for the judge to determine that the admission is a product of informed choice without making the required inquiries of each child individually. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

Acceptance of Admission Was Erroneous. — In a juvenile proceedings, the trial court erred in accepting defendant's admission because the trial court failed to inquire whether defendant was satisfied with his representation, as required by G.S. 7B-2407(a), and the error was not harmless. In re T.E.F., 167 N.C. App. 1, 604 S.E.2d 348, 2004 N.C. App. LEXIS 2060 (2004), aff'd, — N.C. —, 614 S.E.2d 296 (2005).

Addressing each of the six issues listed in G.S. 7B-2407(a) is mandatory and a "totality of the circumstances" standard of review is inapplicable; thus, a trial court committed reversible error in taking an admission from a juvenile in an adjudicatory hearing without specifically asking the juvenile if he was satisfied with his counsel as was required by G.S. 7B-2407(a). In re T.E.F., 359 N.C. 570, 614 S.E.2d 296, 2005 N.C. LEXIS 642 (2005).

Trial court's adjudication and disposition orders were reversed where there was no indication that it had informed a juvenile of his right to remain silent and the risk that any statements may be used against him or of his right to deny the allegations and as a result, it had failed to cover all of the six steps listed in G.S. 7B-2407(a). In re A.W., — N.C. App. —, 641 S.E.2d 354, 2007 N.C. App. LEXIS 473 (2007).

Custodial Term Greater in Disposition Than That in Admission Transcript. — Trial court erred in not advising appellant, a juvenile, of the correct maximum custodial confinement and in entering an order where the maximum custodial confinement was greater than that allowed for in the admission transcript; appellant had agreed to a disposition confining him to a maximum term of his 19th birthday, not his 21st birthday. In re D.A.F., — N.C. App. —, 635 S.E.2d 509, 2006 N.C. App. LEXIS 2154 (2006).

Cited in Thrift v. Buncombe County Dep't of Soc. Servs., 137 N.C. App. 559, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000); In re Wilson, 153 N.C. App. 196, 568 S.E.2d 862, 2002 N.C. App. LEXIS 1074 (2002).

§ 7B-2408. Rules of evidence.

If the juvenile denies the allegations of the petition, the court shall proceed in accordance with the rules of evidence applicable to criminal cases. In addition, no statement made by a juvenile to the juvenile court counselor during the preliminary inquiry and evaluation process shall be admissible prior to the dispositional hearing. (1979, c. 815, s. 1; 1981, ch. 469, s. 17; 1998-202, s. 6; 2001-490, s. 2.17.)

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Psychological Reports. — The clear intent of the legislature is that a hearing upon a motion for review is in the nature of a dispositional hearing rather than an adjudicatory hearing, and that the formal rules of evidence, G.S. 8C-1, do not apply. Therefore, the trial court could properly consider written psychological reports in determining, on motion brought by parents whose parental rights had been terminated under former G.S. 7A-289.34, whether the needs of children would be best served by modification of its previous orders concerning visitation. In re Montgomery, 77 N.C. App. 709, 336 S.E.2d 136 (1985).

Cited in In re Wilson, 153 N.C. App. 196, 568 S.E.2d 862, 2002 N.C. App. LEXIS 1074 (2002).

§ 7B-2409. Quantum of proof in adjudicatory hearing.

The allegations of a petition alleging the juvenile is delinquent shall be proved beyond a reasonable doubt. The allegations in a petition alleging undisciplined behavior shall be proved by clear and convincing evidence. (1979, c. 815, s. 1; 1998-202, s. 6.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *Some of the following cases were decided prior to the enactment of this Chapter.*

The proper quantum of proof in a juvenile hearing to determine delinquency is proof beyond a reasonable doubt. In re Johnson, 32 N.C. App. 492, 232 S.E.2d 486 (1977), decided under former § 7A-285.

In a juvenile adjudicatory hearing, the respondent is entitled to have the evidence evaluated by the same standards as apply in criminal proceedings against adults. The State, therefore, must present substantial evidence of each essential element of the offense charged and of respondent's being the perpetrator. In re Walker, 83 N.C. App. 46, 348 S.E.2d 823 (1986).

The statutory use of "shall" is a mandate to trial judges requiring them to affirmatively state that the allegations of the juvenile petition are proved beyond a reasonable doubt. Failure to follow the mandate of the statute is error. In re Wade, 67 N.C. App. 708, 313 S.E.2d 862 (1984).

It is reversible error for a trial court to fail to state affirmatively that an adjudication of delinquency is based upon proof beyond a reasonable doubt. In re Walker, 83 N.C. App. 46, 348 S.E.2d 823 (1986).

The order of the trial judge must affirmatively state that the allegations are proved beyond a reasonable doubt, even in cases where the juvenile admits the offense alleged. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

The statutory use of the word "shall" mandates trial judges to affirmatively state that the reasonable doubt standard was followed. Failure of the trial judge to follow the clear mandate of the statute is error. In re Mitchell, 87 N.C. App. 164, 359 S.E.2d 809 (1987).

The trial court is required to make ultimate findings of fact based on the evidence and to enter clear and specific conclusions of law based on the findings of fact. In re Gleisner, 141 N.C. App. 475, 539 S.E.2d 362, 2000 N.C. App. LEXIS 1308 (2000).

Oral Finding Sufficient. — Where the trial court, in juvenile proceedings, orally made its G.S. 7B-2409 finding that defendant, beyond a reasonable doubt, engaged in the acts alleged, but the trial court did not include this finding in the written adjudication order, the oral finding was sufficient to satisfy the G.S. 7B-2411 requirement that the finding be stated; G.S. 7B-2512 required the findings in the dispositional order, but not the adjudicatory order, to be in writing. In re Rikard, 161 N.C. App. 150, 587 S.E.2d 467, 2003 N.C. App. LEXIS 1997 (2003).

Binding Effect of Order Failing to State Standard of Proof When Not Appealed. — A trial court's failure to state the standard of proof used in making a determination of abuse or neglect constitutes error. However, because no appeal was taken or other relief sought from trial court's failure to state the standard of proof used in an order adjudging respondent's children abused and neglected, it remained a valid final order which was binding in a later proceeding on the facts. In re Wheeler, 87 N.C. App. 189, 360 S.E.2d 458 (1987).

Estoppel to Relitigate Issue Decided in Previous Proceeding. — The trial court did not err by concluding that petitioner was authorized to file petition to terminate parental rights, nor by ruling that the parties were estopped from relitigating abuse and neglect issues decided in previous proceeding in which respondent was found to have sexually abused his children, where the trial court did not rely solely upon the previous order in a way that would have impermissibly predetermined the outcome of the termination hearing, and did not deny respondent the opportunity to present evidence relevant to these issues, but merely prohibited the parties from relitigating whether respondent had, in fact, sexually abused his children. In re Wheeler, 87 N.C. App. 189, 360 S.E.2d 458 (1987).

Trial court met the requirements of former § 7A-635 (see now this section) and former § 7A-637 (see now §§ 7B-807 and 7B-2410) by stating the standard used at the adjudication stage of the proceeding; he was not also required to recite that his decision at the disposition stage of the proceeding was discretionary. Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

The evidence before the trial court was

sufficient to support its findings of abuse and neglect where: (1) Child, while in respondent's sole care, suffered multiple burns over a wide portion of her body; (2) no accidental cause was established, and the child in fact stated that respondent burned her; (3) the burns were serious, requiring prompt medical attention; (4) respondent did not seek treatment for the child's injuries and refused to permit social worker to do so; and (5) the child was taken for treatment only upon the intervention of the sheriff's department, over respondent's opposition. In re Hayden, 96 N.C. App. 77, 384 S.E.2d 558 (1989).

A finding of neglect by clear and convincing evidence was proper where the children were kept at home, and they did not receive proper medical care, supervision, or adequate nutrition. In re Bell, 107 N.C. App. 566, 421 S.E.2d 590, appeal withdrawn, 333 N.C. 168, 426 S.E.2d 699 (1992).

Juvenile Admission. — Where a juvenile's court supervision was revoked for probation violations, it was not error to fail to make the specific inquiries enumerated in G.S. 7B-2407, because G.S. 7B-2407 did not apply to the juvenile's admission, or admissions by the juvenile through the juvenile's attorney, that the juvenile violated conditions of court supervision. In re D.J.M., — N.C. App. —, 638 S.E.2d 610, 2007 N.C. App. LEXIS 68 (2007).

Applied in In re Rikard, 161 N.C. App. 150, 587 S.E.2d 467, 2003 N.C. App. LEXIS 1997 (2003).

Cited in In re Eades, 143 N.C. App. 712, 547 S.E.2d 146, 2001 N.C. App. LEXIS 334 (2001).

§ 7B-2410. Record of proceedings.

All adjudicatory and dispositional hearings and hearings on probable cause and transfer to superior court shall be recorded by stenographic notes or by electronic or mechanical means. Records shall be reduced to a written transcript only when timely notice of appeal has been given. The court may order that other hearings be recorded. (1979, c. 815, s. 1; 1998-202, s. 6.)

CASE NOTES

Transcript Sufficient for Appellate Review. — Juvenile's claim that the recording of the juvenile proceedings on four-track audio equipment was inadequate to protect the juvenile's rights had to be rejected as the transcript of the proceedings was sufficient to provide for meaningful appellate review, which is all that was required. In re Hartsock, 158 N.C. App. 287, 580 S.E.2d 395 (2003).

Proceedings under former § 7A-636 (see now this section) are to be reported as other "civil trials" in accordance with G.S. 7A-198. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988) (decided prior to enactment of this chapter).

Applied in In re Lineberry, 154 N.C. App. 246, 572 S.E.2d 229, 2002 N.C. App. LEXIS 1456 (2002).

§ 7B-2411. Adjudication.

If the court finds that the allegations in the petition have been proved as provided in G.S. 7B-2409, the court shall so state. If the court finds that the allegations have not been proved, the court shall dismiss the petition with prejudice and the juvenile shall be released from secure or nonsecure custody if the juvenile is in custody. (1979, c. 815, s. 1; 1998-202, s. 6.)

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

The statutory use of "shall" is a mandate to trial judges requiring them to affirmatively state that the allegations of the juvenile petition are proved beyond a reasonable doubt. Failure to follow the mandate of the statute is error. In re Wade, 67 N.C. App. 708, 313 S.E.2d 862 (1984).

If the judge finds that the allegations in the petition have been proved, as provided in G.S. 7A-635 (see now G.S. 7B-805 and 7B-2409), i.e., beyond a reasonable doubt, he shall so state. The failure of the trial judge to follow the clear mandate of the statute is error. In re Johnson, 76 N.C. App. 159, 331 S.E.2d 756 (1985).

It is reversible error for a trial court to fail to state affirmatively that an adjudication of delinquency is based upon proof beyond a reasonable doubt. In re Walker, 83 N.C. App. 46, 348 S.E.2d 823 (1986).

The order of the trial judge must affirmatively state that the allegations are proved beyond a reasonable doubt, even in cases where the juvenile admits the offense alleged. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

The statutory use of the word "shall" mandates trial judges to affirmatively state that the reasonable doubt standard was followed. Failure of the trial judge to follow the clear mandate of the statute is error. In re Mitchell, 87 N.C. App. 164, 359 S.E.2d 809 (1987).

Oral Finding Sufficient. — Where the trial court, in juvenile proceedings, orally made its G.S. 7B-2409 finding that defendant, beyond a reasonable doubt, engaged in the acts alleged, but the trial court did not include this finding in the written adjudication order, the oral finding was sufficient to satisfy the G.S. 7B-2411 requirement that the finding be stated; G.S. 7B-2512 required the findings in the dispositional order, but not the adjudicatory order, to be in writing. In re Rikard, 161 N.C. App. 150, 587 S.E.2d 467, 2003 N.C. App. LEXIS 1997 (2003).

Correction of Written Order Necessary. — In a juvenile delinquency proceeding, a trial court's oral findings as to whether the State had proved the allegations against a juvenile sufficed; however, the written order had to be corrected so that the record reflected the finding. In re Rikard, 161 N.C. App. 150, 587 S.E.2d 467, 2003 N.C. App. LEXIS 1997 (2003).

Binding Effect of Order Failing to State Standard of Proof When Not Appealed. — A trial court's failure to state the standard of proof used in making a determination of abuse or neglect constitutes error. However, because no appeal was taken or other relief sought from trial court's failure to state the standard of proof used in an order adjudging respondent's children abused and neglected, it remained a valid final order which was binding in a later proceeding on the facts. In re Wheeler, 87 N.C. App. 189, 360 S.E.2d 458 (1987).

Estoppel to Relitigate Issue Decided in Previous Proceeding. — The trial court did not err by concluding that petitioner was authorized to file petition to terminate parental rights, nor by ruling that the parties were estopped from relitigating abuse and neglect issues decided in previous proceeding in which respondent was found to have sexually abused his children, where the trial court did not rely solely upon the previous order in a way that would have impermissibly predetermined the outcome of the termination hearing, and did not deny respondent the opportunity to present evidence relevant to these issues, but merely prohibited the parties from relitigating whether respondent had, in fact, sexually abused his children. In re Wheeler, 87 N.C. App. 189, 360 S.E.2d 458 (1987).

Trial court met the requirements of this section by stating the standard used at the adjudication stage of the proceeding; he was not also required to recite that his decision at the disposition stage of the proceeding was discretionary. Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

Self-Defense Not Grounds for Dismissal. — Trial court did not err in failing to dismiss a juvenile adjudication petition because the juvenile's claim of self-defense was not cause to dismiss the proceeding. In re Wilson, 153 N.C. App. 196, 568 S.E.2d 862, 2002 N.C. App. LEXIS 1074 (2002).

Cited in In re Eades, 143 N.C. App. 712, 547 S.E.2d 146, 2001 N.C. App. LEXIS 334 (2001).

§ 7B-2412. Legal effect of adjudication of delinquency.

An adjudication that a juvenile is delinquent or commitment of a juvenile to the Department for placement in a youth development center shall neither be considered conviction of any criminal offense nor cause the juvenile to forfeit any citizenship rights. (1979, c. 815, s. 1; 1998-202, s. 6; 2000-137, s. 3; 2001-95, s. 5.)

CASE NOTES

Use of defendant's prior juvenile adjudication as an aggravator was improper since it was not a prior conviction, not admitted by defendant, and not proven to a jury beyond a reasonable doubt. State v. Yarrell, 172 N.C. App. 135, 616 S.E.2d 258, 2005 N.C. App. LEXIS 1428 (2005).

§ 7B-2413. Predisposition investigation and report.

The court shall proceed to the dispositional hearing upon receipt of the predisposition report. A risk and needs assessment, containing information regarding the juvenile's social, medical, psychiatric, psychological, and educational history, as well as any factors indicating the probability of the juvenile committing further delinquent acts, shall be conducted for the juvenile and shall be attached to the predisposition report. In cases where no predisposition report is available and the court makes a written finding that a report is not needed, the court may proceed with the dispositional hearing. No predisposition report or risk and needs assessment of any child alleged to be delinquent or undisciplined shall be made prior to an adjudication that the juvenile is within the juvenile jurisdiction of the court unless the juvenile, the juvenile's parent, guardian, or custodian, or the juvenile's attorney files a written statement with the juvenile court counselor granting permission and giving consent to the predisposition report or risk and needs assessment. No predisposition report shall be submitted to or considered by the court prior to the completion of the adjudicatory hearing. The court shall permit the juvenile to inspect any predisposition report, including any attached risk and needs assessment, to be considered by the court in making the disposition unless the court determines that disclosure would seriously harm the juvenile's treatment or rehabilitation or would violate a promise of confidentiality. Opportunity to offer evidence in rebuttal shall be afforded the juvenile and the juvenile's parent, guardian, or custodian at the dispositional hearing. The court may order counsel not to disclose parts of the report to the juvenile or the juvenile's parent, guardian, or custodian if the court finds that disclosure would seriously harm the treatment or rehabilitation of the juvenile or would violate a promise of confidentiality given to a source of information. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-423, s. 13; 2001-490, s. 2.18.)

Legal Periodicals. — For 1984 survey, "Termination of Parental Rights: Putting Love in Its Place," see 63 N.C.L. Rev. 1177 (1985).

CASE NOTES

Continuance For State. — Trial court did not abuse its discretion by ordering juvenile into custody and continuing his disposition hearing with regard to charges of breaking and entering, trespass, and injury to real property, because a fourth charge arose during the juvenile's adjudication hearing as he was seen by a court counselor mouthing the words "I'm going to kick your ass" to a witness who had just testified against him; therefore, the State was entitled to more time to prepare since the fourth charge of intimidating a witness was added. In re R.D.R., 175 N.C. App. 397, 623 S.E.2d 341, 2006 N.C. App. LEXIS 52 (2006).

Continuance at Request of Juvenile. — Former G.S. 7A-639 (see now G.S. 7B-808 and 7B-2413) and former G.S. 7A-640 (see now G.S. 7B-901 and 7B-2501) make clear the legislative intent that the dispositional hearing must be continued for the juvenile respondent to present evidence when he requests such a continuance. This is particularly so in light of the provision of former G.S. 7A-632 (see now G.S. 7B-803 and 7B-2406) that "The judge may continue at any time any case to allow additional factual evidence, social information or other information needed in the best interest of the juvenile or in the interest of justice." In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979) (decided prior to enactment of this Chapter).

Trial court did not abuse its discretion in denying a juvenile's motion to continue his dispositional hearing in order to obtain a four-year-old psychological evaluation that was not included in the juvenile's court file under circumstances in which the juvenile's more recent psychological information was included in his juvenile-family data sheet. In re D.A.S., — N.C. App. —, 643 S.E.2d 660, 2007 N.C. App. LEXIS 828 (2007).

§ 7B-2414. When jeopardy attaches.

Jeopardy attaches in an adjudicatory hearing when the court begins to hear evidence. (1979, c. 815, s. 1; 1998-202, s. 6.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

Juvenile Not Placed in Jeopardy Where Only Probable Cause Determined. — Where there was only a determination of probable cause in a hearing before the district court, even though the district court order referred to the hearing as having been adjudicatory and dispositional, the juveniles were not placed in jeopardy by the hearing in the district court before the case's transfer to the superior court. In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305, appeal dismissed, 285 N.C. 758, 209 S.E.2d 279 (1974), decided under former § 7A-280.

A probable cause hearing does not suffice to place a juvenile in jeopardy; it may not be equated with an adjudicatory hearing where jeopardy attaches when the judge begins to hear evidence. In re Stedman, 305 N.C. 92, 286 S.E.2d 527 (1982), overruled on other grounds, State v. Dellinger, 343 N.C. 93, 468 S.E.2d 218 (1996).

ARTICLE 25.

Dispositions.

§ 7B-2500. Purpose.

The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction, including the protection of the public. The court should develop a disposition in each case that:

(1) Promotes public safety;

(2) Emphasizes accountability and responsibility of both the parent, guardian, or custodian and the juvenile for the juvenile's conduct; and

(3) Provides the appropriate consequences, treatment, training, and rehabilitation to assist the juvenile toward becoming a nonoffending, responsible, and productive member of the community. (1979, c. 815, s. 1; 1995 (Reg. Sess., 1996), c. 609, s. 1; 1998-202, s. 6.)

Youth Development Center Staffing. — Session Laws 2004-124 s. 16.4(a)-(c), provides: "(a) With the approval of the Office of State Personnel and the Office of State Budget and Management, the Department of Juvenile Justice and Delinquency Prevention may:

"(1) Reclassify existing departmental vacant positions to establish up to 18 new positions in new job classes listed in this subsection. The Department may use departmental salary reserves and salaries from vacant positions to establish these positions. These newly established positions shall be assigned to Stonewall Jackson and Samarkand Youth Development Centers. The positions shall be reclassified as 14 youth development center youth counselors, two youth counselor supervisors, and two licensed mental health clinicians.

"(2) Use up to one hundred eighty-three thousand nine hundred ninety-two dollars ($183,992) of salary reserves to reclassify up to 68 existing positions to 58 youth counselors and 10 youth counselor supervisors.

"These new positions will provide the starting point for the potential implementation of a statewide therapeutic staffing model.

"(b) Prior to establishing new positions or reclassifying positions listed in subsection (a) of this section, the Department of Juvenile Justice and Delinquency Prevention shall prepare a long-range plan for establishing a therapeutic staffing model to be used in all youth development centers. The plan shall include:

"(1) A report on the proposed implementation of 18 new positions and reclassifications identified in subsection (a) of this section. The report shall provide information on (i) the vacant positions to be reallocated to establish new positions, (ii) the amount and source of funds used for these positions and reclassifications, (iii) how the 18 positions will be allocated between Stonewall Jackson and Samarkand and their specific duties, and (iv) how the 68 reclassified positions will be allocated among the existing youth development centers.

"(2) An outline of the cost and benefits of the proposed model for juveniles in the custody of the Department and a summary of available research regarding the use of therapeutic staffing models in juvenile facilities.

"(3) An action plan and time line for reclassifying current counselor technicians, behavioral specialists, cottage parents, or other current positions to youth counselor or youth counselor supervisor positions or to other job classes that are progressive steps towards youth counselor positions. The Department shall also estimate the number of current statewide positions likely to be reclassified to youth counselor positions, youth counselor supervisors, or other job classes based on the qualifications of the current staff.

"(4) Job specifications, salary grades, and operating costs for each new job class.

"(5) The recommended staffing for and qualifications of teachers and teacher assistants and the standards for evaluating teacher quality in youth development centers.

"(c) The Department of Juvenile Justice and Delinquency Prevention shall report by December 1, 2004, to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee, the Chairs of the House of Representatives and Senate Appropriations Committees, and the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety on the long-range plan required by this section and the budgetary costs for statewide implementation of the therapeutic staffing model."

Implementation of Treatment Staffing Model at Youth Development Centers. — Session Laws 2005-276, ss. 16.6(a) through (c), as amended by Session Laws 2006-66, s. 15.6(a), provides: "(a) The Department of Juvenile Justice and Delinquency Prevention shall report December 31, 2005, and quarterly thereafter during the 2005-2007 biennium to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety and to the Joint Corrections, Crime Control, and Juvenile Justice Oversight Committee on the treatment staffing model being piloted at Samarkand and Stonewall Jackson Youth Development Centers. The report shall include a list of total positions at each facility by job class, whether the position is vacant or filled, whether positions were filled from internal employees or new employees, and the training and certification status of each position. The report shall also describe the nature of the treatment program, the criteria for evaluating the program, and how the program is performing in comparison to these criteria. The report shall also describe the training approach to be used to train staff in using treatment methods in youth development centers and provide information on current staff training and staff training planned for the next quarter. The Department shall also develop indicators for evaluating staff performance once the model has been implemented.

"(b) The Department of Juvenile Justice and Delinquency Prevention shall report December 31, 2005, and quarterly thereafter during the 2005-2007 biennium to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety and the Joint Corrections, Crime Control, and Juvenile Justice Oversight Committee on the implementation of the treatment staffing model at Dobbs, Dillon, and Juvenile Evaluation Center Youth Development Centers. The Department shall identify the number of positions reallocated to the new treatment job classes and the source of funding for those positions.

"(c) The Department of Juvenile Justice and Delinquency Prevention shall report to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety and the Joint Corrections, Crime Control, and Juvenile Justice Oversight Committee by November 10, 2006, on the final recommended staffing plan for youth development centers for the 2007-2008 fiscal year. The report shall include:

"(1) The latest results of the evaluation of the pilot treatment staffing models at the Samarkand and Stonewall Jackson Youth Development Centers and the progress in implementing the model at other youth development centers.

"(2) The total recommended staffing by position classification for each youth development center. Staffing by shift shall be provided for each housing unit as well as justification for the level and type of staff on each shift.

"(3) The total cost and cost per bed for each youth development center to implement the staffing model.

"(4) The primary basis for the number of staff at each youth development center by classification.

"(5) An identification of other states that have implemented a treatment based staffing model, how the staffing patterns compare to the Department of Juvenile Justice and Delinquency Prevention proposal, and any research on the benefits and outcomes of using the treatment based approach in these states."

Reporting on Treatment Staffing Model at Youth Development Centers. — Session Laws 2007-323, s. 18.6(a)-(c), provides: "(a) The Department of Juvenile Justice and Delinquency Prevention shall continue quarterly reporting during the 2007-2008 fiscal year to the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety and the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee on the implementation of the treatment staffing model at Samarkand and Stonewall Jackson Youth Development Centers, including the latest results of the evaluation of the pilot treatment staffing models at the Centers and the progress in implementing the model at other youth development centers.

"(b) The Department shall implement the staffing treatment model presented to the Joint

Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee as part of the Department's November 14, 2006, report regarding the joint use with the Department of Correction of the Swannanoa Youth Development Center campus.

"The staffing levels of the new youth development centers shall be capped at 66 staff for a 32-bed facility and 198 staff for the 96-bed facility for the 2007-2009 fiscal biennium. Staffing ratios shall be no more than 2.1 staff per every juvenile committed at every other existing youth development center.

"(c) In the April 1, 2008, report, the Department shall include a recommendation on whether the staffing and budget for youth development centers should be modified to reflect the results of the pilot treatment programs."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Legal Periodicals. — For article on rights and interests of parent, child, family and State, see 4 Campbell L. Rev. 85 (1981).

For note on community-based care for juvenile offenders, see 18 Wake Forest L. Rev. 610 (1982).

For article, "Leandro v. State and the Constitutional Limitation on School Suspensions and Expulsions in North Carolina" see 83 N.C. L. Rev. 1507 (2005).

For empirical study, "The Faces Within: An Examination of the Disparate Treatment of Minority Youth Throughout the North Carolina Juvenile Justice System," see 40 Wake Forest L. Rev. 727 (2005).

CASE NOTES

Editor's Note. — *Some of the following cases were decided prior to the enactment of this Chapter.*

Continuance For the State. — Trial court did not abuse its discretion by ordering a juvenile into custody and continuing his disposition hearing with regard to charges of breaking and entering, trespass, and injury to real property, because a fourth charge arose during the juvenile's adjudication hearing as he was seen by a court counselor mouthing the words "I'm going to kick your ass" to a witness who had just testified against him, therefore, the State was entitled to more time to prepare since the fourth charge of intimidating a witness was added. In re R.D.R., 175 N.C. App. 397, 623 S.E.2d 341, 2006 N.C. App. LEXIS 52 (2006).

Purpose of Juvenile Code. — The stated purpose of the North Carolina Juvenile Code is to avoid commitment of the juvenile to training school (now youth development center) if he could be helped through community-level resources. In re Hughes, 50 N.C. App. 258, 273 S.E.2d 324 (1981).

Discretion of Court. — It was the legislature's intention that the district courts exercise sound discretion in fashioning an appropriate response to each particular instance of delinquency. In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

Duty of District Court. — It is the constant duty of the district court to give each child subject to its jurisdiction such oversight and control as will conduce to the welfare of the child and to the best interest of the State, and to ensure that the juvenile be carefully afforded all constitutional safeguards at every stage of the hearings. In re Eldridge, 9 N.C. App. 723, 177 S.E.2d 313 (1970).

The court is required to consider the welfare of the delinquent child as well as the best interest of the State. In re Hardy, 39 N.C. App. 610, 251 S.E.2d 643 (1979).

What Judge Must Determine. — This section necessarily requires the judge to first determine the needs of the juvenile and then to determine the appropriate community resources required to meet those needs in order to strengthen the home situation of the juvenile. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Determination of Child's Interest. — What is or is not in the best interest of the child must be determined in tandem with the perception of the legislature as to what is in the best interest of the state as enunciated by the terms of the Juvenile Code and by its general theme as deduced from the impetus behind its enactment. In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

Least Restrictive Disposition Must Be Selected. — In selecting among dispositional alternatives, the trial judge is required to select the least restrictive disposition, taking into account the seriousness of the offense, degree of culpability, age, prior record, and circumstances of the particular case. The judge must also weigh the State's best interest and select a disposition consistent with public safety, and within the judge's statutorily granted authority. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Court Limited to Using Available Dispositional Alternatives. — The district court's authority in juvenile dispositions is limited to utilization of currently existing programs or those for which the funding and machinery for implementation is in place. In re Jackson, 84 N.C. App. 167, 352 S.E.2d 449 (1987).

When a student has been lawfully suspended or expelled pursuant to G.S. 115C-391 and the school has not provided a suitable alternative educational forum, court-ordered public school attendance is not a dispositional alternative available to the juvenile court judge, absent a voluntary reconsideration of or restructuring of the suspension by the school board to allow the student's restoration to an educational program within its system. In re Jackson, 84 N.C. App. 167, 352 S.E.2d 449 (1987).

District Court Not Authorized to Require Creation of Foster Home. — The district court is not authorized to require a county Department of Social Services, either by itself or in conjunction with another agency, to implement the creation of a foster home with appropriate staff, wherein juveniles might be permanently domiciled for program treatment and delivery of services. In re Wharton, 305 N.C. 565, 290 S.E.2d 688 (1982).

Identical Judgments Erroneous for Varying Offenses and Culpability. — The juvenile court failed to consider the express purposes of the Juvenile Code where it entered identical judgments in all six cases tried together, and in which the juveniles ranged in age from 6 to 14, were found to have committed and admitted committing different offenses, and had varying degrees of culpability. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

Cited in In re Schrimpsher, 143 N.C. App. 461, 546 S.E.2d 407 (2001); In re Jones, 2001 N.C. App. LEXIS 652 (N.C. App. Aug. 7, 2001); In re Robinson, 151 N.C. App. 733, 567 S.E.2d 227, 2002 N.C. App. LEXIS 855 (2002).

§ 7B-2501. Dispositional hearing.

(a) The dispositional hearing may be informal, and the court may consider written reports or other evidence concerning the needs of the juvenile. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.

(b) The juvenile and the juvenile's parent, guardian, or custodian shall have an opportunity to present evidence, and they may advise the court concerning the disposition they believe to be in the best interests of the juvenile.

(c) In choosing among statutorily permissible dispositions, the court shall select the most appropriate disposition both in terms of kind and duration for the delinquent juvenile. Within the guidelines set forth in G.S. 7B-2508, the court shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile, based upon:

(1) The seriousness of the offense;

(2) The need to hold the juvenile accountable;
(3) The importance of protecting the public safety;
(4) The degree of culpability indicated by the circumstances of the particular case; and
(5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

(d) The court may dismiss the case, or continue the case for no more than six months in order to allow the family an opportunity to meet the needs of the juvenile through more adequate home supervision, through placement in a private or specialized school or agency, through placement with a relative, or through some other plan approved by the court. (1979, c. 815, s. 1; 1981, c. 469, s. 18; 1998-202, s. 6; 2003-62, s. 5.)

CASE NOTES

Editor's Note. *— Most of the following cases were decided prior to the enactment of this Chapter.*

What Evidence Must Be Considered. — Whenever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court, subject to the discretionary powers of the trial court to exclude cumulative testimony. Without hearing and considering such evidence, the trial court cannot make an informed and intelligent decision concerning the best interest of the child. In re Shue, 311 N.C. 586, 319 S.E.2d 567 (1984).

At a dispositional hearing the trial judge is not restricted to consideration of only those acts for which there had been an adjudication. If the information presented is determined by the trial judge to be reliable, accurate and competently obtained, he may properly consider it. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Trial courts may properly consider all written reports and materials submitted in connection with dispositional proceedings. In re Shue, 63 N.C. App. 76, 303 S.E.2d 636 (1983), modified, 311 N.C. 586, 319 S.E.2d 567 (1984).

Admissibility of Psychological Reports. — The clear intent of the legislature is that a hearing upon a motion for review is in the nature of a dispositional hearing rather than an adjudicatory hearing, and that the formal Rules of Evidence, G.S. 8C-1, do not apply. Therefore, the trial court could properly consider written psychological reports in determining on motion brought by parents whose parental rights had been terminated under former G.S. 7A-289.34 (see now 7B-1113), whether the needs of children would be best served by modification of its previous orders concerning visitation. In re Montgomery, 77 N.C. App. 709, 336 S.E.2d 136 (1985).

Admissibility of Post-petition Occurrences. — Post-petition occurrences were admissible in child neglect proceedings, based on mother's continuing alcohol abuse problems, because the trial court held the adjudication and disposition hearings at the same time, and the mother's post-petition activities reflected on the best interests of the children. Powers v. Powers, 130 N.C. App. 37, 502 S.E.2d 398 (1998).

Consideration of Unadjudicated Acts Unrelated to Petition. — Trial courts giving consideration at a dispositional hearing to unadjudicated acts allegedly committed by a juvenile, unrelated to that for which he stands petitioned, must first determine that such information is reliable and accurate and that it was competently obtained. This does not mean that a full "trial" must be held to make the required determination about the unrelated acts. The trial court should have wide discretion in making the required determination from the sources available to it, but it must make the determination. In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

This section permits the use of unadjudicated acts as evidence to be considered for disposition. In re Barkley, 61 N.C. App. 267, 300 S.E.2d 713 (1983).

Cross-Examination as to Prior Unadjudicated Acts Not Irrelevant. — Cross-examination of juvenile at dispositional hearing about twice running away from county receiving home was not irrelevant merely because the acts about which she was questioned occurred prior to the delinquent act for which she was placed on probation and nothing in the record indicated that she had been adjudicated undisciplined for these acts. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Effect of Failure to Hold Hearing. — Where the judge held no dispositional hearing and denied juvenile the opportunity to present evidence as to disposition, and there was no evidence to support the findings made by the judge with respect to disposition, commitment order would be reversed so that the court could conduct a dispositional hearing. In re Lail, 55 N.C. App. 238, 284 S.E.2d 731 (1981).

Continuance at Request of Juvenile. — Former G.S. 7A-639 (see now G.S. 7B-808) and former G.S. 7A-640 (see now G.S. 7B-901) made clear the legislative intent that the dispositional hearing must be continued for the juvenile respondent to present evidence when he requests such a continuance. This is particularly so in light of the provision of former G.S. 7A-632 (see now G.S. 7B-803 and 7B-2406) that "The judge may continue at any time any case to allow additional factual evidence, social information or other information needed in the best interest of the juvenile or in the interest of justice." In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979); In re Lail, 55 N.C. App. 238, 284 S.E.2d 731 (1981).

Trial court did not abuse its discretion in denying a juvenile's motion to continue his dispositional hearing in order to obtain a four-year-old psychological evaluation that was not included in the juvenile's court file under circumstances in which the juvenile's more recent psychological information was included in his juvenile-family data sheet. In re D.A.S., — N.C. App. —, 643 S.E.2d 660, 2007 N.C. App. LEXIS 828 (2007).

Burden on Parents and Department. — The language of former G.S. 7A-640 (see now this section) and former G.S. 7A-657 (see now 7B-906) does not place any burden of proof upon either the parents or Department of Social Services during the dispositional hearing or the review hearing. The essential requirement at the dispositional hearing and the review hearing is that sufficient evidence be presented to the trial court so that it can determine what is in the best interest of the child. In re Shue, 311 N.C. 586, 319 S.E.2d 567 (1984).

Failure of Court to Question Parents. — The trial court did not deny the parents of a juvenile their right to "present evidence" and "advise the court concerning the disposition they believe to be in the best interests of the juvenile" when, after they were tendered to the trial court, the trial court did not question them; the trial court's decision not to question them did not constitute a refusal to allow them to present evidence or to advise the trial court regarding the appropriate disposition. In re Powers, 144 N.C. App. 140, 546 S.E.2d 186, 2001 N.C. App. LEXIS 319 (2001).

Evidence Did Not Support Transfer of Custody. — Findings of fact in a dispositional order in a delinquency case did not support a trial court's decision to transfer custody of defendant from his mother to his father, and that part of the dispositional order was reversed where the evidence in the record failed to support a finding that placement with the father was in defendant's best interests; the record indicated that defendant had no contact with his father for approximately seven to eight months immediately prior to the assault for which defendant was on trial, the court counselor did not recommend placement with the father and instead advised the court to utilize family services if defendant needed more structure during the day, and it appeared that the trial court based the decision to award custody to the father solely on defendant's school absences. In re Ferrell, 162 N.C. App. 175, 589 S.E.2d 894, 2004 N.C. App. LEXIS 8 (2004).

Level 3 Disposition Proper. — Where juvenile defendant was adjudicated delinquent for having committed assault with a deadly weapon inflicting serious injury, and defendant's delinquency history level was determined to have been been low, the trial court had the authority to impose either a level 2 or level 3 disposition, and it was within the trial court's discretion to determine which dispostional alternative to impose; where defendant failed to return to school at the end of her five-day suspension, was absent from school for more than 100 days, and where the record revealed that the trial court had before it undisputed evidence that both defendant and her mother knew that defendant was eligible to return to school after the five-day suspension, but were unable to offer an explanation for defendant's failure to return to school, defendant failed to show that the trial court's decision to impose a level 3 disposition amounted to an abuse of discretion. In re N.B., 167 N.C. App. 305, 605 S.E.2d 488, 2004 N.C. App. LEXIS 2188 (2004).

Probationary Conditions Proper. — Probationary conditions in juvenile defendant's manslaughter adjudication that required defendant to visit and put flowers on the victim's grave site, wear a necklace with the victim's picture, and not participate in certain school functions and activities, did not require publicizing defendant's records or present defendant with the choice of staying at home or enduring public ridicule and were not improper; the trial court was cognizant of a psychologist's findings concerning defendant's below average cognitive functioning, but did not afford this evidence as much weight as the other evidence of defendant's actions prior to, during, and after his delinquent act, and the trial court properly considered the evidence before it. In re J.B., 172 N.C. App. 747, 616 S.E.2d 385, 2005 N.C. App. LEXIS 1800 (2005), aff'd, 360 N.C. 165, 622 S.E.2d 495 (2005).

Cited in In re D.A.F., — N.C. App. —, 635 S.E.2d 509, 2006 N.C. App. LEXIS 2154 (2006).

§ 7B-2502. Evaluation and treatment of undisciplined and delinquent juveniles.

(a) In any case, the court may order that the juvenile be examined by a physician, psychiatrist, psychologist, or other qualified expert as may be needed for the court to determine the needs of the juvenile. In the case of a juvenile adjudicated delinquent for committing an offense that involves the possession, use, sale, or delivery of alcohol or a controlled substance, the court shall require the juvenile to be tested for the use of controlled substances or alcohol within 30 days of the adjudication. In the case of any juvenile adjudicated delinquent, the court may, if it deems it necessary, require the juvenile to be tested for the use of controlled substances or alcohol. The results of these initial tests conducted pursuant to this subsection shall be used for evaluation and treatment purposes only. In placing a juvenile in out-of-home care under this section, the court shall also consider whether it is in the juvenile's best interest to remain in the juvenile's community of residence.

(b) Upon completion of the examination, the court shall conduct a hearing to determine whether the juvenile is in need of medical, surgical, psychiatric, psychological, or other evaluation or treatment and who should pay the cost of the evaluation or treatment. The county manager, or any other person who is designated by the chair of the board of county commissioners, of the county of the juvenile's residence shall be notified of the hearing, and allowed to be heard. If the court finds the juvenile to be in need of medical, surgical, psychiatric, psychological, or other evaluation or treatment, the court shall permit the parent, guardian, custodian, or other responsible persons to arrange for evaluation or treatment. If the parent, guardian, or custodian declines or is unable to make necessary arrangements, the court may order the needed evaluation or treatment, surgery, or care, and the court may order the parent to pay the cost of the care pursuant to Article 27 of this Chapter. If the court finds the parent is unable to pay the cost of evaluation or treatment, the court shall order the county to arrange for evaluation or treatment of the juvenile and to pay for the cost of the evaluation or treatment. The county department of social services shall recommend the facility that will provide the juvenile with evaluation or treatment.

(c) If the court believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is developmentally disabled, the court shall refer the juvenile to the area mental health, developmental disabilities, and substance abuse services director for appropriate action. A juvenile shall not be committed directly to a State hospital or mental retardation center; and orders purporting to commit a juvenile directly to a State hospital or mental retardation center except for an examination to determine capacity to proceed shall be void and of no effect. The area mental health, developmental disabilities, and substance abuse director shall be responsible for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet the juvenile's needs. If institutionalization is determined to be the best service for the juvenile, admission shall be with the voluntary consent of the parent, guardian, or custodian. If the parent, guardian, or custodian refuses to consent to a mental hospital or retardation center admission after such institutionalization is recommended by the area mental health, developmental disabilities, and substance abuse director, the signature and consent of the court may be substituted for that purpose. In all cases in which a regional mental hospital refuses admission to a juvenile referred for admission by the court and an area mental health, developmental disabilities, and substance abuse director or discharges a juvenile previously admitted on court referral prior to completion of the juvenile's treatment, the hospital shall submit to the court a written report setting out the reasons for denial of admission or discharge and setting out the juvenile's diagnosis, indications of mental illness, indications of need for treatment, and a statement as to the location of any facility known to have a treatment program for the juvenile in question. (1979, c. 815, s. 1; 1981, c. 469, s. 19; 1985, c. 589, s. 5; c. 777, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 2; 1991, c. 636, s. 19(a); 1995 (Reg. Sess., 1996), c. 609, s. 3; 1997-516, s. 1A; 1998-202, s. 6; 1998-229, s. 6; 2002-164, s. 4.9.)

Legal Periodicals. — For note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

For note on community-based care for juvenile offenders, see 18 Wake Forest L. Rev. 610 (1982).

For article, "Coercive Governmental Intervention and the Family: A Comment on North Carolina's Proposed Standards," see 7 Campbell L. Rev. 145 (1984).

For comment, "The Child Abuse Amendments of 1984: Congress Is Calling North Carolina to Respond to the Baby Doe Dilemma," 20 Wake Forest L. Rev. 975 (1984).

For 1984 survey, "Termination of Parental Rights: Putting Love in Its Place," see 63 N.C.L. Rev. 1177 (1985).

For article, "Mental Health Care for Children: Before and During State Custody," see 13 Campbell L. Rev. 1 (1990).

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

1996 Amendment. — As the General Assembly recognized the need for participation by counties in the dispositional stage of a juvenile proceedings it amended subsection (3) of former G.S. 7A-286 to require the trial judge to notify a representative of the county and provide the representative an opportunity to be heard at a juvenile's dispositional hearing. In re D.R.D., 127 N.C. App. 296, 488 S.E.2d 842 (1997).

The provision in subsection (6) of former § 7A-286 that a juvenile judge may not commit a child directly to a mental institution was clearly designed to prevent conflicts with various statutes under former Chapter 122. In re Mikels, 31 N.C. App. 470, 230 S.E.2d 155 (1976).

Former Chapter 122 was written to provide constitutional defense, procedural, and evidentiary rules. To allow juvenile judges to commit minors to mental institutions with a lesser standard than that set forth in former Chapter 122 would subject such commitments to constitutional challenge as a deprivation of liberty without due process of law. In re Mikels, 31 N.C. App. 470, 230 S.E.2d 155 (1976).

"Cost of care" does not include counsel fees for juvenile, which are governed by former G.S. 7A-588 (see now G.S. 7B-603 and 7B-2002). In re Wharton, 54 N.C. App. 447, 283 S.E.2d 528 (1981), rev'd on other grounds, 305 N.C. 565, 290 S.E.2d 688 (1982).

Consecutive commitments are not contrary to the philosophy of the Juvenile Code. Such reasoning would mean that once a juvenile had been committed to a detention facility or training school (now youth development center) he would be free to commit whatever other illegal acts he so chose knowing that he could not receive any additional punishment for his action. This was not the intention of the legislature when it adopted the Juvenile Code. In re Thompson, 74 N.C. App. 329, 327 S.E.2d 908, cert. denied, 314 N.C. 666, 335 S.E.2d 499 (1985).

The Juvenile Code does not contain any provision which prohibits the commitment of a juvenile to consecutive terms of detention. Absent an express prohibition, the common-law rule that the courts have the authority to commit offenders to consecutive terms of confinement is controlling. In re Thompson, 74 N.C. App. 329, 327 S.E.2d 908, cert. denied, 314 N.C. 666, 335 S.E.2d 499 (1985).

Reasonable and Available Non-Statutory Alternatives. — Prior to committing a juvenile to the Division of Youth Services, the court must also consider any reasonable and available nonstatutory community-level alternatives. In re Mosser, 99 N.C. App. 523, 393 S.E.2d 308 (1990).

Failure to Order Psychiatric Examination Precluded Commitment. — Where finding that juvenile was manic-depressive was supported only by a statement made to trial court by mother of the juvenile, this evidence of mental illness compelled further inquiry by trial court prior to entry of any final disposition; however, while trial court had authority to order a psychiatric examination of juvenile and gain advice of a medical specialist, he failed to utilize this community resource and such failure precludes commitment to the Division of Youth Services. In re Mosser, 99 N.C. App. 523, 393 S.E.2d 308 (1990).

Commitment of Juvenile to Training School (Now Youth Development Center) Held Proper. — Court exhausted all alternatives and properly committed a juvenile to training school (now youth development center) after the juvenile violated conditions of probation for second degree rape and taking indecent liberties with a child. In re Molina, 132 N.C. App. 373, 511 S.E.2d 679 (1999).

Cited in In re Braithwaite, 150 N.C. App. 434, 562 S.E.2d 897, 2002 N.C. App. LEXIS 486 (2002), cert. denied, 356 N.C. 162, 568 S.E.2d 187 (2002).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The opinions below were rendered prior to the enactment of this chapter.*

Conflicting Provisions. — Former G.S. 7A-647(2), as amended by Session Laws 1985, c. 777, appeared on its face to be in conflict with 20 U.S.C. § 1415 and with G.S. 115C-106 (repealed), 115C-114 (repealed), and former 115C-116 (repealed), to the extent that it authorizes the county director of social services to make educational decisions for a handicapped child in the custody of a department of social services. This apparent conflict should be resolved by giving full effect to 20 U.S.C. § 1415. See opinion of Attorney General to Mr. Johnnie Ellerbe, Consultant, Division for Exceptional Children, State Department of Public Instruction, 55 N.C.A.G. 94 (1986).

The provisions of Article 9, Chapter 115C should be considered as an exception to the provisions of former G.S. 7A-647(2)c to the extent those statutes are in conflict. See opinion of Attorney General to Mr. Johnnie Ellerbe, Consultant, Division for Exceptional Children, State Department of Public Instruction, 55 N.C.A.G. 94 (1986).

Duration of Child Custody by County Social Services Department. — See opinion of Attorney General to Mrs. Margaret H. Coman, 40 N.C.A.G. 311 (1970), rendered under former G.S. 7A-286.

Articles 4 and 5A of former Chapter 122 did not revoke the authority which subdivision (6) of former § 7A-286 vested in a district court judge exercising juvenile jurisdiction to secure placement of a juvenile needing residential care and treatment for mental impairment to an appropriate facility. See opinion of Attorney General to Mr. R. Patterson Webb, Division of Mental Health, Department of Human Resources, 43 N.C.A.G. 163 (1973), rendered under former G.S. 7A-286.

Section Does Not Authorize District Court Judge to Commit Juvenile to Center for Mentally Retarded. — See opinion of Attorney General to Dr. Ann F. Wolfe, Division of Mental Health Services, 44 N.C.A.G. 126 (1974), rendered under former G.S. 7A-286.

Educational Interests of Handicapped Child. — In those situations where the parents of a handicapped child are unavailable or unknown and the child is a ward of the State, the responsibility and authority for representing that child's educational interests rests with a surrogate parent, and not with the county director of social services. Further, former G.S. 115C-116(c) (repealed) and 20 U.S.C. § 1415(b)(1)(B) prohibit the county director of social services or any employee of a department of social services involved in the education or care of such child from serving as a surrogate parent in such circumstances. See opinion of Attorney General to Mr. Johnnie Ellerbe, Consultant, Division for Exceptional Children, State Department of Public Instruction, 55 N.C.A.G. 94 (1986).

§ 7B-2503. Dispositional alternatives for undisciplined juveniles.

The following alternatives for disposition shall be available to the court exercising jurisdiction over a juvenile who has been adjudicated undisciplined. In placing a juvenile in out-of-home care under this section, the court shall also consider whether it is in the juvenile's best interest to remain in the juvenile's community of residence. The court may combine any of the applicable alternatives when the court finds it to be in the best interests of the juvenile:

(1) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the judge may:

a. Require that the juvenile be supervised in the juvenile's own home by a department of social services in the juvenile's county of residence, a juvenile court counselor, or other personnel as may be available to the court, subject to conditions applicable to the parent, guardian, or custodian or the juvenile as the judge may specify; or

b. Place the juvenile in the custody of a parent, guardian, custodian, relative, private agency offering placement services, or some other suitable person; or

c. Place the juvenile in the custody of a department of social services in the county of the juvenile's residence, or in the case of a juvenile who has legal residence outside the State, in the physical custody of a department of social services in the county where the juvenile is found so that agency may return the juvenile to the responsible authorities in the juvenile's home state. An order placing a juvenile in the custody or placement responsibility of a county department of social services shall contain a finding that the juvenile's continuation in the juvenile's own home would be contrary to the juvenile's best interest. This placement shall be reviewed in accordance with G.S. 7B-906. The director may, unless otherwise ordered by the judge, arrange for, provide, or consent to, needed routine or emergency medical or surgical care or treatment. In the case where the parent is unknown, unavailable, or unable to act on behalf of the juvenile or juveniles, the director may, unless otherwise ordered by the judge, arrange for, provide or consent to any psychiatric, psychological, educational, or other remedial evaluations or treatment for the juvenile placed by a judge or the judge's designee in the custody or physical custody of a county department of social services under the authority of this or any other Chapter of the General Statutes. Prior to exercising this authority, the director shall make reasonable efforts to obtain consent from a parent, guardian, or custodian of the affected juvenile. If the director cannot obtain consent, the director shall promptly notify the parent, guardian, or custodian that care or treatment has been provided and shall give the parent, guardian, or custodian frequent status reports on the circumstances of the juvenile. Upon request of a parent, guardian, or custodian of the affected juvenile, the results or records of the aforementioned evaluations, findings, or treatment shall be made available to the parent, guardian, or custodian by the director unless prohibited by G.S. 122C-53(d).

(2) Place the juvenile under the protective supervision of a juvenile court counselor for a period of up to three months, with an extension of an additional three months in the discretion of the court.

(3) Excuse the juvenile from compliance with the compulsory school attendance law when the court finds that suitable alternative plans can be arranged by the family through other community resources for one of the following:

a. An education related to the needs or abilities of the juvenile including vocational education or special education;

b. A suitable plan of supervision or placement; or

c. Some other plan that the court finds to be in the best interests of the juvenile. (1979, c. 815, s. 1; 1981, c. 469, s. 19; 1985, c. 589, s. 5; c. 777, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 2; 1991, c. 636, s. 19(a); 1995 (Reg. Sess., 1996), c. 609, s. 3; 1997-516, s. 1A; 1998-202, s. 6; 1998-229, s. 6; 2001-208, s. 8; 2001-487, s. 101; 2001-490, s. 2.19; 2002-164, s. 4.10.)

Legal Periodicals. — For note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

For note on community-based care for juvenile offenders, see 18 Wake Forest L. Rev. 610 (1982).

For article, "Coercive Governmental Intervention and the Family: A Comment on North Carolina's Proposed Standards," see 7 Campbell L. Rev. 145 (1984).

For comment, "The Child Abuse Amendments of 1984: Congress Is Calling North Carolina to Respond to the Baby Doe Dilemma," 20 Wake Forest L. Rev. 975 (1984).

For 1984 survey, "Termination of Parental Rights: Putting Love in Its Place," see 63 N.C.L. Rev. 1177 (1985).

For article, "Mental Health Care for Children: Before and During State Custody," see 13 Campbell L. Rev. 1 (1990).

CASE NOTES

Editor's Note. *— The following cases were decided prior to the enactment of this Chapter.*

There is no authorization in the statutes to grant legal and physical custody of a juvenile to the Willie M. Services Section of the Division of Mental Health, Developmental Disabilities and Substance Abuse Services, although juvenile's guardian ad litem argued that the Division of Youth Services, also a Division of the Department of Human Resources, is a "person" within the purview of former G.S. 7A-647. In re Autry, 115 N.C. App. 263, 444 S.E.2d 239 (1994), aff'd per curiam, 340 N.C. 95, 455 S.E.2d 155 (1995).

Consecutive commitments are not contrary to the philosophy of the Juvenile Code. Such reasoning would mean that once a juvenile had been committed to a detention facility or training school (now youth development center) he would be free to commit whatever other illegal acts he so chose knowing that he could not receive any additional punishment for his action. This was not the intention of the legislature when it adopted the Juvenile Code. In re Thompson, 74 N.C. App. 329, 327 S.E.2d 908, cert. denied, 314 N.C. 666, 335 S.E.2d 499 (1985).

The Juvenile Code does not contain any provision which prohibits the commitment of a juvenile to consecutive terms of detention. Absent an express prohibition, the common-law rule that the courts have the authority to commit offenders to consecutive terms of confinement is controlling. In re Thompson, 74 N.C. App. 329, 327 S.E.2d 908, cert. denied, 314 N.C. 666, 335 S.E.2d 499 (1985).

Participation of Parent in Assessment or Treatment. — Former G.S. 7A-650(b1) (see now G.S. 7B-904, 7B-2702 and 7B-2704) only authorizes the district court to order the parent of a juvenile adjudicated as delinquent, undisciplined, abused, neglected, or dependent to participate in medical, psychiatric, psychological or other treatment ordered for the juvenile pursuant to former G.S. 7A-647(3). Former G.S. 7A-650(b1) does not authorize the court to order a juvenile's parent to otherwise submit to medical, psychiatric, psychological or other assessment or treatment. In re Badzinski, 79 N.C. App. 250, 339 S.E.2d 80, cert. denied, 317 N.C. 703, 347 S.E.2d 35 (1986).

Authority to Consider Privately Operated Facility. — Under former G.S. 7A-286, the trial court was not confined to a consideration only of government-operated resources, but had the authority to place an undisciplined child in a privately operated facility for an indefinite stay at the county's expense. In re Lambert, 46 N.C. App. 103, 264 S.E.2d 379 (1980).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The opinions below were rendered prior to the enactment of this chapter.*

Conflicting Provisions. — Former G.S. 7A-647(2), as amended by Session Laws 1985, c. 777, appeared on its face to be in conflict with 20 U.S.C. § 1415 and with G.S. 115C-106 (repealed), 115C-114 (repealed), and former 115C-116 (repealed), to the extent that it authorizes the county director of social services to make educational decisions for a handicapped child in the custody of a department of social services. This apparent conflict should be resolved by giving full effect to 20 U.S.C. § 1415. See opinion of Attorney General to Mr. Johnnie Ellerbe, Consultant, Division for Exceptional Children, State Department of Public Instruction, 55 N.C.A.G. 94 (1986).

The provisions of Article 9, Chapter 115C should be considered as an exception to the provisions of former G.S. 7A-647(2)c to the extent those statutes are in conflict. See opinion of Attorney General to Mr. Johnnie Ellerbe, Consultant, Division for Exceptional Children, State Department of Public Instruction, 55 N.C.A.G. 94 (1986).

Duration of Child Custody by County Social Services Department. — See opinion of Attorney General to Mrs. Margaret H. Coman, 40 N.C.A.G. 311 (1970), rendered under former G.S. 7A-286.

Articles 4 and 5A of former Chapter 122 did not revoke the authority which subdivision (6) of former § 7A-286 vested in a district court judge exercising juvenile jurisdiction to secure placement of a juvenile needing residential care and treatment for mental impairment to an appropriate facility. See opinion of Attorney General to Mr. R. Patterson

Webb, Division of Mental Health, Department of Human Resources, 43 N.C.A.G. 163 (1973), rendered under former G.S. 7A-286.

Section Does Not Authorize District Court Judge to Commit Juvenile to Center for Mentally Retarded. — See opinion of Attorney General to Dr. Ann F. Wolfe, Division of Mental Health Services, 44 N.C.A.G. 126 (1974), rendered under former G.S. 7A-286.

Educational Interests of Handicapped Child. — In those situations where the parents of a handicapped child are unavailable or unknown and the child is a ward of the State, the responsibility and authority for representing that child's educational interests rests with a surrogate parent, and not with the county director of social services. Further, former G.S. 115C-116(c) (repealed) and 20 U.S.C. § 1415(b)(1)(B) prohibit the county director of social services or any employee of a department of social services involved in the education or care of such child from serving as a surrogate parent in such circumstances. See opinion of Attorney General to Mr. Johnnie Ellerbe, Consultant, Division for Exceptional Children, State Department of Public Instruction, 55 N.C.A.G. 94 (1986).

§ 7B-2504. Conditions of protective supervision for undisciplined juveniles.

The court may place a juvenile on protective supervision pursuant to G.S. 7B-2503 so that the juvenile court counselor may (i) assist the juvenile in securing social, medical, and educational services and (ii) visit and work with the family as a unit to ensure the juvenile is provided proper supervision and care. The court may impose any combination of the following conditions of protective supervision that are related to the needs of the juvenile, including:

(1) That the juvenile shall remain on good behavior and not violate any laws;
(2) That the juvenile attend school regularly;
(3) That the juvenile maintain passing grades in up to four courses during each grading period and meet with the juvenile court counselor and a representative of the school to make a plan for how to maintain those passing grades;
(4) That the juvenile not associate with specified persons or be in specified places;
(5) That the juvenile abide by a prescribed curfew;
(6) That the juvenile report to a juvenile court counselor as often as required by a juvenile court counselor;
(7) That the juvenile be employed regularly if not attending school; and
(8) That the juvenile satisfy any other conditions determined appropriate by the court. (1979, c. 815, s. 1; 1998-202, s. 6; 2001-490, s. 2.20.)

CASE NOTES

Applied in In re Schrimpsher, 143 N.C. App. 461, 546 S.E.2d 407 (2001).

§ 7B-2505. Contempt of court for undisciplined juveniles.

Upon motion of the juvenile court counselor or on the court's own motion, the court may issue an order directing a juvenile who has been adjudicated undisciplined to appear and show cause why the juvenile should not be held in contempt for willfully failing to comply with an order of the court. The first time the juvenile is held in contempt, the court may order the juvenile confined in an approved detention facility for a period not to exceed 24 hours. The second time the juvenile is held in contempt, the court may order the juvenile confined in an approved detention facility for a period not to exceed three days. The third time and all subsequent times the juvenile is held in contempt, the court may order the juvenile confined in an approved detention facility for a period not to exceed five days. The timing of any confinement under this section shall be determined by the court in its discretion. In no event shall a juvenile held in contempt pursuant to this section be confined for more than 14 days in one 12-month period. (1998-202, s. 6; 2001-490, s. 2.21.)

§ 7B-2506. Dispositional alternatives for delinquent juveniles.

The court exercising jurisdiction over a juvenile who has been adjudicated delinquent may use the following alternatives in accordance with the dispositional structure set forth in G.S. 7B-2508:

(1) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the judge may:
   a. Require that a juvenile be supervised in the juvenile's own home by the department of social services in the juvenile's county, a juvenile court counselor, or other personnel as may be available to the court, subject to conditions applicable to the parent, guardian, or custodian or the juvenile as the judge may specify; or
   b. Place the juvenile in the custody of a parent, guardian, custodian, relative, private agency offering placement services, or some other suitable person; or
   c. Place the juvenile in the custody of the department of social services in the county of his residence, or in the case of a juvenile who has legal residence outside the State, in the physical custody of a department of social services in the county where the juvenile is found so that agency may return the juvenile to the responsible authorities in the juvenile's home state. An order placing a juvenile in the custody or placement responsibility of a county department of social services shall contain a finding that the juvenile's continuation in the juvenile's own home would be contrary to the juvenile's best interest. This placement shall be reviewed in accordance with G.S. 7B-906. The director may, unless otherwise ordered by the judge, arrange for, provide, or consent to, needed routine or emergency medical or surgical care or treatment. In the case where the parent is unknown, unavailable, or unable to act on behalf of the juvenile or juveniles, the director may, unless otherwise ordered by the judge, arrange for, provide, or consent to any psychiatric, psychological, educational, or other remedial evaluations or treatment for the juvenile placed by a judge or his designee in the custody or physical custody of a county department of social services under the authority of this or any other Chapter of the General Statutes. Prior to exercising this authority, the director shall make reasonable efforts to obtain consent from a parent, guardian, or custodian of the affected juvenile. If the director cannot obtain consent, the director shall promptly notify the parent, guardian, or custodian that care or treatment has been provided and shall give the parent, guardian, or custodian frequent status reports on the circumstances of the juvenile. Upon request of a parent, guardian, or custodian of the affected juvenile, the results or records of the aforementioned evaluations, findings, or treatment shall be made available to the parent, guardian, or custodian by the director unless prohibited by G.S. 122C-53(d).

(2) Excuse the juvenile from compliance with the compulsory school attendance law when the court finds that suitable alternative plans can be arranged by the family through other community resources for one of the following:

a. An education related to the needs or abilities of the juvenile including vocational education or special education;
b. A suitable plan of supervision or placement; or
c. Some other plan that the court finds to be in the best interests of the juvenile.

(3) Order the juvenile to cooperate with a community-based program, an intensive substance abuse treatment program, or a residential or nonresidential treatment program. Participation in the programs shall not exceed 12 months.

(4) Require restitution, full or partial, up to five hundred dollars ($500.00), payable within a 12-month period to any person who has suffered loss or damage as a result of the offense committed by the juvenile. The court may determine the amount, terms, and conditions of the restitution. If the juvenile participated with another person or persons, all participants should be jointly and severally responsible for the payment of restitution; however, the court shall not require the juvenile to make restitution if the juvenile satisfies the court that the juvenile does not have, and could not reasonably acquire, the means to make restitution.

(5) Impose a fine related to the seriousness of the juvenile's offense. If the juvenile has the ability to pay the fine, it shall not exceed the maximum fine for the offense if committed by an adult.

(6) Order the juvenile to perform up to 100 hours supervised community service consistent with the juvenile's age, skill, and ability, specifying the nature of the work and the number of hours required. The work shall be related to the seriousness of the juvenile's offense and in no event may the obligation to work exceed 12 months.

(7) Order the juvenile to participate in the victim-offender reconciliation program.

(8) Place the juvenile on probation under the supervision of a juvenile court counselor, as specified in G.S. 7B-2510.

(9) Order that the juvenile shall not be licensed to operate a motor vehicle in the State of North Carolina for as long as the court retains jurisdiction over the juvenile or for any shorter period of time. The clerk of court shall notify the Division of Motor Vehicles of that order.

(10) Impose a curfew upon the juvenile.

(11) Order that the juvenile not associate with specified persons or be in specified places.

(12) Impose confinement on an intermittent basis in an approved detention facility. Confinement shall be limited to not more than five 24-hour periods, the timing of which is determined by the court in its discretion.

(13) Order the juvenile to cooperate with placement in a wilderness program.

(14) Order the juvenile to cooperate with placement in a residential treatment facility, an intensive nonresidential treatment program, an intensive substance abuse program, or in a group home other than a multipurpose group home operated by a State agency.

(15) Place the juvenile on intensive probation under the supervision of a juvenile court counselor.

(16) Order the juvenile to cooperate with a supervised day program requiring the juvenile to be present at a specified place for all or part of every day or of certain days. In determining whether to order a juvenile to a particular supervised day program, the court shall consider the structure and operations of the program and whether that program will meet the needs of the juvenile. The court also may

require the juvenile to comply with any other reasonable conditions specified in the dispositional order that are designed to facilitate supervision.

(17) Order the juvenile to participate in a regimented training program.

(18) Order the juvenile to submit to house arrest.

(19) Suspend imposition of a more severe, statutorily permissible disposition with the provision that the juvenile meet certain conditions agreed to by the juvenile and specified in the dispositional order. The conditions shall not exceed the allowable dispositions for the level under which disposition is being imposed.

(20) Order that the juvenile be confined in an approved juvenile detention facility for a term of up to 14 24-hour periods, which confinement shall not be imposed consecutively with intermittent confinement pursuant to subdivision (12) of this section at the same dispositional hearing. The timing of this confinement shall be determined by the court in its discretion.

(21) Order the residential placement of a juvenile in a multipurpose group home operated by a State agency.

(22) Require restitution of more than five hundred dollars ($500.00), full or partial, payable within a 12-month period to any person who has suffered loss or damage as a result of an offense committed by the juvenile. The court may determine the amount, terms, and conditions of restitution. If the juvenile participated with another person or persons, all participants should be jointly and severally responsible for the payment of the restitution; however, the court shall not require the juvenile to make restitution if the juvenile satisfies the court that the juvenile does not have, and could not reasonably acquire, the means to make restitution.

(23) Order the juvenile to perform up to 200 hours supervised community service consistent with the juvenile's age, skill, and ability, specifying the nature of work and the number of hours required. The work shall be related to the seriousness of the juvenile's offense.

(24) Commit the juvenile to the Department for placement in a youth development center in accordance with G.S. 7B-2513 for a period of not less than six months. (1979, c. 815, s. 1; 1981, c. 469, ss. 19, 20; 1985, c. 589, s. 5; c. 777, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 2; 1991, c. 353, s. 1; 636, s. 19(a); 1991 (Reg. Sess., 1992), c. 1030, s. 4; 1993, c. 369, s. 1; c. 462, s. 1; 1995 (Reg. Sess., 1996), c. 609, s. 3; 1997-516, s. 1A; 1998-202, s. 6; 1998-229, s. 6; 1999-444, s. 1; 2000-137, s. 3; 2001-95, s. 5; 2001-179, s. 2; 2001-208, s. 9; 2001-487, s. 101; 2001-490, s. 2.22.)

Editor's Note. — The references in subdivisions (8) and (24) to G.S. 7B-2510 and 7B-2513 were substituted for G.S. 7B-2509 and 7B-2512, respectively, following their recodification at the direction of the Revisor of Statutes.

Legal Periodicals. — For note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

For note on community-based care for juvenile offenders, see 18 Wake Forest L. Rev. 610 (1982).

For article, "Coercive Governmental Intervention and the Family: A Comment on North Carolina's Proposed Standards," see 7 Campbell L. Rev. 145 (1984).

For comment, "The Child Abuse Amendments of 1984: Congress Is Calling North Carolina to Respond to the Baby Doe Dilemma," 20 Wake Forest L. Rev. 975 (1984).

For 1984 survey, "Termination of Parental Rights: Putting Love in Its Place," see 63 N.C.L. Rev. 1177 (1985).

For article, "Mental Health Care for Children: Before and During State Custody," see 13 Campbell L. Rev. 1 (1990).

CASE NOTES

***Editor's Note.** — Most of the following cases were decided prior to the enactment of this Chapter.*

Delegation of Authority. — Trial court erred in entering a dispositional order that directed the juvenile to cooperate with placement in a residential treatment facility "if deemed necessary" by either of two counselors as statutory law did not give the trial court authority to delegate its authority in entering a dispositional order. In re Hartsock, 158 N.C. App. 287, 580 S.E.2d 395 (2003).

Because a trial court ordered a juvenile defendant to pay restitution and participate in a residential treatment program, it did not impermissibly delegate authority; instead, defendant was ordered to pay restitution, but the amount was left to be determined until the victim's medical bills were provided to the trial court, which comported with G.S. 7B-2506. In re M.A.B., 170 N.C. App. 192, 611 S.E.2d 886, 2005 N.C. App. LEXIS 894 (2005).

Rule that a trial court may not delegate or vest its discretion in another person or entity applies to a trial court's order of probation pursuant to G.S. 7B-2506(8) and the underlying conditions of that term of probation, which are governed by G.S. 7B-2510; special conditions of probation that respondent juvenile cooperate with any out-of-home placement if deemed necessary by the court counselor and that he cooperate with any counseling or assessment recommended by the court counselor were impermissible delegations of the trial court's authority. In re S.R.S., — N.C. App. —, 636 S.E.2d 277, 2006 N.C. App. LEXIS 2233 (2006).

The legislature intended for the court to consider all information relevant to the disposition of a delinquent child. In re Hardy, 39 N.C. App. 610, 251 S.E.2d 643 (1979).

There is no authorization in the statutes to grant legal and physical custody of a juvenile to the Willie M. Services Section of the Division of Mental Health, Developmental Disabilities and Substance Abuse Services, although juvenile's guardian ad litem argued that the Division of Youth Services, also a Division of the Department of Human Resources, is a "person" within the purview of former G.S. 7A-647. In re Autry, 115 N.C. App. 263, 444 S.E.2d 239 (1994), aff'd per curiam, 340 N.C. 95, 455 S.E.2d 155 (1995).

Consecutive commitments are not contrary to the philosophy of the Juvenile Code. Such reasoning would mean that once a juvenile had been committed to a detention facility or training school (now youth development center) he would be free to commit whatever other illegal acts he so chose knowing that he could not receive any additional punishment for his action. This was not the intention of the legislature when it adopted the Juvenile Code. In re Thompson, 74 N.C. App. 329, 327 S.E.2d 908, cert. denied, 314 N.C. 666, 335 S.E.2d 499 (1985).

The Juvenile Code does not contain any provision which prohibits the commitment of a juvenile to consecutive terms of detention. Absent an express prohibition, the common-law rule that the courts have the authority to commit offenders to consecutive terms of confinement is controlling. In re Thompson, 74 N.C. App. 329, 327 S.E.2d 908, cert. denied, 314 N.C. 666, 335 S.E.2d 499 (1985).

Confinement Not Authorized. — When a trial court found that a juvenile appellant violated his probation, it was governed by G.S. 7B-2510, and was authorized to order a new disposition at Level 2, the next higher level from the original disposition at Level 1; commitment was not an allowable Level 2 disposition, so the trial court was not authorized to impose commitment, stayed or unstayed. In re T.B., 178 N.C. App. 542, 631 S.E.2d 857, 2006 N.C. App. LEXIS 1562 (2006).

Intermittent Confinement Improperly Ordered. — Although the trial court had the authority to order that the juvenile be confined on an intermittent basis in an approved detention facility, statutory law required that the timing of the confinement be determined by the trial court in its discretion and the applicable form left space for instruction as to that timing; the trial court erred in not filling in the timing since it left the space blank and, thus, that portion of the disposition order was incomplete and had no effect. In re Hartsock, 158 N.C. App. 287, 580 S.E.2d 395 (2003).

Participation of Parent in Assessment or Treatment. — Former G.S. 7A-650(b1) (see now G.S. 7B-904, 7B-2702 and 7B-2704) only authorizes the district court to order the parent of a juvenile adjudicated as delinquent, undisciplined, abused, neglected, or dependent to participate in medical, psychiatric, psychological or other treatment ordered for the juvenile pursuant to former G.S. 7A-64k7(3). Former G.S. 7A-650(b1) does not authorize the court to order a juvenile's parent to otherwise submit to medical, psychiatric, psychological or other assessment or treatment. In re Badzinski, 79 N.C. App. 250, 339 S.E.2d 80, cert. denied, 317 N.C. 703, 347 S.E.2d 35 (1986).

Power to Order Sex Offender Treatment. — The district court had power to order the Department of Human Resources, Division of Youth Services to give sex offender treatment to an adolescent found delinquent because of sex offenses and subsequently to deny the conditional release of that adolescent because treatment had not been in compliance with that mandate. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

The district court is authorized to permit the Division of Youth Services, as the "person" responsible for a juvenile in its custody, to arrange for psychological counseling for sexual offenders. When the agency, as custodian, fails to make such arrangements, the court is authorized by statute to "order the needed treatment." In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

Ordering Division of Youth Services to provide specific treatment for sexual offenders for a delinquent juvenile in its custody, when such treatment was available, was within the scope of the court's statutory authority. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

Power to Order Restitution. — The trial court made appropriate findings of fact based on evidence in the record that the juvenile had or could reasonably acquire the means to pay specified restitution within the 12 month probationary period where the court found as fact that the juvenile was 16 years old at the time of the disposition, and lawfully ordered him to obtain a full time job, thus enabling him to make restitution, and made provisions to adjust the weekly payments required by the order if he returned to school in the fall. In re Schrimpsher, 143 N.C. App. 461, 546 S.E.2d 407 (2001).

Restitution Where None of the Co-Defendants Had to Pay. — The trial court erred in requiring that the defendant alone make restitution, and failed to make adequate findings enabling review of that requirement, when the record revealed that at least one other juvenile co-defendant was adjudicated delinquent for breaking and entering and causing injury to local lodge, and that none of the other co-defendants, whether juvenile or adult, were ordered to pay restitution. In re Schrimpsher, 143 N.C. App. 461, 546 S.E.2d 407 (2001).

Requirement That People with Whom Juvenile Lives Submit to Warrantless Searches. — The court may not require that those with whom the juvenile associates submit to warrantless searches as a condition of the juvenile's probation; it is unfair and unreasonable to place the success of the juvenile's probation on the acts of others. In re Schrimpsher, 143 N.C. App. 461, 546 S.E.2d 407 (2001).

Probationary Conditions Proper. — Probationary conditions in juvenile defendant's manslaughter adjudication that required defendant to visit and put flowers on the victim's grave site, wear a necklace with the victim's picture, and not participate in certain school functions and activities, did not require publicizing defendant's records or present defendant with the choice of staying at home or enduring public ridicule and were not improper; the trial court was cognizant of a psychologist's findings concerning defendant's below average cognitive functioning, but did not afford this evidence as much weight as the other evidence of defendant's actions prior to, during, and after his delinquent act, and the trial court properly considered the evidence before it. In re J.B., 172 N.C. App. 747, 616 S.E.2d 385, 2005 N.C. App. LEXIS 1800 (2005), aff'd, 360 N.C. 165, 622 S.E.2d 495 (2005).

Level 3 Classification Proper. — Trial court possessed the discretion to enter a delinquency Level 3 based on an adjudication of assault on a government employee, a class A1 misdemeanor, and the juvenile's "high" prior delinquency history. In re D.A.S., — N.C. App. —, 643 S.E.2d 660, 2007 N.C. App. LEXIS 828 (2007).

Evidence Did Not Support Transfer of Custody. — Findings of fact in a dispositional order in a delinquency case did not support a trial court's decision to transfer custody of defendant from his mother to his father, and that part of the dispositional order was reversed where the evidence in the record failed to support a finding that placement with the father was in defendant's best interests; the record indicated that defendant had no contact with his father for approximately seven to eight months immediately prior to the assault for which defendant was on trial, the court counselor did not recommend placement with the father and instead advised the court to utilize family services if defendant needed more structure during the day, and it appeared that the trial court based the decision to award custody to the father solely on defendant's school absences. In re Ferrell, 162 N.C. App. 175, 589 S.E.2d 894, 2004 N.C. App. LEXIS 8 (2004).

Transfer of Custody to Department of Social Services Was Proper. — Trial court was authorized to grant custody of respondent, who had been adjudicated delinquent based on a finding that respondent committed involuntary manslaughter, to the Department of Social Services for purposes of obtaining necessary evaluation and treatment pursuant to G.S. 7B-2506(1)(c). Respondent had a history of aggressive behavior directed at younger children and a facility that offered 24-hour monitoring would ensure that respondent did not cause any further harm to other children. In re K.T.L., 177 N.C. App. 365, 629 S.E.2d 152, 2006 N.C. App. LEXIS 965 (2006).

Cited in In re M.E.B., 153 N.C. App. 278, 569 S.E.2d 683, 2002 N.C. App. LEXIS 1135 (2002).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The opinions below were rendered prior to the enactment of this chapter.*

Conflicting Provisions. — Former G.S. 7A-647(2), as amended by Session Laws 1985, c. 777, appeared on its face to be in conflict with 20 U.S.C. § 1415 and with G.S. 115C-106 (repealed), 115C-114 (repealed), and former 115C-116 (repealed), to the extent that it authorizes the county director of social services to make educational decisions for a handicapped child in the custody of a department of social services. This apparent conflict should be resolved by giving full effect to 20 U.S.C. § 1415. See opinion of Attorney General to Mr. Johnnie Ellerbe, Consultant, Division for Exceptional Children, State Department of Public Instruction, 55 N.C.A.G. 94 (1986).

The provisions of Article 9, Chapter 115C should be considered as an exception to the provisions of former G.S. 7A-647(2)c to the extent those statutes are in conflict. See opinion of Attorney General to Mr. Johnnie Ellerbe, Consultant, Division for Exceptional Children, State Department of Public Instruction, 55 N.C.A.G. 94 (1986).

Duration of Child Custody by County Social Services Department. — See opinion of Attorney General to Mrs. Margaret H. Coman, 40 N.C.A.G. 311 (1970), rendered under former G.S. 7A-286.

Articles 4 and 5A of former Chapter 122 did not revoke the authority which subdivision (6) of former § 7A-286 vested in a district court judge exercising juvenile jurisdiction to secure placement of a juvenile needing residential care and treatment for mental impairment to an appropriate facility. See opinion of Attorney General to Mr. R. Patterson Webb, Division of Mental Health, Department of Human Resources, 43 N.C.A.G. 163 (1973), rendered under former G.S. 7A-286.

Section Does Not Authorize District Court Judge to Commit Juvenile to Center for Mentally Retarded. — See opinion of Attorney General to Dr. Ann F. Wolfe, Division of Mental Health Services, 44 N.C.A.G. 126 (1974), rendered under former G.S. 7A-286.

Educational Interests of Handicapped Child. — In those situations where the parents of a handicapped child are unavailable or unknown and the child is a ward of the State, the responsibility and authority for representing that child's educational interests rests with a surrogate parent, and not with the county director of social services. Further, former G.S. 115C-116(c) (repealed) and 20 U.S.C. § 1415(b)(1)(B) prohibit the county director of social services or any employee of a department of social services involved in the education or care of such child from serving as a surrogate parent in such circumstances. See opinion of Attorney General to Mr. Johnnie Ellerbe, Consultant, Division for Exceptional Children, State Department of Public Instruction, 55 N.C.A.G. 94 (1986).

§ 7B-2507. Delinquency history levels.

(a) Generally. — The delinquency history level for a delinquent juvenile is determined by calculating the sum of the points assigned to each of the juvenile's prior adjudications and to the juvenile's probation status, if any, that the court finds to have been proved in accordance with this section.

(b) Points. — Points are assigned as follows:

(1) For each prior adjudication of a Class A through E felony offense, 4 points.

(2) For each prior adjudication of a Class F through I felony offense or Class A1 misdemeanor offense, 2 points.

(3) For each prior adjudication of a Class 1, 2, or 3 misdemeanor offense, 1 point.

(4) If the juvenile was on probation at the time of offense, 2 points.

No points shall be assigned for a prior adjudication that a juvenile is in direct contempt of court or indirect contempt of court.

(c) Delinquency History Levels. — The delinquency history levels are:

(1) Low — No more than 1 point.

(2) Medium — At least 2, but not more than 3 points.

(3) High — At least 4 points.

In determining the delinquency history level, the classification of a prior offense is the classification assigned to that offense at the time the juvenile committed the offense for which disposition is being ordered.

(d) Multiple Prior Adjudications Obtained in One Court Session. — For purposes of determining the delinquency history level, if a juvenile is adjudicated delinquent for more than one offense in a single session of district court, only the adjudication for the offense with the highest point total is used.

(e) Classification of Prior Adjudications From Other Jurisdictions. — Except as otherwise provided in this subsection, an adjudication occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. If the juvenile proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning delinquency history level points. If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning delinquency history level points. If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 misdemeanor in North Carolina, the adjudication is treated as a Class A1 misdemeanor for assigning delinquency history level points.

(f) Proof of Prior Adjudications. — A prior adjudication shall be proved by any of the following methods:

(1) Stipulation of the parties.
(2) An original or copy of the court record of the prior adjudication.
(3) A copy of records maintained by the Division of Criminal Information or by the Department.
(4) Any other method found by the court to be reliable.

The State bears the burden of proving, by a preponderance of the evidence, that a prior adjudication exists and that the juvenile before the court is the same person as the juvenile named in the prior adjudication. The original or a copy of the court records or a copy of the records maintained by the Division of Criminal Information or of the Department, bearing the same name as that by which the juvenile is charged, is prima facie evidence that the juvenile named is the same person as the juvenile before the court, and that the facts set out in the record are true. For purposes of this subsection, "a copy" includes a paper writing containing a reproduction of a record maintained electronically on a computer or other data processing equipment, and a document produced by a facsimile machine. The prosecutor shall make all feasible efforts to obtain and present to the court the juvenile's full record. Evidence presented by either party at trial may be utilized to prove prior adjudications. If asked by the juvenile, the prosecutor shall furnish the juvenile's prior adjudications to the juvenile within a reasonable time sufficient to allow the juvenile to determine if the record available to the prosecutor is accurate. (1998-202, s. 6; 2000-137, s. 3; 2007-168, s. 5.)

Editor's Note. — Session Laws 2007-493, s. 32, provides: "The Legislative Research Commission may study dispositional alternatives for juveniles who are adjudicated delinquent for an offense that is a violation of G.S. 20-138.1, Impaired Driving, or G.S. 20-138.3, Driving By Persons Less Than 21 Years Old After Consuming Alcohol or Drugs. In conducting its study, the Commission shall consider the offense classifications and dispositions set forth in G.S. 7B-2508 and shall determine whether violations of G.S. 20-138.1 and G.S. 20-138.3 should be classified as violent, serious, or minor. In addition, the Commission shall review the delinquency history level points assigned to the offense classifications pursuant to G.S. 7B-2507 and shall determine the appropriate points to be assigned for violations of G.S.

20-138.1 and G.S. 20-138.3. The Legislative Research Commission may make an interim report, including any legislative proposals, to the 2007 General Assembly, Regular Session 2008, and shall make its final report to the 2009 General Assembly upon its convening."

Effect of Amendments. — Session Laws 2007-168, s. 5, effective December 1, 2007, and applicable to acts occurring or offenses committed on or after that date, added the last paragraph of subsection (b).

CASE NOTES

Level 3 Disposition Proper. — Where juvenile defendant was adjudicated delinquent for having committed assault with a deadly weapon inflicting serious injury, and defendant's delinquency history level was determined to have been been low, the trial court had the authority to impose either a level 2 or level 3 disposition, and it was within the trial court's discretion to determine which dispostional alternative to impose; where defendant failed to return to school at the end of her five-day suspension, was absent from school for more than 100 days, and where the record revealed that the trial court had before it undisputed evidence that both defendant and her mother knew that defendant was eligible to return to school after the five-day suspension, but were unable to offer an explanation for defendant's failure to return to school, defendant failed to show that the trial court's decision to impose a level 3 disposition amounted to an abuse of discretion. In re N.B., 167 N.C. App. 305, 605 S.E.2d 488, 2004 N.C. App. LEXIS 2188 (2004).

Assault on a government employee was a class A1 misdemeanor; a trial court possessed the discretion to enter a delinquency Level 3 based on a juvenile adjudication of assault on a government employee, and the juvenile's "high" prior delinquency history. In re D.A.S., — N.C. App. —, 643 S.E.2d 660, 2007 N.C. App. LEXIS 828 (2007).

Cited in In re Allison, 143 N.C. App. 586, 547 S.E.2d 169, 2001 N.C. App. LEXIS 329 (2001); In re M.E.B., 153 N.C. App. 278, 569 S.E.2d 683, 2002 N.C. App. LEXIS 1135 (2002); In re K.T.L., 177 N.C. App. 365, 629 S.E.2d 152, 2006 N.C. App. LEXIS 965 (2006).

§ 7B-2508. Dispositional limits for each class of offense and delinquency history level.

(a) Offense Classification. — The offense classifications are as follows:

(1) Violent — Adjudication of a Class A through E felony offense;

(2) Serious — Adjudication of a Class F through I felony offense or a Class A1 misdemeanor;

(3) Minor — Adjudication of a Class 1, 2, or 3 misdemeanor or adjudication of indirect contempt by a juvenile.

(b) Delinquency History Levels. — A delinquency history level shall be determined for each delinquent juvenile as provided in G.S. 7B-2507.

(c) Level 1 — Community Disposition. — A court exercising jurisdiction over a juvenile who has been adjudicated delinquent and for whom the dispositional chart in subsection (f) of this section prescribes a Level 1 disposition may provide for evaluation and treatment under G.S. 7B-2502 and for any of the dispositional alternatives contained in subdivisions (1) through (13) and (16) of G.S. 7B-2506. In determining which dispositional alternative is appropriate, the court shall consider the needs of the juvenile as indicated by the risk and needs assessment contained in the predisposition report, the appropriate community resources available to meet those needs, and the protection of the public.

(d) Level 2 — Intermediate Disposition. — A court exercising jurisdiction over a juvenile who has been adjudicated delinquent and for whom the dispositional chart in subsection (f) of this section prescribes a Level 2 disposition may provide for evaluation and treatment under G.S. 7B-2502 and for any of the dispositional alternatives contained in subdivisions (1) through (23) of G.S. 7B-2506, but shall provide for at least one of the intermediate dispositions authorized in subdivisions (13) through (23) of G.S. 7B-2506. However, notwithstanding any other provision of this section, a court may impose a Level 3 disposition if the juvenile has previously received a Level 3 disposition in a prior juvenile action. In determining which dispositional alternative is appropriate, the court shall consider the needs of the juvenile as indicated by the risk and needs assessment contained in the predisposition report, the appropriate community resources available to meet those needs, and the protection of the public.

(e) Level 3 — Commitment. — A court exercising jurisdiction over a juvenile who has been adjudicated delinquent and for whom the dispositional chart in subsection (f) of this section prescribes a Level 3 disposition shall commit the juvenile to the Department for placement in a youth development center in accordance with G.S. 7B-2506(24). However, a court may impose a Level 2 disposition rather than a Level 3 disposition if the court submits written findings on the record that substantiate extraordinary needs on the part of the offending juvenile.

(f) Dispositions for Each Class of Offense and Delinquency History Level; Disposition Chart Described. — The authorized disposition for each class of offense and delinquency history level is as specified in the chart below. Delinquency history levels are indicated horizontally on the top of the chart. Classes of offense are indicated vertically on the left side of the chart. Each cell on the chart indicates which of the dispositional levels described in subsections (c) through (e) of this section are prescribed for that combination of offense classification and delinquency history level:

	DELINQUENCY HISTORY		
OFFENSE	LOW	MEDIUM	HIGH
VIOLENT	Level 2 or 3	Level 3	Level 3
SERIOUS	Level 1 or 2	Level 2	Level 2 or 3
MINOR	Level 1	Level 1 or 2	Level 2.

(g) Notwithstanding subsection (f) of this section, a juvenile who has been adjudicated for a minor offense may be committed to a Level 3 disposition if the juvenile has been adjudicated of four or more prior offenses. For purposes of determining the number of prior offenses under this subsection, each successive offense is one that was committed after adjudication of the preceding offense.

(h) If a juvenile is adjudicated of more than one offense during a session of juvenile court, the court shall consolidate the offenses for disposition and impose a single disposition for the consolidated offenses. The disposition shall be specified for the class of offense and delinquency history level of the most serious offense. (1998-202, s. 6; 2000-137, s. 3; 2001-95, s. 5; 2001-179, s. 1; 2007-168, s. 6.)

Editor's Note. — Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 19.7, transfers the Guard Response Alternative Sentencing Program and all its functions, powers, duties, and obligations from the Department of Crime Control and Public Safety for the Guard Response Alternative Sentencing Program to the Office of Juvenile Justice (now the Department of Juvenile Justice and Delinquency Prevention.) The Program is to continue to function as an additional probation option for certain first-time juveniles who have been adjudicated delinquent and who are subject to Level 2 disposition.

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. — Session Laws 2007-168, s. 6, effective December 1, 2007, and applicable to acts occurring or offenses committed on or after that date, in subdivision (a)(3), added "or adjudication of indirect contempt by a juvenile."

CASE NOTES

Level 3 Disposition. — The trial court committed no error in using a juvenile's previous commitment to training school (now youth development center) as a basis for imposing a Level 3 disposition and again committing her to training school (now youth development center). In re Allison, 143 N.C. App. 586, 547 S.E.2d 169, 2001 N.C. App. LEXIS 329 (2001).

Where juvenile defendant was adjudicated delinquent for having committed assault with a deadly weapon inflicting serious injury, and defendant's delinquency history level was determined to have been been low, the trial court had the authority to impose either a level 2 or level 3 disposition, and it was within the trial court's discretion to determine which dispostional alternative to impose; where defendant failed to return to school at the end of her five-day suspension, was absent from school for more than 100 days, and where the record revealed that the trial court had before it undisputed evidence that both defendant and her mother knew that defendant was eligible to return to school after the five-day suspension, but were unable to offer an explanation for defendant's failure to return to school, defendant failed to show that the trial court's decision to impose a level 3 disposition amounted to an abuse of discretion. In re N.B., 167 N.C. App. 305, 605 S.E.2d 488, 2004 N.C. App. LEXIS 2188 (2004).

When appellant, a juvenile, had a violent offense, first-degree sexual assault, and a low delinquency history, the court did not err in ordering him to a youth development center; the decision was a reasoned one, given evidence that appellant had a strong sexual interest in younger children, that he might reoffend, and that rape might sexually excite him, and an evaluation which stated that appellant might be more suitable for treatment in a secure environment and that he should not have unsupervised contact with children aged 11 or under. In re D.A.F., — N.C. App. —, 635 S.E.2d 509, 2006 N.C. App. LEXIS 2154 (2006).

Assault on a government employee was a class A1 misdemeanor; a trial court possessed the discretion to enter a delinquency Level 3 based on a juvenile adjudication of assault on a government employee, and the juvenile's "high" prior delinquency history. In re D.A.S., — N.C. App. —, 643 S.E.2d 660, 2007 N.C. App. LEXIS 828 (2007).

Confinement Not Authorized. — When a trial court found that a juvenile appellant violated his probation, it was governed by G.S. 7B-2510, and was authorized to order a new disposition at Level 2, the next higher level from the original disposition at Level 1; commitment was not an allowable Level 2 disposition, so the trial court was not authorized to impose commitment, stayed or unstayed. In re T.B., 178 N.C. App. 542, 631 S.E.2d 857, 2006 N.C. App. LEXIS 1562 (2006).

Cited in In re M.E.B., 153 N.C. App. 278, 569 S.E.2d 683, 2002 N.C. App. LEXIS 1135 (2002); In re K.T.L., 177 N.C. App. 365, 629 S.E.2d 152, 2006 N.C. App. LEXIS 965 (2006).

§ 7B-2509. Registration of certain delinquent juveniles.

In any case in which a juvenile, who was at least 11 years of age at the time of the offense, is adjudicated delinquent for committing a violation of G.S. 14-27.2 (first-degree rape), G.S. 14-27.3 (second degree rape), G.S. 14-27.4 (first-degree sexual offense), G.S. 14-27.5 (second degree sexual offense), or G.S. 14-27.6 (attempted rape or sexual offense), the judge, upon a finding that the juvenile is a danger to the community, may order that the juvenile register in accordance with Part 4 of Article 27A of Chapter 14 of the General Statutes. (1997-516, s. 1A; 1998-202, s. 11.)

Editor's Note. — This section was originally enacted by Session Laws 1997-516, s. 1A, as G.S. 7A-647(4) and by Session Laws 1998-202, s. 11, as G.S. 7B-2508.1 and was recodified as this section at the direction of the Revisor of Statutes.

§ 7B-2510. Conditions of probation; violation of probation.

(a) In any case where a juvenile is placed on probation pursuant to G.S. 7B-2506(8), the juvenile court counselor shall have the authority to visit the juvenile where the juvenile resides. The court may impose conditions of probation that are related to the needs of the juvenile and that are reasonably necessary to ensure that the juvenile will lead a law-abiding life, including:

(1) That the juvenile shall remain on good behavior.
(2) That the juvenile shall not violate any laws.
(3) That the juvenile shall not violate any reasonable and lawful rules of a parent, guardian, or custodian.
(4) That the juvenile attend school regularly.
(5) That the juvenile maintain passing grades in up to four courses during each grading period and meet with the juvenile court counselor and a representative of the school to make a plan for how to maintain those passing grades.
(6) That the juvenile not associate with specified persons or be in specified places.
(7) That the juvenile:
  a. Refrain from use or possession of any controlled substance included in any schedule of Article 5 of Chapter 90 of the General Statutes, the Controlled Substances Act;
  b. Refrain from use or possession of any alcoholic beverage regulated under Chapter 18B of the General Statutes; and
  c. Submit to random drug testing.
(8) That the juvenile abide by a prescribed curfew.
(9) That the juvenile submit to a warrantless search at reasonable times.
(10) That the juvenile possess no firearm, explosive device, or other deadly weapon.
(11) That the juvenile report to a juvenile court counselor as often as required by the juvenile court counselor.
(12) That the juvenile make specified financial restitution or pay a fine in accordance with G.S. 7B-2506(4), (5), and (22).
(13) That the juvenile be employed regularly if not attending school.
(14) That the juvenile satisfy any other conditions determined appropriate by the court.

(b) In addition to the regular conditions of probation specified in subsection (a) of this section, the court may, at a dispositional hearing or any subsequent hearing, order the juvenile to comply, if directed to comply by the chief court counselor, with one or more of the following conditions:

(1) Perform up to 20 hours of community service;
(2) Submit to substance abuse monitoring and treatment;
(3) Participate in a life skills or an educational skills program administered by the Department;
(4) Cooperate with electronic monitoring; and
(5) Cooperate with intensive supervision.

However, the court shall not give the chief court counselor discretion to impose the conditions of either subsection (4) or (5) of this section unless the juvenile is subject to Level 2 dispositions pursuant to G.S. 7B-2508 or subsection (d) of this section.

(c) An order of probation shall remain in force for a period not to exceed one year from the date entered. Prior to expiration of an order of probation, the court may extend it for an additional period of one year after a hearing, if the court finds that the extension is necessary to protect the community or to safeguard the welfare of the juvenile.

(d) On motion of the juvenile court counselor or the juvenile, or on the court's own motion, the court may review the progress of any juvenile on probation at any time during the period of probation or at the end of probation. The conditions or duration of probation may be modified only as provided in this Subchapter and only after notice and a hearing.

(e) If the court, after notice and a hearing, finds by the greater weight of the evidence that the juvenile has violated the conditions of probation set by the court, the court may continue the original conditions of probation, modify the conditions of probation, or, except as provided in subsection (f) of this section, order a new disposition at the next higher level on the disposition chart in G.S. 7B-2508. In the court's discretion, part of the new disposition may include an order of confinement in a secure juvenile detention facility for up to twice the term authorized by G.S. 7B-2508.

(f) A court shall not order a Level 3 disposition for violation of the conditions of probation by a juvenile adjudicated delinquent for an offense classified as minor under G.S. 7B-2508. (1979, c. 815, s. 1; 1981, c. 469, s. 20; 1991, c. 353, s. 1; 1991 (Reg. Sess., 1992), c. 1030, s. 4; 1993, c. 369, s. 1; c. 462, s. 1; 1998-202, s. 6; 2000-137, s. 3; 2001-490, ss. 2.23, 2.24.)

Editor's Note. — This section was originally enacted by Session Laws 1998-202, s. 6, as G.S. 7B-2509 and was recodified as this section at the direction of the Revisor of Statutes.

CASE NOTES

Violation of Conditions of Probation. — Where respondent juvenile was initially placed on probation as an "undisciplined" child for unlawful absence from school, and his probation was continued when he was adjudicated a delinquent for damage to property by shooting out the windows and screens of a home with an air rifle and again when he was adjudicated a delinquent for stealing $60.00 from a purse, his probationary status resulted from delinquent behavior rather than merely from the undisciplined behavior upon which it was initially grounded, and the juvenile court had authority to commit respondent to the custody of the Division of Youth Services for placement in one of its residential facilities upon finding respondent in violation of the conditions of his probation subsequent to the adjudications that he was delinquent. In re Hughes, 50 N.C. App. 258, 273 S.E.2d 324 (1981), (decided prior to the enactment of this Chapter).

When a juvenile admitted a violation of his probation due to being physically aggressive with another juvenile, the double jeopardy clause did not preclude his subsequent delinquency adjudication based on that behavior, as double jeopardy did not apply to his probation revocation hearing; any punishment to which he was exposed by virtue of that hearing was punishment for the offense for which he was originally placed on probation, rather than punishment for the offense on which his probation violation was based, so he was not being punished twice for the same offense. In re O'Neal, 160 N.C. App. 409, 585 S.E.2d 478, 2003 N.C. App. LEXIS 1789 (2003), cert. denied, 357 N.C. 657, 590 S.E.2d 270 (2003).

When a trial court found that a juvenile appellant violated his probation, it was governed by G.S. 7B-2510, and was authorized to order a new disposition at Level 2, the next higher level from the original disposition at Level 1; commitment was not an allowable Level 2 disposition, so the trial court was not authorized to impose commitment, stayed or unstayed. In re T.B., 178 N.C. App. 542, 631 S.E.2d 857, 2006 N.C. App. LEXIS 1562 (2006).

Where a juvenile's court supervision was revoked for probation violations, it was not error to fail to make the specific inquiries enumerated in G.S. 7B-2407, because G.S. 7B-2407 did not apply to the juvenile's admission, or admissions by the juvenile through the juvenile's attorney, that the juvenile violated conditions of court supervision. In re D.J.M., — N.C. App. —, 638 S.E.2d 610, 2007 N.C. App. LEXIS 68 (2007).

Probationary Conditions Proper. — Probationary conditions in juvenile defendant's manslaughter adjudication that required defendant to visit and put flowers on the victim's grave site, wear a necklace with the victim's picture, and not participate in certain school functions and activities, did not require publicizing defendant's records or present defendant with the choice of staying at home or enduring public ridicule and were not improper; the trial court was cognizant of a psychologist's findings concerning defendant's below average cognitive functioning, but did not afford this evidence as much weight as the other evidence of defendant's actions prior to, during, and after his delinquent act, and the trial court properly considered the evidence before it. In re J.B., 172 N.C. App. 747, 616 S.E.2d 385, 2005 N.C. App. LEXIS 1800 (2005), aff'd, 360 N.C. 165, 622 S.E.2d 495 (2005).

Extension of Probation After Expiration of Probationary Period. — Juvenile court's decision to extend juvenile's probation after the expiration of his original term of probation, made upon a finding that the juvenile had violated probation, was within the limited discretion of the trial court to modify probation within a reasonable time after its expiration, as conferred by G.S. 7B-2510. In re T.J., 146 N.C. App. 605, 553 S.E.2d 418, 2001 N.C. App. LEXIS 980 (2001).

Delegation of Authority. — Rule that a trial court may not delegate or vest its discretion in another person or entity applies to a trial court's order of probation pursuant to G.S. 7B-2506(8) and the underlying conditions of that term of probation, which are governed by G.S. 7B-2510; special conditions of probation that respondent juvenile cooperate with any out-of-home placement if deemed necessary by the court counselor and that he cooperate with any counseling or assessment recommended by the court counselor were impermissible delegations of the trial court's authority. In re S.R.S., — N.C. App. —, 636 S.E.2d 277, 2006 N.C. App. LEXIS 2233 (2006).

Applied in In re Jones, 2001 N.C. App. LEXIS 652 (N.C. App. Aug. 7, 2001).

Cited in In re M.E.B., 153 N.C. App. 278, 569 S.E.2d 683, 2002 N.C. App. LEXIS 1135 (2002); State v. Hinton, 361 N.C. 207, 639 S.E.2d 437, 2007 N.C. LEXIS 33 (2007).

§ 7B-2511. Termination of probation.

At the end of or at any time during probation, the court may terminate probation by written order upon finding that there is no further need for supervision. The finding and order terminating probation may be entered in chambers in the absence of the juvenile and may be based on a report from the juvenile court counselor or, at the election of the court, the order may be entered with the juvenile present after notice and a hearing. (1979, c. 815, s. 1; 1998-202, s. 6; 2001-490, s. 2.25.)

Editor's Note. — This section was originally enacted by Session Laws 1998-202, s. 6, as G.S. 7B-2510 and was recodified as this section at the direction of the Revisor of Statutes.

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Violation of Conditions of Probation. — Where respondent juvenile was initially placed on probation as an "undisciplined" child for unlawful absence from school, and his probation was continued when he was adjudicated a delinquent for damage to property by shooting out the windows and screens of a home with an air rifle and again when he was adjudicated a delinquent for stealing $60.00 from a purse, his probationary status resulted from delinquent behavior rather than merely from the undisciplined behavior upon which it was initially grounded, and the juvenile court had authority to commit respondent to the custody of the Division of Youth Services for placement in one of its residential facilities upon finding respondent in violation of the conditions of his probation subsequent to the adjudications that he was delinquent. In re Hughes, 50 N.C. App. 258, 273 S.E.2d 324 (1981).

§ 7B-2512. Dispositional order.

The dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law. The court shall state with particularity, both orally and in the written order of disposition, the precise terms of the disposition including the kind, duration, and the person who is responsible for carrying out the disposition and the person or agency in whom custody is vested. (1979, c. 815, s. 1; 1987 (Reg. Sess., 1988), c. 1090, s. 10; 1991, c. 434, s. 1; 1997-390, s. 8; 1998-202, s. 6; 1998-229, s. 7.)

Editor's Note. — This section was originally enacted by Session Laws 1998-202, s. 6, as G.S. 7B-2511 and was recodified as this section at the direction of the Revisor of Statutes.

CASE NOTES

Editor's Note. — *Some of the following cases were decided prior to the enactment of this Chapter.*

Procedural validity of a dispositional order would be evaluated in light of the North Carolina Rules of Civil Procedure, G.S. 1A-1, and this section. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Former § 7A-651 does not require the trial judge to announce his findings and conclusions in open court, mandating only that the terms of the disposition be stated in open court with "particularity." In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Judge May Make Oral Entry of Order. — Under G.S. 1A-1, Rule 58, a judge may make an oral entry of a juvenile order, provided the order is subsequently reduced to written form as required by this section. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

In a juvenile delinquency proceeding, a trial court's oral findings as to whether the State had proved the allegations against a juvenile sufficed; however, the written order had to be corrected so that the record reflected the finding. In re Rikard, 161 N.C. App. 150, 587 S.E.2d 467, 2003 N.C. App. LEXIS 1997 (2003).

Commitment Order Not Authorized. — When a trial court found that a juvenile appellant violated his probation, it was governed by G.S. 7B-2510, and was authorized to order a new disposition at Level 2, the next higher level from the original disposition at Level 1; commitment was not an allowable Level 2 disposition, so the trial court was not authorized to impose commitment, stayed or unstayed. In re T.B., 178 N.C. App. 542, 631 S.E.2d 857, 2006 N.C. App. LEXIS 1562 (2006).

Written dispositional order entered by juvenile court, which conformed generally with oral announcement of the order in open court, was valid. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

The written order terminating respondent's parental rights which contained language not included in the trial court's recital in open court did not violate former § 7A-651 where the findings about which respondent complained related to the "adjudication" by the trial court, pursuant to the provisions of former G.S. 7A-289.32, that grounds for termination of respondent's parental rights existed at the time of the hearing, not to the court's "disposition" pursuant to former G.S. 7A-289.31 and where the order entered by the trial court was in "general conformity" to the disposition announced in open court. In re Brim, 139 N.C. App. 733, 535 S.E.2d 367, 2000 N.C. App. LEXIS 1028 (2000).

Evidence Did Not Support Transfer of Custody. — Findings of fact in a dispositional order in a delinquency case did not support a trial court's decision to transfer custody of defendant from his mother to his father, and that part of the dispositional order was reversed where the evidence in the record failed to support a finding that placement with the father was in defendant's best interests; the record indicated that defendant had no contact with his father for approximately seven to eight months immediately prior to the assault for which defendant was on trial, the court counselor did not recommend placement with the father and instead advised the court to utilize family services if defendant needed more structure during the day, and it appeared that the trial court based the decision to award custody to the father solely on defendant's school absences. In re Ferrell, 162 N.C. App. 175, 589 S.E.2d 894, 2004 N.C. App. LEXIS 8 (2004).

Evidence in Support of Commitment Insufficient. — Where the court counselor merely stated that a juvenile "probably" would not be accepted into alternative placements, the evidence did not support a finding that other alternatives were explored as required by former section before the juvenile was committed to the Division of Youth Services. In re Robinson, 132 N.C. App. 122, 510 S.E.2d 190 (1999).

Implication of Separation as Pre-Condition to Reunification Deemed Prejudicial. — Although the court was authorized under former G.S. 7A-651(c)(2) to find that efforts to reunite a family would be futile or inconsistent with the juvenile's safety, the court's statements implying that separation of the parents was a pre-condition to the mother having a realistic chance to regain custody were prejudicial error, and the part of the court's order retaining jurisdiction was, therefore, vacated. In re McLean, 135 N.C. App. 387, 521 S.E.2d 121, 1999 N.C. App. LEXIS 1150 (1999).

Restitution Order Vacated. — Where although the record contained substantial evidence that victim suffered great damage to his mobile home, juveniles were charged only with breaking windows and damaging the doors of his property, and admitted only to throwing rocks through some of the windows in the mobile home and nothing further, and there was no evidence in the record as to the amount of damage caused by the rocks thrown by the juveniles, dispositional order ordering restitution in the amount of $3,000.00 would be vacated and the matter remanded for a new dispositional hearing, at which the court would determine the amount of damages caused to the mobile home by the rocks thrown through the windows by the juveniles. In re Hull, 89 N.C. App. 171, 365 S.E.2d 221 (1988).

§ 7B-2513. Commitment of delinquent juvenile to Department.

(a) Pursuant to G.S. 7B-2506 and G.S. 7B-2508, the court may commit a delinquent juvenile who is at least 10 years of age to the Department for placement in a youth development center. Commitment shall be for an indefinite term of at least six months. In no event shall the term exceed:

(1) The twenty-first birthday of the juvenile if the juvenile has been committed to the Department for an offense that would be first-degree murder pursuant to G.S. 14-17, first-degree rape pursuant to G.S. 14-27.2, or first-degree sexual offense pursuant to G.S. 14-27.4 if committed by an adult;

(2) The nineteenth birthday of the juvenile if the juvenile has been committed to the Department for an offense that would be a Class B1, B2, C, D, or E felony if committed by an adult, other than an offense set forth in subdivision (1) of this subsection; or

(3) The eighteenth birthday of the juvenile if the juvenile has been committed to the Department for an offense other than an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult.

No juvenile shall be committed to a youth development center beyond the minimum six-month commitment for a period of time in excess of the maximum term of imprisonment for which an adult in prior record level VI for felonies or in prior conviction level III for misdemeanors could be sentenced for the same offense, except when the Department pursuant to G.S. 7B-2515 determines that the juvenile's commitment needs to be continued for an additional period of time to continue care or treatment under the plan of care or treatment developed under subsection (f) of this section. At the time of commitment to a youth development center, the court shall determine the maximum period of time the juvenile may remain committed before a determination must be made by the Department pursuant to G.S. 7B-2515 and shall notify the juvenile of that determination.

(b) The court may commit a juvenile to a definite term of not less than six months and not more than two years if the court finds that the juvenile is 14 years of age or older, has been previously adjudicated delinquent for two or more felony offenses, and has been previously committed to a youth development center.

(c) The chief court counselor shall have the responsibility for transporting the juvenile to the youth development center designated by the Department. The juvenile shall be accompanied to the youth development center by a person of the same sex.

(d) The chief court counselor shall ensure that the records requested by the Department accompany the juvenile upon transportation for admittance to a youth development center or, if not obtainable at the time of admission, are sent to the youth development center within 15 days of the admission. If records requested by the Department for admission do not exist, to the best knowledge of the chief court counselor, the chief court counselor shall so stipulate in writing to the youth development center. If such records do exist, but the chief court counselor is unable to obtain copies of them, a district court may order that the records from public agencies be made available to the youth development center. Records that are confidential by law shall remain confidential and the Department shall be bound by the specific laws governing the confidentiality of these records. All records shall be used in a manner consistent with the best interests of the juvenile.

(e) A commitment order accompanied by information requested by the Department shall be forwarded to the Department. The Department shall place the juvenile in the youth development center that would best provide for the juvenile's needs and shall notify the committing court. The Department may assign a juvenile committed for delinquency to any institution of the Department or licensed by the Department, which program is appropriate to the needs of the juvenile.

The Department, after assessment of the juvenile, may provide commitment services to the juvenile in a program not located in a youth development center or detention facility. If the Department recommends that commitment services for the juvenile are to be provided in a setting that is not located in a youth development center or detention facility, the Department shall file a motion, along with information about the recommended services for the juvenile, with the committing court prior to placing the juvenile in the identified commitment program. The Department shall send notice of the motion to the District Attorney, the juvenile, and the juvenile's attorney. Upon receipt of the motion filed by the Department, the court may enter an order without the appearance of witnesses and without hearing if the court determines that the identified commitment program is appropriate and a hearing is not necessary. The court must hold a hearing if the juvenile or the juvenile's attorney requests a hearing. If the court notifies the Department of its intent to hold a hearing, the date for that hearing shall be set by the court and the Department shall place the juvenile in a youth development center or detention facility until the determination of the court at that hearing.

(f) When the court commits a juvenile to the Department for placement in a youth development center, the Department shall prepare a plan for care or treatment within 30 days after assuming custody of the juvenile.

(g) Commitment of a juvenile to the Department for placement in a youth development center does not terminate the court's continuing jurisdiction over the juvenile and the juvenile's parent, guardian, or custodian. Commitment of a juvenile to the Department for placement in a youth development center transfers only physical custody of the juvenile. Legal custody remains with the parent, guardian, custodian, agency, or institution in whom it was vested.

(h) Pending placement of a juvenile with the Department, the court may house a juvenile who has been adjudicated delinquent for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult in a holdover facility up to 72 hours if the court, based on the information provided by the juvenile court counselor, determines that no acceptable alternative placement is available and the protection of the public requires that the juvenile be housed in a holdover facility.

(i) A juvenile who is committed to the Department for placement in a youth development center shall be tested for the use of controlled substances or alcohol. The results of this initial test shall be incorporated into the plan of care as provided in subsection (f) of this section and used for evaluation and treatment purposes only.

(j) When a juvenile is committed to the Department for placement in a youth development center for an offense that would have been a Class A or B1 felony if committed by an adult, the chief court counselor shall notify the victim and members of the victim's immediate family that the victim, or the victim's immediate family members may request in writing to be notified in advance of the juvenile's scheduled release date in accordance with G.S. 7B-2514(d). (1979, c. 815, s. 1; 1983, c. 133, s. 2; 1987, c. 100; c. 372; 1991, c. 434, ss. 2, 3; 1995 (Reg. Sess., 1996), c. 609, s. 2; 1997-443, s. 11A.118(a); 1998-202, s. 6; 1999-423, s. 1; 2000-137, s. 3; 2001-95, s. 5; 2001-490, s. 2.26; 2003-53, s. 1.)

Editor's Note. — This section was originally enacted by Session Laws 1998-202, s. 6, as G.S. 7B-2512 and was recodified as this section at the direction of the Revisor of Statutes.

The references in subsections (a) and (j) to G.S. 7B-2515 and 7B-2514, respectively, were substituted for G.S. 7B-2514 and 7B-2513 following their recodification at the direction of the Revisor of Statutes.

CASE NOTES

Editor's Note. — *Most of the following cases were decided prior to the enactment of this Chapter.*

Purpose of Section and Amendment. — This section allows a trial court to commit a juvenile for the maximum period of time that any adult could be committed for the same offense, without considering prior record levels and aggravating/mitigating factors as required under structured sentencing for adults; this interpretation is supported by the purpose of disposition in juvenile actions and the amendment effective December 1, 1996. In re Carter, 125 N.C. App. 140, 479 S.E.2d 284 (1996).

Equal Protection Rights Not Violated. — There is a rational basis for the legislature's disparate treatment of adults and children, and, therefore, this section was not unconstitutionally applied to a juvenile in derogation of her equal protection rights, notwithstanding that she was committed to the custody of the state for longer than the period for which an adult could have been imprisoned for her conduct, i.e., unauthorized use of a motor vehicle. In re Allison, 143 N.C. App. 586, 547 S.E.2d 169, 2001 N.C. App. LEXIS 329 (2001).

Detailed Findings Required. — The trial judge must recite detailed findings in support of either test enunciated under this section, and those enumerated findings must be supported by some evidence in the record of the dispositional hearing. In re Khork, 71 N.C. App. 151, 321 S.E.2d 487 (1984).

Findings Must Be Supported by Evidence in Hearing Record. — The essential element in the commitment order is not that it recites detailed findings beyond the two tests enumerated in this section, but that those enumerated findings are supported by some evidence in the record of the dispositional hearing. In re Lail, 55 N.C. App. 238, 284 S.E.2d 731 (1981).

Effect of Lack of Evidence to Support Findings. — Where judge held no dispositional hearing, and denied juvenile the opportunity to present evidence as to disposition, and there was no evidence to support the findings made by the judge with respect to disposition, the commitment order would be reversed so that the court could conduct a dispositional hearing. In re Lail, 55 N.C. App. 238, 284 S.E.2d 731 (1981).

Consecutive commitments are not contrary to the philosophy of the Juvenile Code. Such reasoning would mean that once a juvenile had been committed to a detention facility or training school (now youth development center) he would be free to commit whatever other illegal acts he so chose, knowing that he could not receive any additional punishment for his action. This was not the intention of the legislature when it adopted the Juvenile Code. In re Thompson, 74 N.C. App. 329, 327 S.E.2d 908, cert. denied, 314 N.C. 666, 335 S.E.2d 499 (1985).

The Juvenile Code does not contain any provision which prohibits the commitment of a juvenile to consecutive terms of detention. Absent an express prohibition, the common-law rule that the courts have the authority to commit offenders to consecutive terms of confinement is controlling. In re Thompson, 74 N.C. App. 329, 327 S.E.2d 908, cert. denied, 314 N.C. 666, 335 S.E.2d 499 (1985).

Recommittal After Revocation of Conditional Release. — When a juvenile judge revokes a conditional release, the previous order provides authority for recommittal to the Division of Youth Services; no new order with the findings required by this section is necessary. In re Baxley, 74 N.C. App. 527, 328 S.E.2d 831, cert. denied, 314 N.C. 330, 333 S.E.2d 483 (1985).

Inadequate Exploration of Alternatives to Commitment. — Judge had affirmative obligation to inquire into and to seriously consider merits of alternative dispositions; therefore, his failure to do so was error, even though court counselor failed to inform judge of any programs that might be appropriate for child. Judge did not consider any of the broad range of community-level alternatives (except probation) listed in former G.S. 7A-647, 7A-648, or 7A-649 of the Juvenile Code, and although child's attorney offered several examples of appropriate alternative programs, judge apparently failed to entertain these, simply accepting as dispositive court counselor's statement that drug rehabilitation program was available. In re Groves, 93 N.C. App. 34, 376 S.E.2d 481 (1989).

Where the court counselor merely stated that a juvenile "probably" would not be accepted into alternative placements, the evidence did not support a finding that other alternatives were explored as required by former section before the juvenile was committed to the Division of Youth Services. In re Robinson, 132 N.C. App.

122, 510 S.E.2d 190 (1999).

Parent's Inability to Pay for Treatment Did Not Amount to "Attempt." — Inability of child's mother to pay for drug treatment did not amount to an attempt at drug rehabilitation; determination of what disposition is appropriate for a given juvenile cannot be predicated on the parent's ability, or inability, to pay. In re Groves, 93 N.C. App. 34, 376 S.E.2d 481 (1989).

Commitment Within Discretion of Court. — It is within the discretion of the trial court to commit a juvenile to the Division of Youth Services, and there is no requirement that a recommendation for training school (now youth development center) be made before a commitment is ordered. In re Molina, 132 N.C. App. 373, 511 S.E.2d 679 (1999).

Commitment to training school (now youth development center) was inappropriate where trial judge found that child was threat to himself, not to others, and where two shoplifting incidents comprised the only threat child posed to property of citizens of community. In re Groves, 93 N.C. App. 34, 376 S.E.2d 481 (1989).

Fact that juvenile ran away from placements outside her home was not itself evidence of a "threat to persons or property in the community." In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Unauthorized use of a motor vehicle, standing alone, was insufficient to support a finding that juvenile was a threat to persons or property. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Reasonable and Available Nonstatutory Alternatives. — Prior to committing a juvenile to the Division of Youth Services, the court must also consider any reasonable and available nonstatutory community-level alternatives. In re Mosser, 99 N.C. App. 523, 393 S.E.2d 308 (1990).

Seriousness of Offense Cannot Be Sole Basis for Commitment. — A juvenile may not be committed to training school (now youth development center) based upon the perceived seriousness of the offense alone. In re Randall, 99 N.C. App. 356, 393 S.E.2d 121 (1990), citing In re Khork, 71 N.C. App. 151, 321 S.E.2d 487 (1984).

Commitment Warranted. — Where juvenile was initially placed on probation as an "undisciplined" child for unlawful absence from school, and his probation was continued when he was adjudicated a delinquent for damage to property by shooting out the windows and screens of a home with an air rifle and again when he was adjudicated a delinquent for stealing $60.00 from a purse, his probationary status resulted from delinquent behavior rather than merely from the undisciplined behavior upon which it was initially grounded, and the juvenile court had authority to commit him to the custody of the Division of Youth Services for placement in one of its residential facilities upon finding him in violation of the conditions of his probation subsequent to the adjudications that he was delinquent. In re Hughes, 50 N.C. App. 258, 273 S.E.2d 324 (1981).

Court exhausted all alternatives and properly committed a juvenile to training school (now youth development center) after the juvenile violated conditions of probation for second degree rape and taking indecent liberties with a child. In re Molina, 132 N.C. App. 373, 511 S.E.2d 679 (1999).

Findings Held Unsupported. — Findings of fact that alternatives to commitment as contained in former G.S. 7A-649 had been attempted unsuccessfully or were inappropriate and that juvenile's behavior constituted a threat to persons or property in the community, made under subsection (a) of this section, held unsupported by the evidence. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Power to Order Sex Offender Treatment. — The district court had power to order the Department of Human Resources, Division of Youth Services to give sex offender treatment to an adolescent found delinquent because of sex offenses and subsequently to deny the conditional release of that adolescent because treatment had not been in compliance with that mandate. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

Ordering Division of Youth Services to provide specific treatment for sexual offenders for a delinquent juvenile in its custody, when such treatment was available, was within the scope of the court's statutory authority. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

Court Authorized to Oversee Plans for Release. — District court was authorized continually to oversee Division of Youth Services' plans for delinquent juvenile's release. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

§ 7B-2514. Post-release supervision planning; release.

(a) The Department shall be responsible for evaluation of the progress of each juvenile at least once every six months as long as the juvenile remains in the care of the Department. Any determination that the juvenile should remain in the care of the Department for an additional period of time shall be based on the Department's determination that the juvenile requires additional treatment or rehabilitation pursuant to G.S. 7B-2515. If the Department determines that a juvenile is ready for release, the Department shall initiate a post-release supervision planning process. The post-release supervision planning process shall be defined by rules and regulations of the Department, but shall include the following:

(1) Written notification shall be given to the court that ordered commitment.

(2) A post-release supervision planning conference shall be held involving as many as possible of the following: the juvenile, the juvenile's parent, guardian, or custodian, juvenile court counselors who have supervised the juvenile on probation or will supervise the juvenile on post-release supervision, and staff of the facility that found the juvenile ready for release. The planning conference shall include personal contact and evaluation rather than telephonic notification.

(3) The planning conference participants shall consider, based on the individual needs of the juvenile and pursuant to rules adopted by the Department, placement of the juvenile in any program under the auspices of the Department, including the juvenile court services programs that, in the judgment of the Department, would be appropriate transitional placement, pending release under G.S. 7B-2513.

(b) The Department shall develop the plan in writing and base the terms on the needs of the juvenile and the protection of the public. Every plan shall require the juvenile to complete at least 90 days, but not more than one year, of post-release supervision.

(c) The Department shall release a juvenile under a plan of post-release supervision at least 90 days prior to:

(1) Completion of the juvenile's definite term of commitment; or

(2) The juvenile's twenty-first birthday if the juvenile has been committed to the Department for an offense that would be first-degree murder pursuant to G.S. 14-17, first-degree rape pursuant to G.S. 14-27.2, or first-degree sexual offense pursuant to G.S. 14-27.4 if committed by an adult.

(3) The juvenile's nineteenth birthday if the juvenile has been committed to the Department for an offense that would be a Class B1, B2, C, D, or E felony if committed by an adult, other than an offense set forth in G.S. 7B-1602(a).

(4) The juvenile's eighteenth birthday if the juvenile has been committed to the Department for an offense other than an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult.

(d) Notwithstanding Articles 30 and 31 of Subchapter III of this Chapter, at least 45 days before releasing to post-release supervision a juvenile who was committed for a Class A or B1 felony, the Department shall notify, by first-class mail at the last known address:

(1) The juvenile;

(2) The juvenile's parent, guardian, or custodian;

(3) The district attorney of the district where the juvenile was adjudicated;

(4) The head of the enforcement agency that took the juvenile into custody; and

(5) The victim and any of the victim's immediate family members who have requested in writing to be notified.

The notification shall include only the juvenile's name, offense, date of commitment, and date proposed for release. A copy of the notice shall be sent to the appropriate clerk of superior court for placement in the juvenile's court file.

(e) The Department may release a juvenile under an indefinite commitment to post-release supervision only after the juvenile has been committed to the

Department for placement in a youth development center for a period of at least six months.

(f) A juvenile committed to the Department for placement in a youth development center for a definite term shall receive credit toward that term for the time the juvenile spends on post-release supervision.

(g) A juvenile on post-release supervision shall be supervised by a juvenile court counselor. Post-release supervision shall be terminated by order of the court. (1979, c. 815, s. 1; 1983, c. 133, s. 1; c. 276, s. 1; 1989, c. 235; 1996, 2nd Ex. Sess., c. 18, s. 23.2(e); 1998-202, s. 6; 2000-137, s. 3; 2001-95, s. 5; 2001-490, ss. 2.27, 2.28.)

Editor's Note. — This section was originally enacted by Session Laws 1998-202, s. 6, as G.S. 7B-2513 and was recodified as this section at the direction of the Revisor of Statutes.

The reference in subsection (a) to G.S. 7B-2513 and 7B-2515 were substituted for G.S. 7B-2512 and 7B-2514 following their recodification at the direction of the Revisor of Statutes.

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

Nature of Conditional Release. — A conditional release from the Division of Youth Services is not the same as probation or final discharge. A juvenile on conditional release is still technically subject to the original order committing him to the Division of Youth Services, which is the basis of whatever restrictions on his activity might be deemed appropriate as aftercare supervision. In re Baxley, 74 N.C. App. 527, 328 S.E.2d 831, cert. denied, 314 N.C. 330, 333 S.E.2d 483 (1985).

Recommittal After Revocation of Conditional Release. — When a juvenile judge revokes a conditional release, the previous order provides authority for recommittal to the Division of Youth Services; no new order with the findings required by former G.S. 7A-652 is necessary. In re Baxley, 74 N.C. App. 527, 328 S.E.2d 831, cert. denied, 314 N.C. 330, 333 S.E.2d 483 (1985).

Denial of Conditional Release on Failure to Give Sex Offender Treatment. — The district court had power to order the Department of Human Resources, Division of Youth Services to give sex offender treatment to an adolescent found delinquent because of sex offenses and subsequently to deny the conditional release of that adolescent because treatment had not been in compliance with that mandate. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

§ 7B-2515. Notification of extended commitment; plan of treatment.

(a) In determining whether a juvenile should be released before the juvenile's 18th birthday, the Department shall consider the protection of the public and the likelihood that continued placement will lead to further rehabilitation. If the Department does not intend to release the juvenile prior to the juvenile's eighteenth birthday, or if the Department determines that the juvenile's commitment should be continued beyond the maximum commitment period as set forth in G.S. 7B-2513(a), the Department shall notify the juvenile and the juvenile's parent, guardian, or custodian in writing at least 30 days in advance of the juvenile's eighteenth birthday or the end of the maximum commitment period, of the additional specific commitment period proposed by the Department, the basis for extending the commitment period, and the plan for future care or treatment.

(b) The Department shall modify the plan of care or treatment developed pursuant to G.S. 7B-2513(f) to specify (i) the specific goals and outcomes that require additional time for care or treatment of the juvenile; (ii) the specific course of treatment or care that will be implemented to achieve the established goals and outcomes; and (iii) the efforts that will be taken to assist the juvenile's family in creating an environment that will increase the likelihood that the efforts to treat and rehabilitate the juvenile will be successful upon release. If appropriate, the Department may place the juvenile in a setting other than a youth development center.

(c) The juvenile and the juvenile's parent, guardian, or custodian may request a review by the court of the Department's decision to extend the juvenile's commitment beyond the juvenile's eighteenth birthday or maximum commitment period, in which case the court shall conduct a review hearing. The court may modify the Department's decision and the juvenile's maximum commitment period. If the juvenile or the juvenile's parent, guardian, or custodian does not request a review of the Department's decision, the Department's decision shall become the juvenile's new maximum commitment period. (1998-202, s. 6; 1998-217, s. 57(1); 2000-137, s. 3; 2001-95, s. 5.)

Editor's Note. — This section was originally enacted by Session Laws 1998-202, s. 6, as G.S. 7B-2514 and was recodified as this section at the direction of the Revisor of Statutes.

The references in subsections (a) and (b) to G.S. 7B-2513 were substituted for G.S. 7B-2512 following its recodification at the direction of the Revisor of Statutes.

CASE NOTES

Cited in In re Allison, 143 N.C. App. 586, 547 S.E.2d 169, 2001 N.C. App. LEXIS 329 (2001).

§ 7B-2516. Revocation of post-release supervision.

(a) On motion of the juvenile court counselor providing post-release supervision or motion of the juvenile, or on the court's own motion, and after notice, the court may hold a hearing to review the progress of any juvenile on post-release supervision at any time during the period of post-release supervision. With respect to any hearing involving allegations that the juvenile has violated the terms of post-release supervision, the juvenile:

(1) Shall have reasonable notice in writing of the nature and content of the allegations in the motion, including notice that the purpose of the hearing is to determine whether the juvenile has violated the terms of post-release supervision to the extent that post-release supervision should be revoked;
(2) Shall be represented by an attorney at the hearing;
(3) Shall have the right to confront and cross-examine witnesses; and
(4) May admit, deny, or explain the violation alleged and may present proof, including affidavits or other evidence, in support of the juvenile's contentions. A record of the proceeding shall be made and preserved in the juvenile's record.

(b) If the court determines by the greater weight of the evidence that the juvenile has violated the terms of post-release supervision, the court may revoke the post-release supervision or make any other disposition authorized by this Subchapter.

(c) If the court revokes post-release supervision, the juvenile shall be returned to the Department for placement in a youth development center for an indefinite term of at least 90 days, provided, however, that no juvenile shall remain committed to the Department for placement in a youth development center past:

(1) The juvenile's twenty-first birthday if the juvenile has been committed to the Department for an offense that would be first-degree murder pursuant to G.S. 14-17, first-degree rape pursuant to G.S. 14-27.2, or first-degree sexual offense pursuant to G.S. 14-27.4 if committed by an adult.

(2) The juvenile's nineteenth birthday if the juvenile has been committed to the Department for an offense that would be a Class B1, B2, C, D, or E felony if committed by an adult, other than an offense set forth in G.S. 7B-1602(a).

(3) The juvenile's eighteenth birthday if the juvenile has been committed to the Department for an offense other than an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult. (1979, c. 815, s. 1; 1998-202, s. 6; 2000-137, s.3; 2001-95, s. 5; 2001-490, s. 2.29.)

Editor's Note. — This section was originally enacted by Session Laws 1998-202, s. 6, as G.S. 7B-2515 and was recodified as this section at the direction of the Revisor of Statutes.

§ 7B-2517. Transfer authority of Governor.

The Governor may order transfer of any person less than 18 years of age from any jail or penal facility of the State to one of the residential facilities operated by the Department in appropriate circumstances, provided the Governor shall consult with the Department concerning the feasibility of the transfer in terms of available space, staff, and suitability of program.

When an inmate, committed to the Department of Correction, is transferred by the Governor to a residential program operated by the Department, the Department may release the juvenile based on the needs of the juvenile and the best interests of the State. Transfer shall not divest the probation or parole officer of the officer's responsibility to supervise the inmate on release. (1979, c. 815, s. 1; 1997-443, s. 11A.118(a); 1998-202, s. 6; 2000-137, s. 3.)

Editor's Note. — This section was originally enacted by Session Laws 1998-202, s. 6, as G.S. 7B-2516 and was recodified as this section at the direction of the Revisor of Statutes.

Article 26.

Modification and Enforcement of Dispositional Orders; Appeals.

§ 7B-2600. Authority to modify or vacate.

(a) Upon motion in the cause or petition, and after notice, the court may conduct a review hearing to determine whether the order of the court is in the best interests of the juvenile, and the court may modify or vacate the order in light of changes in circumstances or the needs of the juvenile.

(b) In a case of delinquency, the court may reduce the nature or the duration of the disposition on the basis that it was imposed in an illegal manner or is unduly severe with reference to the seriousness of the offense, the culpability of the juvenile, or the dispositions given to juveniles convicted of similar offenses.

(c) In any case where the court finds the juvenile to be delinquent or undisciplined, the jurisdiction of the court to modify any order or disposition made in the case shall continue (i) during the minority of the juvenile, (ii) until the juvenile reaches the age of 19 years if the juvenile has been adjudicated delinquent and committed to the Department for an offense that would be a Class B1, B2, C, D, or E felony if committed by an adult, other than an offense set forth in G.S. 7B-1602(a), (iii) until the juvenile reaches the age of 21 years if the juvenile has been adjudicated delinquent and committed for an offense that would be first-degree murder pursuant to G.S. 14-17, first-degree rape pursuant to G.S. 14-27.2, or first-degree sexual offense pursuant to G.S. 14-27.4 if committed by an adult, or (iv) until terminated by order of the court. (1979, c. 815, s. 1; 1998-202, s. 6; 2000-137, s. 3.)

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

Finding of Changed Conditions Required. — It is fundamental that before an order may be entered modifying a custody decree, there must be a finding of fact of changed conditions. In re Williamson, 77 N.C. App. 53, 334 S.E.2d 428, cert. denied, 316 N.C. 194, 341 S.E.2d 584 (1986).

A decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. In re Williamson, 77 N.C. App. 53, 334 S.E.2d 428, cert. denied, 316 N.C. 194, 341 S.E.2d 584 (1986).

For case in which the court found no change in the needs of juvenile requiring that her custody be returned to her parents, see In re Botsford, 75 N.C. App. 72, 330 S.E.2d 23 (1985).

Evidence of prior neglect which led to an adjudication of neglect shows circumstances as they were and therefore is relevant to whether a change of circumstances has occurred since the court's order. In re Brenner, 83 N.C. App. 242, 350 S.E.2d 140 (1986).

Modification Upheld. — Where court had previously deemed it in the best interest of minor children who had been adjudicated neglected that mother comply with certain orders of the court, the court acted with full statutory authority when it later conducted a hearing upon social worker's subsequent motion and determined that mother's refusal to cooperate with community-level services and orders applicable to her constituted a "change of circumstances" affecting the best interest of the children, sufficient to require modification of prior custody orders. In re Brenner, 83 N.C. App. 242, 350 S.E.2d 140 (1986).

§ 7B-2601. Request for modification for lack of suitable services.

If the Department finds that any juvenile committed to the Department's care is not suitable for its program, the Department may make a motion in the cause so that the court may make an alternative disposition that is consistent with G.S. 7B-2508. (1979, c. 815, s. 1; 1998-202, s. 6; 2000-137, s. 3.)

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

The onus is clearly on the Division of Youth Services to alert the court whenever it finds "that any juvenile committed to its care is not suitable for its program." In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

§ 7B-2602. Right to appeal.

Upon motion of a proper party as defined in G.S. 7B-2604, review of any final order of the court in a juvenile matter under this Article shall be before the Court of Appeals. Notice of appeal shall be given in open court at the time of the hearing or in writing within 10 days after entry of the order. However, if no disposition is made within 60 days after entry of the order, written notice of appeal may be given within 70 days after such entry. A final order shall include:

(1) Any order finding absence of jurisdiction;
(2) Any order which in effect determines the action and prevents a judgment from which appeal might be taken;
(3) Any order of disposition after an adjudication that a juvenile is delinquent or undisciplined; or

(4) Any order modifying custodial rights. (1979, c. 815, s. 1; 1998-202, s. 6.)

CASE NOTES

Editor's Note. *— Most of the following cases were decided prior to the enactment of this Chapter.*

This statute does not authorize an appeal following the adjudicatory portion of a juvenile case, only a final order. In re Pegram, 137 N.C. App. 382, 527 S.E.2d 737, 2000 N.C. App. LEXIS 322 (2000).

This section authorizes an immediate direct appeal to the Court of Appeals of a juvenile transfer order. State v. T.D.R., 347 N.C. App. 489, 495 S.E.2d 700 (1998).

Finding of Probable Cause Not Final Order. — A finding of probable cause in a juvenile proceeding was not an appealable "final order" under former G.S. 7A-666 [see now this section], and evidentiary rulings of the trial court in conducting the probable cause hearing were not properly before the Court of Appeals for review. In re Ford, 49 N.C. App. 680, 272 S.E.2d 157 (1980).

A finding of probable cause in a juvenile proceeding did not fall within any of the four categories of final orders specified in former G.S. 7A-666 [see now this section] and, therefore, was not immediately appealable. In re K.R.B., 134 N.C. App. 328, 517 S.E.2d 200, 1999 N.C. App. LEXIS 744 (1999), cert. denied, 351 N.C. 188, 541 S.E.2d 713 (1999).

An adjudication of delinquency is not a final order. No appeal may be taken from such order unless no disposition is made within 60 days of the adjudication of delinquency. In re Taylor, 57 N.C. App. 213, 290 S.E.2d 797 (1982).

No Trial Court Jurisdiction During Pendency of Appeal. — In a juvenile delinquency proceeding, an amended adjudication order and a disposition order had to be vacated because both were entered during the pendency of the juvenile's appeal after no disposition had been entered within 60 days of the adjudication of the juvenile as delinquent. In re Rikard, 161 N.C. App. 150, 587 S.E.2d 467, 2003 N.C. App. LEXIS 1997 (2003).

Oral Notice of Appeal from Final Order. — When the second sentence of this section permitting oral notice of appeal at the hearing, is read in conjunction with the first sentence providing for appellate review only upon any "final order," it appears that oral notice of appeal given at the time of the hearing must be from a final order. In re Hawkins, 120 N.C. App. 585, 463 S.E.2d 268 (1995).

Cited in In re Powers, 144 N.C. App. 140, 546 S.E.2d 186, 2001 N.C. App. LEXIS 319 (2001); In re D.A.F., — N.C. App. —, 635 S.E.2d 509, 2006 N.C. App. LEXIS 2154 (2006).

§ 7B-2603. Right to appeal transfer decision.

(a) Notwithstanding G.S. 7B-2602, any order transferring jurisdiction of the district court in a juvenile matter to the superior court may be appealed to the superior court for a hearing on the record. Notice of the appeal must be given in open court or in writing within 10 days after entry of the order of transfer in district court. Entry of an order shall be treated in the same manner as entry of a judgment under G.S. 1A-1, Rule 58 of the North Carolina Rules of Civil Procedure. The clerk of superior court shall provide the district attorney with a copy of any written notice of appeal filed by the attorney for the juvenile. Upon expiration of the 10 day period in which an appeal may be entered, if an appeal has been entered and not withdrawn, the clerk shall transfer the case to the superior court docket. The superior court shall, within a reasonable time, review the record of the transfer hearing for abuse of discretion by the juvenile court in the issue of transfer. The superior court shall not review the findings as to probable cause for the underlying offense.

(b) Once an order of transfer has been entered by the district court, the juvenile has the right to be considered for pretrial release as provided in G.S. 15A-533 and G.S. 15A-534. The release order shall specify the person or persons to whom the juvenile may be released. Pending release, the court shall order that the juvenile be detained in a detention facility while awaiting trial. The court may order the juvenile to be held in a holdover facility as defined by G.S. 7B-1501 at any time the presence of the juvenile is required in court for pretrial hearings or trial, if the court finds that it would be inconvenient to return the juvenile to the detention facility.

(c) If an appeal of the transfer order is taken, the superior court shall enter an order either (i) remanding the case to the juvenile court for adjudication or (ii) upholding the transfer order. If the superior court remands the case to juvenile court for adjudication and the juvenile has been granted pretrial release provided in G.S 15A-533 and G.S. 15A-534, the obligor shall be released from the juvenile's bond upon the district court's review of whether the juvenile shall be placed in secure or nonsecure custody as provided in G.S. 7B-1903.

(d) The superior court order shall be an interlocutory order, and the issue of transfer may be appealed to the Court of Appeals only after the juvenile has been convicted in superior court. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-309, s. 2; 1999-423, s. 2.)

CASE NOTES

Editor's Note. — *Some of the following cases were decided prior to the enactment of this Chapter.*

This section authorizes an immediate direct appeal to the Court of Appeals of a juvenile transfer order. State v. T.D.R., 347 N.C. App. 489, 495 S.E.2d 700 (1998).

Finding of Probable Cause Not Final Order. — A finding of probable cause in a juvenile proceeding was not an appealable "final order" under former G.S. 7A-666 (see now this section), and evidentiary rulings of the trial court in conducting the probable cause hearing were not properly before the Court of Appeals for review. In re Ford, 49 N.C. App. 680, 272 S.E.2d 157 (1980).

An adjudication of delinquency is not a final order. No appeal may be taken from such order unless no disposition is made within 60 days of the adjudication of delinquency. In re Taylor, 57 N.C. App. 213, 290 S.E.2d 797 (1982).

Oral Notice of Appeal from Final Order. — When the second sentence of this section permitting oral notice of appeal at the hearing, is read in conjunction with the first sentence providing for appellate review only upon any "final order," it appears that oral notice of appeal given at the time of the hearing must be from a final order. In re Hawkins, 120 N.C. App. 585, 463 S.E.2d 268 (1995).

Preservation for Review Not Established. — Defendant juvenile failed to preserve the right to appeal a transfer order because defendant did not appeal the district court's order to the superior court; the General Assembly removed from G.S. 7B-2603, any indication that a juvenile could skip an appeal in the superior court, but still challenge the transfer order after losing a trial in the superior court. State v. Wilson, 151 N.C. App. 219, 565 S.E.2d 223, 2002 N.C. App. LEXIS 714 (2002), cert. denied, 356 N.C. 313, 571 S.E.2d 215 (2002).

No Right to Appeal Transfer Decision Upon Guilty Plea. — Under G.S. 15A-1444, defendant had no right to appeal a transfer decision upon a plea of guilty because the appeal did not fall within any of the categories of appeal permitted under G.S. 15A-1444; moreover, defendant did not petition for a writ of certiorari and G.S. 7B-2603(d) did not establish an exception to G.S. 15A-1444(e). State v. Evans, — N.C. App. —, 646 S.E.2d 859, 2007 N.C. App. LEXIS 1600 (2007).

§ 7B-2604. Proper parties for appeal.

(a) An appeal may be taken by the juvenile, the juvenile's parent, guardian, or custodian, a county, or the State.

(b) The State's appeal is limited to the following orders in delinquency or undisciplined cases:

(1) An order finding a State statute to be unconstitutional; and
(2) Any order which terminates the prosecution of a petition by upholding the defense of double jeopardy, by holding that a cause of action is not stated under a statute, or by granting a motion to suppress.

(c) A county's appeal is limited to orders in which the county has been ordered to pay for medical, surgical, psychiatric, psychological, or other evaluation or treatment of a juvenile pursuant to G.S. 7B-2502, or other medical, psychiatric, psychological, or other evaluation or treatment of a parent pursuant to G.S. 7B-2702. (1979, c. 815, s. 1; 1998-202, s. 6; 2003-171, s. 1.)

CASE NOTES

County May Not Appeal. — It is manifest that this statute (former G.S. 7A-667) does not empower a county to take an appeal in a juvenile proceeding. In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981), decided prior to enactment of this chapter.

The county was not entitled to appeal an order to pay for the mental health evaluation of a juvenile although it had to be given notice and the opportunity to be heard at the juvenile hearing. In re Voight, 138 N.C. App. 542, 530 S.E.2d 76, 2000 N.C. App. LEXIS 624 (2000).

Cited in In re Powers, 144 N.C. App. 140, 546 S.E.2d 186, 2001 N.C. App. LEXIS 319 (2001).

§ 7B-2605. Disposition pending appeal.

Pending disposition of an appeal, the release of the juvenile, with or without conditions, should issue in every case unless the court orders otherwise. For compelling reasons which must be stated in writing, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State. (1979, c. 815, s. 1; 1987 (Reg. Sess., 1988), c. 1090, s. 12; 1998-202, s. 6.)

Legal Periodicals. — For article, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

CASE NOTES

Editor's Note. — *Most of the following cases were decided prior to the enactment of this Chapter.*

Constitutionality of Former § 7A-289. — Former G.S. 7A-289, permitting the district court to enter a temporary custody order affecting a juvenile who is appealing a commitment order of the court, was not unconstitutional on the ground that the statute deprived the juvenile of the right to bail. In re Martin, 9 N.C. App. 576, 176 S.E.2d 849 (1970), decided under former § 7A-289.

Section Controls over § 1-294. — Although G.S. 1-294 states the general rule regarding jurisdiction of the trial court pending appeal, it is not controlling where there is a specific statute, such as former G.S. 7A-669 (see now this section), addressing the matter in question. In re Huber, 57 N.C. App. 453, 291 S.E.2d 916, appeal dismissed and cert. denied, 306 N.C. 557, 294 S.E.2d 223 (1982).

Trial Courts Divested of Jurisdiction During Pendency of Appeal. — In a juvenile delinquency proceeding, an amended adjudication order and a disposition order had to be vacated because both were entered during the pendency of the juvenile's appeal after no disposition had been entered within 60 days of the adjudication of the juvenile as delinquent. In re Rikard, 161 N.C. App. 150, 587 S.E.2d 467, 2003 N.C. App. LEXIS 1997 (2003).

Section Permits Court to Circumvent Recalcitrant Parties. — Without authority of the district court to provide for the treatment of a neglected child pending appeal, a recalcitrant party could frustrate the efforts of the court to provide for the child's best interests by simply entering notice of appeal. In re Huber, 57 N.C. App. 453, 291 S.E.2d 916, appeal dismissed and cert. denied, 306 N.C. 557, 294 S.E.2d 223 (1982).

Commitment Held Proper. — Temporary order, which also ordered respondent juvenile to remain in custody of the Department of Social Services and to be placed in a residential treatment facility for ninety days for evaluation purposes, was authorized pursuant to G.S. 7B-2605. In re K.T.L., 177 N.C. App. 365, 629 S.E.2d 152, 2006 N.C. App. LEXIS 965 (2006).

Commitment Held Improper. — Trial court erred by denying a juvenile's release while his appeal was pending in part because he refused to admit committing the offenses for which he was adjudicated delinquent, as compelling such an admission to win release violated the juvenile's self-incrimination privilege under the state and federal constitutions. In re Lineberry, 154 N.C. App. 246, 572 S.E.2d 229, 2002 N.C. App. LEXIS 1456 (2002).

Emergency Commitment Held Improper. — Written order which merely stated that it was an "emergency commitment," without stating any supporting reasons or findings of fact, was not proper. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988), holding, however, that juvenile had not shown prejudice from such order.

§ 7B-2606. Disposition after appeal.

Upon the affirmation of the order of adjudication or disposition of the court by the Court of Appeals or by the Supreme Court in the event of an appeal, the court shall have authority to modify or alter the original order of adjudication or disposition as the court finds to be in the best interests of the juvenile to reflect any adjustment made by the juvenile or change in circumstances during the period of time the appeal was pending. If the modifying order is entered ex parte, the court shall give notice to interested parties to show cause within 10 days thereafter as to why the modifying order should be vacated or altered. (1979, c. 815, s. 1; 1998-202, s. 6.)

CASE NOTES

No Trial Court Jurisdiction During Pendency of Appeal. — Where defendant, a juvenile, appealed the adjudication order of the trial court, pursuant to G.S. 7B-2602, the orders of the trial court, entered after notice of appeal was filed, amending the adjudication order and entering a disposition order, were improper; the trial courts lacked jurisdiction under G.S. 7B-2605 and G.S. 7B-2606 to enter these orders during the pendency of appeal. In re Rikard, 161 N.C. App. 150, 587 S.E.2d 467, 2003 N.C. App. LEXIS 1997 (2003).

Applied in In re Rikard, 161 N.C. App. 150, 587 S.E.2d 467, 2003 N.C. App. LEXIS 1997 (2003).

ARTICLE 27.

Authority over Parents of Juveniles Adjudicated Delinquent or Undisciplined.

§ 7B-2700. Appearance in court.

The parent, guardian, or custodian of a juvenile under the jurisdiction of the juvenile court shall attend the hearings of which the parent, guardian, or custodian receives notice. The court may excuse the appearance of either or both parents or the guardian or custodian at a particular hearing or all hearings. Unless so excused, the willful failure of a parent, guardian, or custodian to attend a hearing of which the parent, guardian, or custodian has notice shall be grounds for contempt. (1998-202, s. 6.)

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

§ 7B-2701. Parental responsibility classes.

The court may order the parent, guardian, or custodian of a juvenile who has been adjudicated undisciplined or delinquent to attend parental responsibility classes if those classes are available in the judicial district in which the parent, guardian, or custodian resides. (1998-202, s. 6.)

§ 7B-2702. Medical, surgical, psychiatric, or psychological evaluation or treatment of juvenile or parent.

(a) If the court orders medical, surgical, psychiatric, psychological, or other evaluation or treatment pursuant to G.S. 7B-2502, the court may order the parent or other responsible parties to pay the cost of the treatment or care ordered.

(b) At the dispositional hearing or a subsequent hearing, if the court finds that it is in the best interests of the juvenile for the parent to be directly involved in the juvenile's evaluation or treatment, the court may order that person to participate in medical, psychiatric, psychological, or other evaluation or treatment of the juvenile. The cost of the evaluation or treatment shall be paid pursuant to G.S. 7B-2502.

(c) At the dispositional hearing or a subsequent hearing, the court may determine whether the best interests of the juvenile require that the parent undergo psychiatric, psychological, or other evaluation or treatment or counseling directed toward remedying behaviors or conditions that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent. If the court finds that the best interests of the juvenile require the parent undergo evaluation or treatment, it may order that person to comply with a plan of evaluation or treatment approved by the court or condition legal custody or physical placement of the juvenile with the parent upon that person's compliance with the plan of evaluation or treatment.

(d) In cases in which the court has ordered the parent of the juvenile to comply with or undergo evaluation or treatment, the court may order the parent to pay the cost of evaluation or treatment ordered pursuant to this subsection. In cases in which the court has conditioned legal custody or physical placement of the juvenile with the parent upon the parent's compliance with a plan of evaluation or treatment, the court may charge the cost of the evaluation or treatment to the county of the juvenile's residence if the court finds the parent is unable to pay the cost of the evaluation or treatment. In all other cases, if the court finds the parent is unable to pay the cost of the evaluation or treatment ordered pursuant to this subsection, the court may order the parent to receive evaluation or treatment currently available from the area mental health program that serves the parent's catchment area. (1979, c. 815, s. 1; 1981, c. 469, s. 19; 1983, c. 837, ss. 2, 3; 1985, c. 589, s. 5; c. 777, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 2; 1987, c. 598, s. 2; 1989, c. 218; c. 529, s. 7; 1991, c. 636, s. 19(a); 1995, c. 328, s. 2; 1995 (Reg. Sess., 1996), c. 609, ss. 3, 4; 1997-456, s. 1; 1997-516, s. 1A; 1998-202, s. 6; 1998-229, s. 6.)

§ 7B-2703. Compliance with orders of court.

(a) The court may order the parent, guardian, or custodian, to the extent that person is able to do so, to provide transportation for a juvenile to keep an appointment with a juvenile court counselor or to comply with other orders of the court.

(b) The court may order a parent, guardian, or custodian to cooperate with and assist the juvenile in complying with the terms and conditions of probation or other orders of the court. (1998-202, s. 6; 2001-490, s. 2.30.)

§ 7B-2704. Payment of support or other expenses; assignment of insurance coverage.

At the dispositional hearing or a subsequent hearing, if the court finds that the parent is able to do so, the court may order the parent to:

(1) Pay a reasonable sum that will cover in whole or in part the support of the juvenile. If the court requires the payment of child support, the amount of the payments shall be determined as provided in G.S. 50-13.4;

(2) Pay a fee for probation supervision or residential facility costs;

(3) Assign private insurance coverage to cover medical costs while the juvenile is in secure detention, youth development center, or other out-of-home placement; and

(4) Pay appointed attorneys' fees.

All money paid by a parent pursuant to this section shall be paid into the office of the clerk of superior court.

If the court places a juvenile in the custody of a county department of social services and if the court finds that the parent is unable to pay the cost of the support required by the juvenile, the cost shall be paid by the county department of social services in whose custody the juvenile is placed, provided the juvenile is not receiving care in an institution owned or operated by the State or federal government or any subdivision thereof. (1979, c. 815, s. 1; 1981, c. 469, s. 19; 1983, c. 837, ss. 2, 3; 1985, c. 589, s. 5; c. 777, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 2; 1987, c. 598, s. 2; 1989, c. 218; c. 529, s. 7; 1991, c. 636, s. 19(a); 1995, c. 328, s. 2; 1995 (Reg. Sess., 1996), c. 609, ss. 3, 4; 1997-456, s. 1; 1997-516, s. 1A; 1998-202, s. 6; 1998-229, s. 6; 2000-144, s. 24; 2001-95, s. 5.)

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, G.S. 7A-498 et seq.

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Support payments ordered pursuant to former § 7A-650(c) should be based on the interplay of the trial court's conclusions as to the amount of support necessary to meet the needs of the child and the ability of the parents to provide that amount. The court's conclusions should in turn be based on findings of fact sufficiently specific to show that the court gave due regard to the relevant factors in G.S. 50-13.4(c) and any other relevant factors of the particular case. When such findings are not made, the order should be vacated, because appellate courts have no means of determining whether the order is supported by the evidence and is based on the proper considerations. In re Botsford, 75 N.C. App. 72, 330 S.E.2d 23 (1985).

§ 7B-2705. Employment discrimination unlawful.

No employer may discharge, demote, or deny a promotion or other benefit of employment to any employee because the employee complies with the provisions of this Article. The Commissioner of Labor shall enforce the provisions of this section according to Article 21 of Chapter 95 of the General Statutes, including the rules and regulations issued pursuant to that Article. (1998-202, s. 6.)

§ 7B-2706. Contempt for failure to comply.

Upon motion of the juvenile court counselor or prosecutor or upon the court's own motion, the court may issue an order directing the parent, guardian, or custodian to appear and show cause why the parent, guardian, or custodian should not be found or held in civil or criminal contempt for willfully failing to comply with an order of the court. Chapter 5A of the General Statutes shall govern contempt proceedings initiated pursuant to this Article. (1998-202, s. 6; 2001-490, s. 2.31.)

ARTICLE 28.

Interstate Compact on Juveniles.

(For contingent repeal — see note)

§ 7B-2800. (For contingent repeal — see note) Execution of Compact.

The Governor is hereby authorized and directed to execute a Compact on behalf of this State with any other state or states legally joining therein in the form substantially as follows: The contracting states solemnly agree. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1; 1998-202, s. 6.)

Article Has a Contingent Repeal Date. — Session Laws 2005-194, which enacted Article 40 of Chapter 7B, in s. 2 provides for the repeal of Article 28 of Chapter 7B, only when all states as defined in the compact have adopted The Interstate Compact for Juveniles.

Session Laws 2005-194, s. 3, effective July 15, 2005, provides: "The Secretary of the Department of Juvenile Justice and Delinquency Prevention shall notify the Revisor of Statutes when The Interstate Compact for Juveniles becomes effective under the terms of the Compact. The Secretary of the Department of Juvenile Justice and Delinquency Prevention shall notify the Revisor of Statutes when The Interstate Compact for Juveniles has been adopted by all states, as defined in the Compact."

Session Laws 2005-194, s. 4, effective July 15, 2005, provides: "This act shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act. The Department of Juvenile Justice and Delinquency Prevention shall implement the provisions of this act with funds that are otherwise appropriated or available to the Department."

Session Laws 2005-194, s. 5, effective July 15, 2005, provides: "Section 1 of this act becomes effective only when 35 states have adopted The Interstate Compact for Juveniles, as set forth in the Compact. Section 2 of this act becomes effective only when all states, as defined in the Compact, have adopted The Interstate Compact for Juveniles. The remainder of this act is effective when it becomes law."

Editor's note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

§ 7B-2801. (For contingent repeal — see note) Findings and purposes.

Juveniles who are not under proper supervision and control, or who have absconded, escaped, or run away, are likely to endanger their own health, morals, and welfare, and the health, morals, and welfare of others. The cooperation of the states party to this Compact is therefore necessary to provide for the welfare and protection of juveniles and of the public with respect to:

(1) Cooperative supervision of delinquent juveniles on probation or parole;

(2) The return, from one state to another, of delinquent juveniles who have escaped or absconded;

(3) The return, from one state to another, of nondelinquent juveniles who have run away from home; and

(4) Additional measures for the protection of juveniles and of the public, which any two or more of the party states may find desirable to undertake cooperatively.

In carrying out the provisions of this Compact, the party states shall be guided by the noncriminal, reformative, and protective policies which guide their laws concerning delinquent, neglected, or dependent juveniles generally.

Article 28 has a contingent repeal. See note.

It shall be the policy of the states party to this Compact to cooperate and observe their respective responsibilities for the prompt return and acceptance of juveniles and delinquent juveniles who become subject to the provisions of this Compact. The provisions of this Compact shall be reasonably and liberally construed to accomplish the foregoing purposes. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2802. (For contingent repeal — see note) Existing rights and remedies.

All remedies and procedures provided by this Compact are in addition to and not in substitution for other rights, remedies, and procedures and are not in derogation of parental rights and responsibilities. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2803. (For contingent repeal — see note) Definitions.

For the purposes of this Compact, "delinquent juvenile" means any juvenile who has been adjudged delinquent and who, at the time the provisions of this Compact are invoked, is still subject to the jurisdiction of the court that has made adjudication or to the jurisdiction or supervision of an agency or institution pursuant to an order of the court; "probation or parole" means any kind of post-release supervision of juveniles authorized under the laws of the states party hereto; "court" means any court having jurisdiction over delinquent, neglected, or dependent juveniles; "state" means any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico; and "residence" or any variant thereof means a place at which a home or regular place of abode is maintained. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Findings of fact that the juvenile met the definition of "delinquent juvenile" contained in former G.S. 7A-687 (see now this section), that he was the juvenile sought by a state demanding his return, that he was alleged to have escaped or be a runaway as defined by the law of the demanding state, that the paperwork filed by the demanding state was in order, and that the juvenile had fled the demanding state were not implicit in finding that "the requisition [was] in order" under former G.S. 7A-689. In re Teague, 91 N.C. App. 242, 371 S.E.2d 510, cert. denied, 323 N.C. 624, 374 S.E.2d 588 (1988).

§ 7B-2804. (For contingent repeal — see note) Return of runaways.

(a) The parent, guardian, person, or agency entitled to legal custody of a juvenile who has not been adjudged delinquent but who has run away without the consent of the parent, guardian, person, or agency may petition the appropriate court in the demanding state for the issuance of a requisition for the juvenile's return. The petition shall state the name and age of the juvenile, the name of the petitioner, and the basis of entitlement to the juvenile's custody, the circumstances of the running away, the juvenile's location if known at the time application is made, and any other facts that may tend to show that the juvenile who has run away is endangering the juvenile's own welfare or the welfare of others and is not an emancipated minor. The petition shall be verified by affidavit, shall be executed in duplicate, and shall be accompanied by two certified copies of the document or documents on which the petitioner's entitlement to the juvenile's custody is based, such as birth certificates, letters of guardianship, or custody decrees. Any further affidavits and other documents as may be deemed proper may be submitted with the petition. The judge of the court to which this application is made may hold a hearing thereon to determine whether for the purposes of this Compact the petitioner is entitled to the legal custody of the juvenile, whether or not it appears that the juvenile has in fact run away without consent, whether or not the juvenile is an emancipated minor, and whether or not it is in the best interests of the juvenile to compel the juvenile's return to the state. If the judge determines, either with or without a hearing, that the juvenile should be returned, the judge shall present to the appropriate court or to the executive authority of the state where the juvenile is alleged to be located a written requisition for the return of the juvenile. The requisition shall set forth the name and age of the juvenile, the determination of the court that the juvenile has run away without the consent of a parent, guardian, person, or agency entitled to legal custody, and that it is in the best interests and for the protection of the juvenile that the juvenile be returned. In the event that a proceeding for the adjudication of the juvenile as a delinquent, neglected, or dependent juvenile is pending in the court at the time when the juvenile runs away, the court may issue a requisition for the return of the juvenile upon its own motion, regardless of the consent of the parent, guardian, person, or agency entitled to legal custody, reciting therein the nature and circumstances of the pending proceeding. The requisition shall in every case be executed in duplicate and shall be signed by the judge. One copy of the requisition shall be filed with the Compact Administrator of the demanding state, there to remain on file subject to the provisions of law governing records of the court. Upon the receipt of a requisition demanding the return of a juvenile who has run away, the court or the executive authority to whom the requisition is addressed shall issue an order to any peace officer or other appropriate person directing that person to take into custody and detain the juvenile. The detention order must substantially recite the facts necessary to the validity of its issuance hereunder. No juvenile detained upon the order shall be delivered over to the officer whom the court has appointed to receive the juvenile unless the juvenile first is taken before a judge of a court in the state, who shall inform the juvenile of the demand made for the juvenile's return, and who may determine that counsel or guardian ad litem for the juvenile should be appointed. If the court finds that the requisition is in order, the court shall deliver the juvenile over to the officer appointed to receive the juvenile by the court demanding the juvenile. The court, however, may fix a reasonable time to be allowed for the purpose of testing the legality of the proceeding.

Upon reasonable information that a person is a juvenile who has run away from another state party to this Compact without the consent of a parent, guardian, person, or agency entitled to legal custody, the juvenile may be taken into custody without a requisition and brought before a judge of the appropriate court who may determine that counsel or guardian ad litem for the juvenile should be appointed and who shall determine after a hearing whether sufficient cause exists to hold the person, subject to the order of the court, for the juvenile's own protection and welfare, for such a time not exceeding 90 days as will enable the return of the juvenile to another state party to this Compact pursuant to a requisition for return from a court of that state. In cases in which the court determines that counsel or guardian ad litem should be provided for the juvenile, appointment shall be in accordance with rules adopted by the Office of Indigent Defense Services. If, at the time when a state seeks the return of a juvenile who has run away, there is pending in the state wherein the juvenile is found, any criminal charge, or any proceeding to have the juvenile adjudicated a delinquent juvenile for an act committed in the state, or if the juvenile is suspected of having committed within the state a criminal offense or an act of juvenile delinquency, the juvenile shall not be returned without the consent of the state until discharged from prosecution or other form of proceeding, imprisonment, detention, or supervision for the offense or juvenile delinquency. The duly accredited officers of any state party to this Compact, upon the establishment of their authority and the identity of the juvenile being returned, shall be permitted to transport the juvenile through any and all states party to this Compact, without interference. Upon return of the juvenile to the state from which the juvenile ran away, the juvenile shall be subject to such further proceedings as may be appropriate under the laws of that state.

(b) The state to which the juvenile is returned under this Article shall be responsible for payment of the transportation costs of return.

(c) The term "juvenile" as used in this Article means any person who is a minor under the law of the state of residence of the parent, guardian, person, or agency entitled to the legal custody of the minor. (1963, c. 910, s. 1; c. 1965, c. 925, s. 1; 1979, c. 815, s. 1; 1998-202, s. 6; 2000-144, s. 25.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, G.S. 7A-498 et seq.

§ 7B-2805. (For contingent repeal — see note) Return of escapees and absconders.

(a) The appropriate person or authority from whose probation or parole supervision a delinquent juvenile has absconded or from whose institutional custody a delinquent juvenile has escaped shall present to the appropriate court or to the executive authority of the state where the delinquent juvenile is alleged to be located a written requisition for the return of the delinquent juvenile. The requisition shall state the name and age of the delinquent juvenile, the particulars of the juvenile's adjudication as a delinquent juvenile, the circumstances of the breach of the terms of probation or parole or of the juvenile's escape from an institution or agency vested with legal custody or supervision, and the location of the delinquent juvenile, if known, at the time the requisition is made. The requisition shall be verified by affidavit, shall be executed in duplicate, and shall be accompanied by two certified copies of the judgment, formal adjudication, or order of commitment which subjects the delinquent juvenile to probation or parole or to the legal custody of the institution or agency concerned. Any further affidavits and documents as may be deemed proper may be submitted with the requisition. One copy of the requisition shall be filed with the Compact Administrator of the demanding state, there to remain on file subject to the provisions of the law governing records of the appropriate court. Upon the receipt of a requisition demanding the return of a delinquent juvenile who has absconded or escaped, the court or the executive authority to whom the requisition is addressed shall issue an order to any peace officer or other appropriate person directing the person to take into custody and detain such delinquent juvenile. The detention order must substantially recite the facts necessary to the validity of its issuance hereunder. No delinquent juvenile detained upon the order shall be delivered over to the officer whom the appropriate person or authority demanding the juvenile has appointed to receive the juvenile, unless the juvenile is first taken forthwith before a judge of an appropriate court in the state, who shall inform the juvenile of the demand made for the return, and who may determine that counsel or guardian ad litem for the juvenile should be appointed. If the judge of the court finds that the requisition is in order, the judge shall deliver the delinquent juvenile over to the officer whom the appropriate person or authority demanding the juvenile appointed to receive the juvenile. The judge, however, may fix a reasonable time to be allowed for the purpose of testing the legality of the proceeding.

Upon reasonable information that a person is a delinquent juvenile who has absconded while on probation or parole, or escaped from an institution or agency vested with legal custody or supervision in any state party to this Compact, the person may be taken into custody in any other state party to this Compact without a requisition. But in that event, the juvenile shall be taken forthwith before a judge of the appropriate court, who may determine that counsel or guardian ad litem for the person should be appointed and who shall determine after a hearing, whether sufficient cause exists to hold the person subject to the order of the court for a length of time, not exceeding 90 days, as will enable detention of the juvenile under a detention order issued on a requisition pursuant to this Article. If, at the time when a state seeks the return of a delinquent who has either absconded while on probation or parole or escaped from an institution or agency vested with legal custody or supervision, there is pending in the state wherein the juvenile is detained any criminal charge or any proceeding to have the juvenile adjudicated a delinquent juvenile for an act committed in the state, or if the juvenile is suspected of having committed a criminal offense or an act of juvenile delinquency within the state, the juvenile shall not be returned without the consent of the state until discharged from prosecution or other form of proceeding, imprisonment, detention, or supervision for the offense or juvenile delinquency. The duly accredited officers of any state party to this Compact, upon the establishment of their authority and the identity of the delinquent juvenile being returned, shall be permitted to transport the delinquent juvenile through any and all states party to this Compact, without interference. Upon return to the state from which the juvenile escaped or absconded, the delinquent juvenile shall be subject to any further proceedings appropriate under the laws of that state.

(b) The state to which a delinquent juvenile is returned under this Article shall be responsible for the payment of transportation costs of the return.

(c) If the court determines that counsel or guardian ad litem should be provided under this section, appointment shall be in accordance with rules adopted by the Office of Indigent Defense Services. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1; 1998-202, s. 6; 2000-144, s. 26.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, 7A-498 et seq.

CASE NOTES

Editor's Note. — *The following cases were decided prior to the enactment of this Chapter.*

Former § 7A-689 did not violate the juvenile's right to due process merely because it allowed no inquiry into the juvenile's best interests; by the time a juvenile is before a court in a proceeding under former G.S. 7A-689, he or she has received a best interest determination by the demanding state, and it would be redundant as well as contrary to the statute to conduct another best interest determination. In re Teague, 91 N.C. App. 242, 371 S.E.2d 510, cert. denied, 323 N.C. 624, 374 S.E.2d 588 (1988).

Section Not Violative of Equal Protection. — Because former G.S. 7A-689 applies uniformly to all juveniles who have escaped or absconded from other state jurisdictions which are members of the Interstate Compact on Juveniles, it does not violate equal protection of the law merely because it allows no inquiry into the juvenile's best interests. In re Teague, 91 N.C. App. 242, 371 S.E.2d 510, cert. denied, 323 N.C. 624, 374 S.E.2d 588 (1988).

Former § 7A-689 requires findings of fact that the requisition from the requesting state is in order and that the name and age of the delinquent juvenile on such requisition is the same as the juvenile before the court. In re Teague, 91 N.C. App. 242, 371 S.E.2d 510, cert. denied, 323 N.C. 624, 374 S.E.2d 588 (1988).

Findings in adult and juvenile proceedings need not be the same; however, former G.S. 7A-689 requires some findings of fact to protect a juvenile in this state from being improperly returned to the demanding state. In re Teague, 91 N.C. App. 242, 371 S.E.2d 510, cert. denied, 323 N.C. 624, 374 S.E.2d 588 (1988).

Nothing in former § 7A-689 allows the court to return a juvenile to the demanding state only upon finding that such return is in the best interest of the juvenile. In re Teague, 91 N.C. App. 242, 371 S.E.2d 510, cert. denied, 323 N.C. 624, 374 S.E.2d 588 (1988).

Findings of fact that the juvenile met the definition of "delinquent juvenile" contained in former G.S. 7A-687, that he was the juvenile sought by a state demanding his return, that he was alleged to have escaped or be a runaway as defined by the law of the demanding state, that the paperwork filed by the demanding state was in order, and that the juvenile had fled the demanding state were not implicit in finding that "the requisition [was] in order" under former G.S. 7A-689. In re Teague, 91 N.C. App. 242, 371 S.E.2d 510, cert. denied, 323 N.C. 624, 374 S.E.2d 588 (1988).

§ 7B-2806. (For contingent repeal — see note) Voluntary return procedure.

Any delinquent juvenile who has absconded while on probation or parole, or escaped from an institution or agency vested with legal custody or supervision in any state party to this Compact, and any juvenile who has run away from any state party to this Compact, who is taken into custody without a requisition in another state party to this Compact under the provisions of G.S. 7B-2804(a) or G.S. 7B-2805(a), may consent to the immediate return of the juvenile to the state from which the juvenile absconded, escaped, or ran away. Consent shall be given by the juvenile or delinquent juvenile and the juvenile's counsel or guardian ad litem, if any, by executing or subscribing a writing in the presence of a judge of the appropriate court, which states that the juvenile or delinquent juvenile and the juvenile's counsel or guardian ad litem, if any, consent to return of the juvenile to the demanding state. Before consent is executed or subscribed, however, the judge, in the presence of counsel or guardian ad litem, if any, shall inform the juvenile or delinquent juvenile of the juvenile's rights under this Compact. When the consent has been duly executed, it shall be forwarded to and filed with the Compact Administrator of the state in which the court is located, and the judge shall direct the officer having the juvenile or delinquent juvenile in custody to deliver the juvenile to the duly accredited officer or officers of the state demanding return of the juvenile and shall cause to be delivered to the officer or officers a copy of the consent. The court may, however, upon the request of the state to which the juvenile or delinquent juvenile is being returned, order the juvenile to return unaccompanied to the state and shall provide the juvenile with a copy of the court order; in that event a copy of the consent shall be forwarded to the Compact Administrator of the state to which the juvenile or delinquent juvenile is ordered to return. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2807. (For contingent repeal — see note) Cooperative supervision of probationers and parolees.

(a) That the duly constituted judicial and administrative authorities of a state party to this Compact (herein called "sending state") may permit any delinquent juvenile within such state, placed on probation or parole, to reside in any other state party to this Compact (herein called "receiving state") while on probation or parole, and the receiving state shall accept the delinquent juvenile, if the parent, guardian, or person entitled to the legal custody of the delinquent juvenile is residing or undertakes to reside within the receiving state. Before granting permission, opportunity shall be given to the receiving state to make investigations as it deems necessary. The authorities of the sending state shall send to the authorities of the receiving state copies of pertinent court orders, social case studies, and all other available information which may be of value to and assist the receiving state in supervising a probationer or parolee under this Compact. A receiving state, in its discretion, may agree to accept supervision of a probationer or parolee in cases where the parent, guardian, or person entitled to the legal custody of the delinquent juvenile is not a resident of the receiving state, and if so accepted, the sending state may transfer the supervision accordingly.

(b) That each receiving state will assume the duties of visitation and of supervision over any delinquent juvenile and in the exercise of those duties will be governed by the same standards of visitation and supervision that prevail for its own delinquent juveniles released on probation or parole.

(c) That, after consultation between the appropriate authorities of the sending state and of the receiving state as to the desirability and necessity of returning the delinquent juvenile, the duly accredited officers of a sending state may enter a receiving state and there apprehend and retake any delinquent juvenile on probation or parole. For that purpose, no formalities will be required other than establishing the authority of the officer and the identity of the delinquent juvenile to be retaken and returned. The decision of the sending state to retake a delinquent juvenile on probation or parole shall be conclusive upon and not reviewable within the receiving state, but if, at the time the sending state seeks to retake a delinquent juvenile on probation or parole, there is pending against the juvenile within the receiving state any criminal charge or any proceeding to have the juvenile adjudicated a delinquent juvenile for any act committed in the state or if the juvenile is suspected of having committed within the state a criminal offense or an act of juvenile delinquency, the juvenile shall not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment, detention, or supervision for the offense or juvenile delinquency. The duly accredited officers of the sending state shall be permitted to transport delinquent juveniles being so returned through any and all states party to this Compact without interference.

(d) The sending state shall be responsible under this Article for paying the costs of transporting any delinquent juvenile to the receiving state or of returning any delinquent juvenile to the sending state. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2808. (For contingent repeal — see note) Responsibility for costs.

(a) The provisions of G.S. 7B-2804(b), 7B-2805(b), and 7B-2807(d) shall not be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs or responsibilities therefor.

(b) Nothing in this Compact shall be construed to prevent any party state or subdivision thereof from asserting any right against any person, agency, or other entity in regard to costs for which such party state or subdivision thereof may be responsible pursuant to G.S. 7B-2804(b), 7B-2805(b), and 7B-2807(d). (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2809. (For contingent repeal — see note) Detention practices.

To every extent possible, it shall be the policy of states party to this Compact that no juvenile or delinquent juvenile shall be placed or detained in any prison, jail, or lockup, nor be detained or transported in association with criminal, vicious, or dissolute persons. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2810. (For contingent repeal — see note) Supplementary agreements.

The duly constituted administrative authorities of a state party to this Compact may enter into supplementary agreements with any other state or states party hereto for the cooperative care, treatment, and rehabilitation of delinquent juveniles whenever they find that the agreements will improve the facilities or programs available for care, treatment, and rehabilitation. Care, treatment, and rehabilitation may be provided in an institution located within any state entering into a supplementary agreement. Supplementary agreements shall:

(1) Provide the rates to be paid for the care, treatment, and custody of delinquent juveniles taking into consideration the character of facilities, services, and subsistence furnished;
(2) Provide that the delinquent juvenile shall be given a court hearing prior to the juvenile being sent to another state for care, treatment, and custody;
(3) Provide that the state receiving a delinquent juvenile in one of its institutions shall act solely as agent for the state sending the delinquent juvenile;
(4) Provide that the sending state shall at all times retain jurisdiction over delinquent juveniles sent to an institution in another state;
(5) Provide for reasonable inspection of the institutions by the sending state;
(6) Provide that the consent of the parent, guardian, person, or agency entitled to the legal custody of the delinquent juvenile shall be secured prior to the juvenile being sent to another state; and
(7) Make provisions for any other matters and details as shall be necessary to protect the rights and equities of delinquent juveniles and of the cooperating states. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2811. (For contingent repeal — see note) Acceptance of federal and other aid.

Any state party to this Compact may accept any and all donations, gifts, and grants of money, equipment, and services from the federal or any local government, or any agency thereof and from any person, firm, or corporation, for any of the purposes and functions of this Compact, and may receive and utilize, the same subject to the terms, conditions, and regulations governing such donations, gifts, and grants. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2812. (For contingent repeal — see note) Compact administrators.

The governor of each state party to this Compact shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more efficiently the terms and provisions of this Compact. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2813. (For contingent repeal — see note) Execution of Compact.

This Compact shall become operative immediately upon its execution by any state as between it and any other state or states so executing. When executed it shall have the full force and effect of law within the state, the form of execution to be in accordance with the laws of the executing state. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2814. (For contingent repeal — see note) Renunciation.

This Compact shall continue in force and remain binding upon each executing state until renounced by it. Renunciation of this Compact shall be by the same authority which executed it, by sending six months' notice in writing of its intention to withdraw from the Compact to the other states party hereto. The duties and obligations of a renouncing state under G.S. 7B-2807 hereof shall continue as to parolees and probationers residing therein at the time of withdrawal until retaken or finally discharged. Supplementary agreements entered into under G.S. 7B-2810 hereof shall be subject to renunciation as provided by supplementary agreements and shall not be subject to the six months' renunciation notice of the present section. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2815. (For contingent repeal — see note) Severability.

The provisions of this Compact shall be severable and, if any phrase, clause, sentence, or provision of this Compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person, or circumstances is held invalid, the validity of the remainder of this Compact and the applicability thereof to any government, agency, person, or circumstances shall not be affected thereby. If this Compact shall be held contrary to the constitution of any state participating therein, the Compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2816. (For contingent repeal — see note) Authority of Governor to designate Compact Administrator.

Pursuant to said Compact, the Governor is hereby authorized and empowered to designate an officer who shall be the Compact Administrator and who, acting jointly with like officers of other party states, shall adopt rules and regulations to carry out more effectively the terms of the Compact. The Compact Administrator shall serve subject to the pleasure of the Governor. The Compact Administrator is hereby authorized, empowered, and directed to cooperate with all departments, agencies, and officers of and in the government of this State and its subdivisions in facilitating the proper administration of the Compact or of any supplementary agreement or agreements entered into by this State hereunder. (1963, c. 910, s. 2; 1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2817. (For contingent repeal — see note) Authority of Compact Administrator to enter into supplementary agreements.

The Compact Administrator is hereby authorized and empowered to enter into supplementary agreements with appropriate officials of other states pursuant to the Compact. In the event that the supplementary agreement shall require or contemplate the use of any institution or facility of this State or require or contemplate the provision of any service by this State, the supplementary agreement shall have no force or effect until approved by the head of the department or agency under whose jurisdiction said institution or facility is operated or whose department or agency will be charged with the rendering of the service. (1963, c. 910, s. 3; 1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2818. (For contingent repeal — see note) Discharging financial obligations imposed by Compact or agreement.

The Compact Administrator, subject to the approval of the Director of the Budget, may make or arrange for any payments necessary to discharge any financial obligations imposed upon this State by the Compact or by any supplementary agreement entered into thereunder. (1963, c. 910, s. 4; 1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2819. (For contingent repeal — see note) Enforcement of Compact.

The courts, departments, agencies, and officers of this State and subdivisions shall enforce this Compact and shall do all things appropriate to the effectuation of its purposes and intent which may be within their respective jurisdictions. (1963, c. 910, s. 5; 1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2820. (For contingent repeal — see note) Additional procedure for returning runaways not precluded.

In addition to any procedure provided in G.S. 7B-2804 and G.S. 7B-2806 of the Compact for the return of any runaway juvenile, the particular states, the juvenile or the juvenile's parents, the courts, or other legal custodian involved may agree upon and adopt any other plan or procedure legally authorized under the laws of this State and the other respective party states for the return of any runaway juvenile. (1963, c. 910, s. 6; 1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2821. (For contingent repeal — see note) Proceedings for return of runaways under G.S. 7B-2804 of Compact; "juvenile" construed.

The judge of any court in North Carolina to which an application is made for the return of a runaway under the provisions of G.S. 7B-2804 of the Interstate Compact on Juveniles shall hold a hearing thereon to determine whether for the purposes of the Compact the petitioner is entitled to the legal custody of the juvenile, whether or not it appears that the juvenile has in fact run away without consent, whether or not the juvenile is an emancipated minor, and whether or not it is in the best interests of the juvenile to compel the return of the juvenile to the state. The judge of any court in North Carolina, finding that a requisition for the return of a juvenile under the provisions of G.S. 7B-2804 of the Compact is in order, shall upon request fix a reasonable time to be allowed for the purpose of testing the legality of the proceeding. The period of time for holding a juvenile in custody under the provisions of G.S. 7B-2804 of the Compact for the protection and welfare of the juvenile, subject to the order of a court of this State, to enable the juvenile's return to another state party to the Compact pursuant to a requisition for return from a court of that state, shall not exceed 30 days. In applying the provisions of G.S. 7B-2804 of the Compact to secure the return of a runaway from North Carolina, the courts of this State shall construe the word "juvenile" as used in this Article to mean any person who has not reached the person's eighteenth birthday. (1965, c. 925, s. 2; 1971, c. 1231, s. 2; 1977, c. 552; 1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2822. (For contingent repeal — see note) Interstate parole and probation hearing procedures for juveniles.

Where supervision of a parolee or probationer is being administered pursuant to the Interstate Compact on Juveniles, the appropriate judicial or administrative authorities in this State shall notify the Compact Administrator of the sending state whenever, in their view, consideration should be given to retaking or reincarceration for a parole or a probation violation. Prior to giving of notification, a hearing shall be held in accordance with this Article within a reasonable time, unless the hearing is waived by the parolee or probationer. The appropriate officer or officers of this State shall, as soon as practicable, following termination of any hearing, report to the sending state, furnish a copy of the hearing record, and make recommendations regarding the disposition to be made of the parolee or probationer by the sending state. Pending any proceeding pursuant to this section, the appropriate officers of this State may take custody of and detain the parolee or probationer involved for a period not to exceed 10 days prior to the hearing and, if it appears to the hearing officer or officers that retaking or reincarceration is likely to follow, for a reasonable period after the hearing or waiver as may be necessary to arrange for retaking or the reincarceration. (1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2823. (For contingent repeal — see note) Hearing officers.

Any hearing pursuant to this Article may be before the Administrator of the Interstate Compact on Juveniles, a deputy of the Administrator, or any other person authorized pursuant to the juvenile laws of this State to hear cases of alleged juvenile parole or probation violations, except that no hearing officer shall be the person making the allegation of violation. (1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2824. (For contingent repeal — see note) Due process at parole or probation violation hearing.

With respect to any hearing pursuant to this Article, the parolee or probationer:

(1) Shall have reasonable notice in writing of the nature and content of the allegations to be made, including notice that the purpose of the hearing is to determine whether there is probable cause to believe that the parolee or probationer has committed a violation that may lead to a revocation of parole or probation;

(2) Shall be permitted to advise with any persons whose assistance the parolee or probationer reasonably desires, prior to the hearing;

(3) Shall have the right to confront and examine any persons who have made allegations against the parolee or probationer, unless the hearing officer determines that confrontation would present a sub-

stantial present or subsequent danger of harm to the person or persons; and

(4) May admit, deny, or explain the violation alleged and may present proof, including affidavits and other evidence, in support of the parolee's or probationer's contentions.

A record of the proceedings shall be made and preserved. (1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2825. (For contingent repeal — see note) Effect of parole or probation violation hearing outside State.

In any case of alleged parole or probation violation by a person being supervised in another state pursuant to the Interstate Compact on Juveniles, any appropriate judicial or administrative officer or agency in another state is authorized to hold a hearing on the alleged violation. Upon receipt of the record of a parole or probation violation hearing held in another state pursuant to a statute substantially similar to this Article, such record shall have the same standing and effect as though the proceeding of which it is a record was had before the appropriate officer or officers in this State, and any recommendations contained in or accompanying the record shall be fully considered by the appropriate officer or officers of this State in making disposition of the matter. (1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2826. (For contingent repeal — see note) Amendment to Interstate Compact on Juveniles concerning interstate rendition of juveniles alleged to be delinquent.

(a) This amendment shall provide additional remedies and shall be binding only as among and between those party states which specifically execute the same.

(b) All provisions and procedures of G.S. 7B-2805 and G.S. 7B-2806 of the Interstate Compact on Juveniles shall be construed to apply to any juvenile charged with being a delinquent by reason of a violation of any criminal law. Any juvenile, charged with being a delinquent by reason of violating any criminal law, shall be returned to the requesting state upon a requisition to the state where the juvenile may be found. A petition in the case shall be filed in a court of competent jurisdiction in the requesting state where the violation of criminal law is alleged to have been committed. The petition may be filed regardless of whether the juvenile has left the state before or after the filing of the petition. The requisition described in G.S. 7B-2805 of the Compact shall be forwarded by the judge of the court in which the petition has been filed. (1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§ 7B-2827. (For contingent repeal — see note) Out-of-State Confinement Amendment.

(a) The Out-of-State Confinement Amendment to the Interstate Compact on Juveniles is hereby enacted into law and entered into by this State with all other states legally joining therein in the form substantially as follows:

(1) Whenever the fully constituted judicial or administrative authorities in a sending state shall determine that confinement of a probationer or reconfinement of a parolee is necessary or desirable, the officials may direct that the confinement or reconfinement be in an appropriate institution for delinquent juveniles within the territory of the receiving state, the receiving state to act in that regard solely as agent for the sending state.

(2) Escapees and absconders who would otherwise be returned pursuant to G.S. 7B-2805 of the Compact may be confined or reconfined in the receiving state pursuant to this amendment. In any case in which the information and allegations are required to be made and furnished in a requisition pursuant to G.S. 7B-2805, the sending state shall request confinement or reconfinement in the receiving state. Whenever applicable, detention orders, as provided in G.S. 7B-2805, may be employed pursuant to this paragraph preliminary to disposition of the escapee or absconder.

(3) The confinement or reconfinement of a parolee, probationer, escapee, or absconder pursuant to this amendment shall require the concurrence of the appropriate judicial or administrative authorities of the receiving state.

(4) As used in this amendment: (i) "sending state" means a sending state as that term is used in G.S. 7B-2807 of the Compact or the state from which a delinquent juvenile has escaped or absconded within the meaning of G.S. 7B-2805 of the Compact; (ii) "receiving state" means any state, other than the sending state, in which a parolee, probationer, escapee, or absconder may be found, provided that the state is a party to this amendment.

(5) Every state which adopts this amendment shall designate at least one of its institutions for delinquent juveniles as a "Compact Institution" and shall confine persons therein as provided in subdivision (1) of this subsection unless the sending and receiving state in question shall make specific contractual arrangements to the contrary. All states party to this amendment shall have access to "Compact Institutions" at all reasonable hours for the purpose of inspecting the facilities thereof and for the purpose of visiting such of the State's delinquents as may be confined in the institution.

(6) Persons confined in "Compact Institutions" pursuant to the terms of this Compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed from the "Compact Institution" for transfer to an appropriate institution within the sending state, for return to probation or parole, for discharge, or for any purpose permitted by the laws of the sending state.

(7) All persons who may be confined in a "Compact Institution" pursuant to the provisions of this amendment shall be treated in a reasonable and humane manner. The fact of confinement or reconfinement in a receiving state shall not deprive any person so confined or reconfined

of any rights which the person would have had if confined or reconfined in an appropriate institution of the sending state. No agreement to submit to confinement or reconfinement pursuant to the terms of this amendment may be construed as a waiver of any rights which the delinquent would have had if the person had been confined or reconfined in any appropriate institution of the sending state, except that the hearing or hearings, if any, to which a parolee, probationer, escapee, or absconder may be entitled (prior to confinement or reconfinement) by the laws of the sending state may be had before the appropriate judicial or administrative officers of the receiving state. In this event, said judicial and administrative officers shall act as agents of the sending state after consultation with appropriate officers of the sending state.

(8) Any receiving state incurring costs or other expenses under this amendment shall be reimbursed in the amount of the costs or other expenses by the sending state unless the states concerned shall specifically otherwise agree. Any two or more states party to this amendment may enter into supplementary agreements determining a different allocation of costs as among themselves.

(9) This amendment shall take initial effect when entered into by any two or more states party to the Compact and shall be effective as to those states which have specifically enacted this amendment. Rules and regulations necessary to effectuate the terms of this amendment may be adopted by the appropriate officers of those states which have enacted this amendment.

(b) In addition to any institution in which the authorities of this State may otherwise confine or order the confinement of a delinquent juvenile, the authorities may, pursuant to the Out-of-State Confinement Amendment to the Interstate Compact on Juveniles, confine or order the confinement of a delinquent juvenile in a Compact Institution within another party state. (1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — For contingent repeal of this Article, see Editor's note under G.S. 7B-2800.

§§ 7B-2828 through 7B-2899: Reserved for future codification purposes.

SUBCHAPTER III. JUVENILE RECORDS.

ARTICLE 29.

Records and Social Reports of Cases of Abuse, Neglect, and Dependency.

§ 7B-2900. Definitions.

The definitions of G.S. 7B-101 and G.S. 7B-1501 apply to this Subchapter. (1998-202, s. 6.)

Editor's Note. — Session Laws 1998-202, s. 37(b), made this article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

§ 7B-2901. Confidentiality of records.

(a) The clerk shall maintain a complete record of all juvenile cases filed in the clerk's office alleging abuse, neglect, or dependency. The records shall be withheld from public inspection and, except as provided in this subsection, may be examined only by order of the court. The record shall include the summons, petition, custody order, court order, written motions, the electronic or mechanical recording of the hearing, and other papers filed in the proceeding. The recording of the hearing shall be reduced to a written transcript only when notice of appeal has been timely given. After the time for appeal has expired with no appeal having been filed, the recording of the hearing may be erased or destroyed upon the written order of the court.

The following persons may examine the juvenile's record maintained pursuant to this subsection and obtain copies of written parts of the record without an order of the court:

(1) The person named in the petition as the juvenile;
(2) The guardian ad litem;
(3) The county department of social services; and
(4) The juvenile's parent, guardian, or custodian, or the attorney for the juvenile or the juvenile's parent, guardian, or custodian.

(b) The Director of the Department of Social Services shall maintain a record of the cases of juveniles under protective custody by the Department or under placement by the court, which shall include family background information; reports of social, medical, psychiatric, or psychological information concerning a juvenile or the juvenile's family; interviews with the juvenile's family; or other information which the court finds should be protected from public inspection in the best interests of the juvenile. The records maintained pursuant to this subsection may be examined only by order of the court except that the guardian ad litem, or juvenile, shall have the right to examine them.

(c) In the case of a child victim, the court may order the sharing of information among such public agencies as the court deems necessary to reduce the trauma to the victim.

(d) The court's entire record of a proceeding involving consent for an abortion on an unemancipated minor under Article 1A, Part 2 of Chapter 90 of the General Statutes is not a matter of public record, shall be maintained separately from any juvenile record, shall be withheld from public inspection, and may be examined only by order of the court, by the unemancipated minor, or by the unemancipated minor's attorney or guardian ad litem. (1979, c. 815, s. 1; 1987, c. 297; 1994, Ex. Sess., c. 7, s. 1; 1995, c. 462, s. 4; c. 509, s. 5; 1997-459, s. 2; 1998-202, s. 6; 2001-208, s. 10; 2001-487, s. 101.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 459.

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Cross-Examination of Defendant as to Prior Adjudications of Delinquency. — For purposes of impeachment, it is permissible to cross-examine a juvenile defendant with reference to his prior convictions or adjudications of guilt of prior conduct which, if committed by an adult, would have constituted a conviction of crime. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972), decided under former § 7A-287.

In a criminal case, the rule that when a defendant takes the stand he may be impeached by cross-examination with respect to previous convictions of crime applies to every defendant who takes the stand, regardless of his age at the time of his previous conviction. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972), decided under former § 7A-287.

Cited in Jane Doe 1 v. Swannanoa Valley Youth Dev. Ctr., 163 N.C. App. 136, 592 S.E.2d 715, 2004 N.C. App. LEXIS 299 (2004).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The opinion below was rendered prior to the enactment of this Chapter.*

What Is Protected Under Section. — The investigations and records protected by the confidentiality provisions of former G.S. 7A-675 are those arising under the Juvenile Code. See opinion of Attorney General to Mr. Maurice A. Cawn, Police Attorney, City of Greensboro, 58 N.C.A.G. 33 (1988).

The confidentiality provisions of former G.S. 7A-675 do not prohibit the identification in a collision report filed pursuant to G.S. 20-166.1(e) of a person under 18 years of age who was involved in the collision. See opinion of Attorney General to Mr. Maurice A. Cawn, Police Attorney, City of Greensboro, 58 N.C.A.G. 33 (1988).

§ 7B-2902. Disclosure in child fatality or near fatality cases.

(a) The following definitions apply in this section:

(1) Child fatality. — The death of a child from suspected abuse, neglect, or maltreatment.

(2) Findings and information. — A written summary, as allowed by subsections (c) through (f) of this section, of actions taken or services rendered by a public agency following receipt of information that a child might be in need of protection. The written summary shall include any of the following information the agency is able to provide:

a. The dates, outcomes, and results of any actions taken or services rendered.

b. The results of any review by the State Child Fatality Prevention Team, a local child fatality prevention team, a local community child protection team, the Child Fatality Task Force, or any public agency.

c. Confirmation of the receipt of all reports, accepted or not accepted by the county department of social services, for investigation of suspected child abuse, neglect, or maltreatment, including confirmation that investigations were conducted, the results of the investigations, a description of the conduct of the most recent investigation and the services rendered, and a statement of basis for the department's decision.

(3) Near fatality. — A case in which a physician determines that a child is in serious or critical condition as the result of sickness or injury caused by suspected abuse, neglect, or maltreatment.

(4) Public agency. — Any agency of State government or its subdivisions as defined in G.S. 132-1(a).

(b) Notwithstanding any other provision of law and subject to the provisions of subsections (c) through (f) of this section, a public agency shall disclose to the public, upon request, the findings and information related to a child fatality or near fatality if:

(1) A person is criminally charged with having caused the child fatality or near fatality; or

(2) The district attorney has certified that a person would be charged with having caused the child fatality or near fatality but for that person's prior death.

(c) Nothing herein shall be deemed to authorize access to the confidential records in the custody of a public agency, or the disclosure to the public of the substance or content of any psychiatric, psychological, or therapeutic evaluations or like materials or information pertaining to the child or the child's family unless directly related to the cause of the child fatality or near fatality, or the disclosure of information that would reveal the identities of persons who provided information related to the suspected abuse, neglect, or maltreatment of the child.

(d) Within five working days from the receipt of a request for findings and information related to a child fatality or near fatality, a public agency shall consult with the appropriate district attorney and provide the findings and information unless the agency has a reasonable belief that release of the information:

(1) Is not authorized by subsections (a) and (b) of this section;
(2) Is likely to cause mental or physical harm or danger to a minor child residing in the deceased or injured child's household;
(3) Is likely to jeopardize the State's ability to prosecute the defendant;
(4) Is likely to jeopardize the defendant's right to a fair trial;
(5) Is likely to undermine an ongoing or future criminal investigation; or
(6) Is not authorized by federal law and regulations.

(e) Any person whose request is denied may apply to the appropriate superior court for an order compelling disclosure of the findings and information of the public agency. The application shall set forth, with reasonable particularity, factors supporting the application. The superior court shall have jurisdiction to issue such orders. Actions brought pursuant to this section shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the appellate courts. After the court has reviewed the specific findings and information, in camera, the court shall issue an order compelling disclosure unless the court finds that one or more of the circumstances in subsection (d) of this section exist.

(f) Access to criminal investigative reports and criminal intelligence information of public law enforcement agencies and confidential information in the possession of the State Child Fatality Prevention Team, the local teams, and the Child Fatality Task Force, shall be governed by G.S. 132-1.4 and G.S. 7B-1413 respectively. Nothing herein shall be deemed to require the disclosure or release of any information in the possession of a district attorney.

(g) Any public agency or its employees acting in good faith in disclosing or declining to disclose information pursuant to this section shall be immune from any criminal or civil liability that might otherwise be incurred or imposed for such action.

(h) Nothing herein shall be deemed to narrow or limit the definition of "public records" as set forth in G.S. 132-1(a). (1997-459, s. 1; 1998-202, s. 6.)

Article 30.

Juvenile Records and Social Reports of Delinquency and Undisciplined Cases.

§ 7B-3000. Juvenile court records.

(a) The clerk shall maintain a complete record of all juvenile cases filed in the clerk's office to be known as the juvenile record. The record shall include the summons and petition, any secure or nonsecure custody order, any electronic or mechanical recording of hearings, and any written motions, orders, or papers filed in the proceeding.

(b) All juvenile records shall be withheld from public inspection and, except as provided in this subsection, may be examined only by order of the court.

Except as provided in subsection (c) of this section, the following persons may examine the juvenile's record and obtain copies of written parts of the record without an order of the court:

(1) The juvenile;

(2) The juvenile's parent, guardian, or custodian, or the authorized representative of the juvenile's parent, guardian, or custodian;

(3) The prosecutor; and

(4) Court counselors.

Except as provided in subsection (c) of this section, the prosecutor may, in the prosecutor's discretion, share information obtained from a juvenile's record with law enforcement officers sworn in this State, but may not allow a law enforcement officer to photocopy any part of the record.

(c) The court may direct the clerk to "seal" any portion of a juvenile's record. The clerk shall secure any sealed portion of a juvenile's record in an envelope clearly marked "SEALED: MAY BE EXAMINED ONLY BY ORDER OF THE COURT", or with similar notice, and shall permit examination or copying of sealed portions of a juvenile's record only pursuant to a court order specifically authorizing inspection or copying.

(d) Any portion of a juvenile's record consisting of an electronic or mechanical recording of a hearing shall be transcribed only when notice of appeal has been timely given and shall be copied electronically or mechanically, only by order of the court. After the time for appeal has expired with no appeal having been filed, the court may enter a written order directing the clerk to destroy the recording of the hearing.

(e) The juvenile's record of an adjudication of delinquency for an offense that would be a felony if committed by an adult may be used by law enforcement, the magistrate, and the prosecutor for pretrial release and plea negotiating decisions.

(f) The juvenile's record of an adjudication of delinquency for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult may be used in a subsequent criminal proceeding against the juvenile either under G.S. 8C-1, Rule 404(b), or to prove an aggravating factor at sentencing under G.S. 15A-1340.4(a), 15A-1340.16(d), or 15A-2000(e). The record may be so used only by order of the court in the subsequent criminal proceeding, upon motion of the prosecutor, after an in camera hearing to determine whether the record in question is admissible.

(g) Except as provided in subsection (d) of this section, a juvenile's record shall be destroyed only as authorized by G.S. 7B-3200 or by rules adopted by the Administrative Office of the Courts. (1979, c. 815, s. 1; 1987, c. 297; 1994, Ex. Sess., c. 7, s. 1; 1995, c. 462, s. 4; c. 509, s. 5; 1997-459, s. 2; 1998-202, s. 6; 2000-137, s. 3; 2002-159, s. 26.)

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 459.

CASE NOTES

Cross-Examination of Defendant as to Prior Adjudications of Delinquency. — For purposes of impeachment, it is permissible to cross-examine a juvenile defendant with reference to his prior convictions or adjudications of guilt of prior conduct which, if committed by an adult, would have constituted a conviction of crime. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972), decided under former § 7A-287.

In a criminal case, the rule that when a defendant takes the stand he may be impeached by cross-examination with respect to previous convictions of crime applies to every defendant who takes the stand, regardless of his age at the time of his previous conviction. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972), decided under former § 7A-287.

Cited in Jane Doe 1 v. Swannanoa Valley Youth Dev. Ctr., 163 N.C. App. 136, 592 S.E.2d 715, 2004 N.C. App. LEXIS 299 (2004).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The opinion below was rendered prior to the enactment of this Chapter.*

What Is Protected Under Section. — The investigations and records protected by the confidentiality provisions of former G.S. 7A-675 are those arising under the Juvenile Code. See opinion of Attorney General to Mr. Maurice A. Cawn, Police Attorney, City of Greensboro, 58 N.C.A.G. 33 (1988).

The confidentiality provisions of former G.S. 7A-675 do not prohibit the identification in a collision report filed pursuant to G.S. 20-166.1(e) of a person under 18 years of age who was involved in the collision. See opinion of Attorney General to Mr. Maurice A. Cawn, Police Attorney, City of Greensboro, 58 N.C.A.G. 33 (1988).

§ 7B-3001. Other records relating to juveniles.

(a) The chief court counselor shall maintain a record of all cases of juveniles under supervision of juvenile court counselors, to be known as the juvenile court counselor's record. The juvenile court counselor's record shall include family background information; reports of social, medical, psychiatric, or psychological information concerning a juvenile or the juvenile's family; probation reports; interviews with the juvenile's family; or other information the court finds should be protected from public inspection in the best interests of the juvenile.

(b) Unless jurisdiction of the juvenile has been transferred to superior court, all law enforcement records and files concerning a juvenile shall be kept separate from the records and files of adults and shall be withheld from public inspection. The following persons may examine and obtain copies of law enforcement records and files concerning a juvenile without an order of the court:

(1) The juvenile;
(2) The juvenile's parent, guardian, custodian, or the authorized representative of the juvenile's parent, guardian, or custodian;
(3) The district attorney or prosecutor;
(4) Juvenile court counselors; and
(5) Law enforcement officers sworn in this State.

Otherwise, the records and files may be examined or copied only by order of the court.

(c) All records and files maintained by the Department pursuant to this Chapter shall be withheld from public inspection. The following persons may examine and obtain copies of the Department records and files concerning a juvenile without an order of the court:

(1) The juvenile and the juvenile's attorney;
(2) The juvenile's parent, guardian, custodian, or the authorized representative of the juvenile's parent, guardian, or custodian;
(3) Professionals in the agency who are directly involved in the juvenile's case; and
(4) Juvenile court counselors.

Otherwise, the records and files may be examined or copied only by order of the court. The court may inspect and order the release of records maintained by the Department. (1979, c. 815, s. 1; 1987, c. 297; 1994, Ex. Sess., c. 7, s. 1; 1995, c. 462, s. 4; c. 509, s. 5; 1997-459, s. 2; 1998-202, s. 6; 2000-137, s. 3; 2001-490, s. 2.32.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 459.

CASE NOTES

Cross-Examination of Defendant as to Prior Adjudications of Delinquency. — For purposes of impeachment, it is permissible to cross-examine a juvenile defendant with reference to his prior convictions or adjudications of guilt of prior conduct which, if committed by an adult, would have constituted a conviction of crime. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972), decided under former § 7A-287.

In a criminal case, the rule that when a defendant takes the stand he may be impeached by cross-examination with respect to previous convictions of crime applies to every defendant who takes the stand, regardless of his age at the time of his previous conviction. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972), decided under former § 7A-287.

Cited in In re M.E.B., 153 N.C. App. 278, 569 S.E.2d 683, 2002 N.C. App. LEXIS 1135 (2002).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — *The opinion below was rendered prior to the enactment of this Chapter.*

What Is Protected Under Section. — The investigations and records protected by the confidentiality provisions of former G.S. 7A-675 are those arising under the Juvenile Code. See opinion of Attorney General to Mr. Maurice A. Cawn, Police Attorney, City of Greensboro, 58 N.C.A.G. 33 (1988).

The confidentiality provisions of former G.S. 7A-675 do not prohibit the identification in a collision report filed pursuant to G.S. 20-166.1(e) of a person under 18 years of age who was involved in the collision. See opinion of Attorney General to Mr. Maurice A. Cawn, Police Attorney, City of Greensboro, 58 N.C.A.G. 33 (1988).

ARTICLE 31.

Disclosure of Juvenile Information.

§ 7B-3100. Disclosure of information about juveniles.

(a) The Department, after consultation with the Conference of Chief District Court Judges, shall adopt rules designating certain local agencies that are authorized to share information concerning juveniles in accordance with the provisions of this section. Agencies so designated shall share with one another, upon request and to the extent permitted by federal law and regulations, information that is in their possession that is relevant to any assessment of a report of child abuse, neglect, or dependency or the provision or arrangement of protective services in a child abuse, neglect, or dependency case by a local department of social services pursuant to the authority granted under Chapter 7B of the General Statutes or to any case in which a petition is filed alleging that a juvenile is abused, neglected, dependent, undisciplined, or delinquent and shall continue to do so until the protective services case is closed by the local department of social services, or if a petition is filed when the juvenile is no longer subject to the jurisdiction of juvenile court. Agencies that may be designated as "agencies authorized to share information" include local mental health facilities, local health departments, local departments of social services, local law enforcement agencies, local school administrative units, the district's district attorney's office, the Department of Juvenile Justice and Delinquency Prevention, and the Office of Guardian ad Litem Services of the Administrative Office of the Courts. Any information shared among agencies pursuant to this section shall remain confidential, shall be withheld from public inspection, and shall be used only for the protection of the juvenile and others or to improve the educational opportunities of the juvenile, and shall be released in accordance with the provisions of the Family Educational and Privacy Rights Act as set forth in 20 U.S.C. § 1232g. Nothing in this section or any other provision of law shall preclude any other necessary sharing of information among agencies. Nothing herein shall be deemed to require the disclosure or release of any information in the possession of a district attorney.

(b) Disclosure of information concerning any juvenile under investigation or alleged to be within the jurisdiction of the court that would reveal the identity of that juvenile is prohibited except that publication of pictures of runaways is permitted with the permission of the parents and except as provided in G.S. 7B-3102. (1979, c. 815, s. 1; 1987, c. 297; 1994, Ex. Sess., c. 7, s. 1; 1995, c. 462, s. 4; c. 509, s. 5; 1997-459, s. 2; 1998-202, s. 6; 2000-137, s. 3; 2006-205, s. 2; 2007-458, s. 4.)

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

Effect of Amendments. — Session Laws 2006-205, s. 2, effective August 8, 2006, in the second sentence of subsection (a), substituted "request and to the extent permitted by federal law and regulations" for "request," added the language "any assessment of a report ... Chapter 7B of the General Statutes or to" and "the protective services case is closed by the local department of social services, or if a petition is filed when."

Session Laws 2007-458, s. 4, effective October 1, 2007, inserted "and except as provided in G.S. 7B-3102" at the end of subsection (b).

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 459.

CASE NOTES

Cross-Examination of Defendant as to Prior Adjudications of Delinquency. — For purposes of impeachment, it is permissible to cross-examine a juvenile defendant with reference to his prior convictions or adjudications of guilt of prior conduct which, if committed by an adult, would have constituted a conviction of crime. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972), decided under former § 7A-287.

In a criminal case, the rule that when a defendant takes the stand he may be impeached by cross-examination with respect to previous convictions of crime applies to every defendant who takes the stand, regardless of his age at the time of his previous conviction. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972), decided under former § 7A-287.

Cited in In re M.E.B., 153 N.C. App. 278, 569 S.E.2d 683, 2002 N.C. App. LEXIS 1135 (2002).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — *The opinion below was rendered prior to the enactment of this Chapter.*

What Is Protected Under Section. — The investigations and records protected by the confidentiality provisions of former G.S. 7A-675 are those arising under the Juvenile Code. See opinion of Attorney General to Mr. Maurice A. Cawn, Police Attorney, City of Greensboro, 58 N.C.A.G. 33 (1988).

The confidentiality provisions of former G.S. 7A-675 do not prohibit the identification in a collision report filed pursuant to G.S. 20-166.1(e) of a person under 18 years of age who was involved in the collision. See opinion of Attorney General to Mr. Maurice A. Cawn, Police Attorney, City of Greensboro, 58 N.C.A.G. 33 (1988).

§ 7B-3101. Notification of schools when juveniles are alleged or found to be delinquent.

(a) Notwithstanding G.S. 7B-3000, the juvenile court counselor shall deliver verbal and written notification of the following actions to the principal of the school that the juvenile attends:

(1) A petition is filed under G.S. 7B-1802 that alleges delinquency for an offense that would be a felony if committed by an adult;

(2) The court transfers jurisdiction over a juvenile to superior court under G.S. 7B-2200;

(3) The court dismisses under G.S. 7B-2411 the petition that alleges delinquency for an offense that would be a felony if committed by an adult;

(4) The court issues a dispositional order under Article 25 of Chapter 7B of the General Statutes including, but not limited to, an order of probation that requires school attendance, concerning a juvenile alleged or found delinquent for an offense that would be a felony if committed by an adult; or

(5) The court modifies or vacates any order or disposition under G.S. 7B-2600 concerning a juvenile alleged or found delinquent for an offense that would be a felony if committed by an adult.

Notification of the school principal in person or by telephone shall be made before the beginning of the next school day. Delivery shall be made as soon as practicable but at least within five days of the action. Delivery shall be made in person or by certified mail. Notification that a petition has been filed shall describe the nature of the offense. Notification of a dispositional order, a modified or vacated order, or a transfer to superior court shall describe the court's action and any applicable disposition requirements. As used in this subsection, the term "offense" shall not include any offense under Chapter 20 of the General Statutes.

(b) If the principal of the school the juvenile attends returns any notification as required by G.S. 115C-404, and if the juvenile court counselor learns that the juvenile is transferring to another school, the juvenile court counselor shall deliver the notification to the principal of the school to which the juvenile is transferring. Delivery shall be made as soon as practicable and shall be made in person or by certified mail.

(c) Principals shall handle any notification delivered under this section in accordance with G.S. 115C-404.

(d) For the purpose of this section, "school" means any public or private school in the State that is authorized under Chapter 115C of the General Statutes. (1997-443, s. 8.29(e); 1998-202, s. 6.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 459.

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Cross-Examination of Defendant as to Prior Adjudications of Delinquency. — For purposes of impeachment, it is permissible to cross-examine a juvenile defendant with reference to his prior convictions or adjudications of guilt of prior conduct which, if committed by an adult, would have constituted a conviction of crime. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972), decided under former § 7A-287.

In a criminal case, the rule that when a defendant takes the stand he may be impeached by cross-examination with respect to previous convictions of crime applies to every defendant who takes the stand, regardless of his age at the time of his previous conviction. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972), decided under former § 7A-287.

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — *The opinion below was rendered prior to the enactment of this Chapter.*

What Is Protected Under Section. — The investigations and records protected by the confidentiality provisions of former G.S. 7A-765 are those arising under the Juvenile Code. See opinion of Attorney General to Mr. Maurice A. Cawn, Police Attorney, City of Greensboro, 58 N.C.A.G. 33 (1988).

The confidentiality provisions of former G.S.

7A-675 do not prohibit the identification in a collision report filed pursuant to G.S. 20-166.1(e) of a person under 18 years of age who was involved in the collision. See opinion of Attorney General to Mr. Maurice A. Cawn, Police Attorney, City of Greensboro, 58 N.C.A.G. 33 (1988).

§ 7B-3102. Disclosure of information about juveniles who escape.

(a) Notwithstanding G.S. 7B-2102(d) or any other law to the contrary, within 24 hours of the time a juvenile escapes from custody the Department shall release to the public the juvenile's first name, last initial, and photograph; the name and location of the institution from which the juvenile escaped; and a statement, based on the juvenile's record, of the level of concern of the Department as to the juvenile's threat to self or to others, if:

(1) The juvenile escapes from a detention facility, and the juvenile is alleged to have committed an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult.

(2) The juvenile escapes from a youth development center, and the juvenile has been adjudicated delinquent for an offense that would be a felony or a Class A1 misdemeanor if committed by an adult.

(b) When a juvenile escapes from custody, and the juvenile has been adjudicated for an offense that would be a Class 1, 2, or 3 misdemeanor if committed by an adult, the Department may release to the public within 24 hours the juvenile's first name, last initial, and photograph; the name and location of the institution from which the juvenile escaped, or if the juvenile's escape was not from an institution, the circumstances and location of the escape; and a statement, based on the juvenile's record, of the level of concern of the Department as to the juvenile's threat to self or to others.

(c) If a juvenile subject to subsection (a) or (b) of this section is returned to custody before the disclosure required or permitted is made, the Department shall not make the disclosure.

(d) The Department shall maintain a photograph of every juvenile in its custody. (2007-458, s. 2.)

Editor's Note. — Session Laws 2007-458, s. 5, made this section effective October 1, 2007.

Article 32.

Expunction of Juvenile Records.

§ 7B-3200. Expunction of records of juveniles alleged or adjudicated delinquent and undisciplined.

(a) Any person who has attained the age of 18 years may file a petition in the court where the person was adjudicated undisciplined for expunction of all records of that adjudication.

(b) Any person who has attained the age of 18 years may file a petition in the court where the person was adjudicated delinquent for expunction of all records of that adjudication provided:

(1) The offense for which the person was adjudicated would have been a crime other than a Class A, B1, B2, C, D, or E felony if committed by an adult.

(2) At least 18 months have elapsed since the person was released from juvenile court jurisdiction, and the person has not subsequently been adjudicated delinquent or convicted as an adult of any felony or

misdemeanor other than a traffic violation under the laws of the United States or the laws of this State or any other state.

Records relating to an adjudication for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult shall not be expunged.

(c) The petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner that the petitioner has been of good behavior since the adjudication and, in the case of a petition based on a delinquency adjudication, that the petitioner has not subsequently been adjudicated delinquent or convicted as an adult of any felony or misdemeanor other than a traffic violation under the laws of the United States, or the laws of this State or any other state;

(2) Verified affidavits of two persons, who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which the petitioner lives and that the petitioner's character and reputation are good; and

(3) A statement that the petition is a motion in the cause in the case wherein the petitioner was adjudicated delinquent or undisciplined.

The petition shall be served upon the district attorney in the district wherein adjudication occurred. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing on the petition.

(d) If the court, after hearing, finds that the petitioner satisfies the conditions set out in subsections (a) or (b) of this section, the court shall order and direct the clerk and all law enforcement agencies to expunge their records of the adjudication including all references to arrests, complaints, referrals, petitions, and orders.

(e) The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other law enforcement agency.

(f) Records of a juvenile adjudicated delinquent or undisciplined being maintained by the chief court counselor, an intake counselor, or a juvenile court counselor shall be retained or disposed of as provided by the Department, except that no records shall be destroyed before the juvenile reaches the age of 18 or 18 months have elapsed since the person was released from juvenile court jurisdiction, whichever occurs last.

(g) Records of a juvenile adjudicated delinquent or undisciplined being maintained by personnel at a residential facility operated by the Department, shall be retained or disposed of as provided by the Department, except that no records shall be destroyed before the juvenile reaches the age of 18 or 18 months have elapsed since the person was released from juvenile court jurisdiction, whichever occurs last.

(h) Any person who was alleged to be delinquent as a juvenile and has attained the age of 16 years, or was alleged to be undisciplined as a juvenile and has attained the age of 18 years, may file a petition in the court in which the person was alleged to be delinquent or undisciplined, for expunction of all juvenile records of the juvenile having been alleged to be delinquent or undisciplined if the court dismissed the juvenile petition without an adjudication that the juvenile was delinquent or undisciplined. The petition shall be served on the chief court counselor in the district where the juvenile petition was filed. The chief court counselor shall have 10 days thereafter in which to file a written objection in the court. If no objection is filed, the court may grant the petition without a hearing. If an objection is filed or the court so directs, a hearing shall be scheduled and the chief court counselor shall be notified as to the date of the hearing. If the court finds at the hearing that the petitioner satisfies the conditions specified herein, the court shall order the clerk and the appropriate law enforcement agencies to expunge their records of the allegations of delinquent or undisciplined acts including all references to arrests, complaints, referrals, juvenile petitions, and orders. The clerk shall forward a certified copy of the order of expunction to the sheriff, chief of police, or other appropriate law enforcement agency, and to the chief court counselor, and these specified officials shall immediately destroy all records relating to the allegations that the juvenile was delinquent or undisciplined.

(i) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in the clerk's county, file with the Administrative Office of the Courts, the names of those persons granted an expunction under the provisions of this section, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted an expunction. The information contained in such file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted an expunction. (1979, c. 815, s. 1; 1989, c. 186; 1994, Ex. Sess., c. 7, s. 2; 1995, c. 509, s. 6; 1997-443, s. 11A.118(a); 1998-202, s. 6; 2000-137, s. 3; 2001-490, s. 2.33.)

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

CASE NOTES

Cited in In re Spencer, 140 N.C. App. 776, 538 S.E.2d 236 (2000).

§ 7B-3201. Effect of expunction.

(a) Whenever a juvenile's record is expunged, with respect to the matter in which the record was expunged, the juvenile who is the subject of the record and the juvenile's parent may not be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of the person's failure to recite or acknowledge such record or response to any inquiry made of the person for any purpose.

(b) Notwithstanding subsection (a) of this section, in any delinquency case if the juvenile is the defendant and chooses to testify or if the juvenile is not the defendant and is called as a witness, the juvenile may be ordered to testify with respect to whether the juvenile was adjudicated delinquent. (1979, c. 815, s. 1; 1983 (Reg. Sess., 1984), c. 1037, s. 7; 1998-202, s. 6.)

CASE NOTES

Editor's Note. — *The following case was decided prior to the enactment of this Chapter.*

Cross-Examination About Prior Juvenile Proceedings. — Former G.S. 7A-677(b) is in line with the general rule that a defendant who takes the stand may be cross-examined for impeachment purposes about prior convictions. State v. Baker, 312 N.C. 34, 320 S.E.2d 670 (1984).

The prosecutor's tactic of reading from defendant's juvenile petitions while cross-examining defendant is not to be commended, but it does not constitute prejudicial error. When a prosecutor is acting on a good faith belief in the reliability of his information, he may press or "sift" the witness by further cross-examination when the witness denies that he committed the crimes or bad acts that are the subject of the cross-examination. State v. Baker, 312 N.C. 34, 320 S.E.2d 670 (1984).

A prosecutor may not, in cross-examining a defendant on collateral crimes, use questions which assume as facts unproved insinuations of the defendant's guilt of collateral offenses.

However, prosecutor was not making insinuations of unproven facts where he based his questions concerning defendant's prior convictions on juvenile petitions from proceedings in which defendant had been found to be delinquent. State v. Baker, 312 N.C. 34, 320 S.E.2d 670 (1984).

§ 7B-3202. Notice of expunction.

Upon expunction of a juvenile's record, the clerk shall send a written notice to the juvenile at the juvenile's last known address informing the juvenile that the record has been expunged and with respect to the matter involved, the juvenile may not be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of the juvenile's failure to recite or acknowledge such record or response to any inquiry made of the juvenile for any purpose except that upon testifying in a delinquency proceeding, the juvenile may be required by a court to disclose that the juvenile was adjudicated delinquent. (1979, c. 815, s. 1; 1983 (Reg. Sess., 1984), c. 1037, s. 8; 1998-202, s. 6.)

Article 33.

Computation of Recidivism Rates.

§ 7B-3300: Repealed by Session Laws 2005-276, s. 14.19(c), effective July 1, 2005.

SUBCHAPTER IV. PARENTAL AUTHORITY; EMANCIPATION.

Article 34.

Parental Authority over Juveniles.

§ 7B-3400. Juvenile under 18 subject to parents' control.

Notwithstanding any other provision of law, any juvenile under 18 years of age, except as provided in G.S. 7B-3402 and G.S. 7B-3403, shall be subject to the supervision and control of the juvenile's parents. (1969, c. 1080, s. 1; 1998-202, s. 6.)

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

CASE NOTES

Applied in In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

OPINIONS OF ATTORNEY GENERAL

No Conflict with G.S. 90-21.5. — Section 7B-3400, which provides that minors are subject to the supervision and control of their parents "notwithstanding any other provision of law," does not abrogate or conflict with G.S. 90-21.5, which specifies the circumstances under which minors can consent to health services. See opinion of Attorney General to Dr. David King, Chairman, Rowan Board of Health, 1999 N.C. AG LEXIS 27, 38 (8/25/99).

§ 7B-3401. Definitions.

The definitions of G.S. 7B-101 and G.S. 7B-1501 apply to this Subchapter. (1998-202, s. 6.)

§ 7B-3402. Exceptions.

This Article shall not apply to any juvenile under the age of 18 who is married or who is serving in the armed forces of the United States, or who has been emancipated. (1969, c. 1080, s. 2; 1998-202, s. 6.)

§ 7B-3403. No criminal liability created.

This Article shall not be interpreted to place any criminal liability on a parent, guardian, or custodian for any act of the juvenile 16 years of age or older. (1969, c. 1080, s. 3; 1998-202, s. 6.)

§ 7B-3404. Enforcement.

The provisions of this Article may be enforced by the parent, guardian, custodian, or person who has assumed the status and obligation of a parent without being awarded legal custody of the juvenile by a court to the juvenile by filing a civil action in the district court of the county where the juvenile can be found or the county of the plaintiff's residence. Upon the institution of such action by a verified complaint, alleging that the defendant juvenile has left home or has left the place where the juvenile has been residing and refuses to return and comply with the direction and control of the plaintiff, the court may issue an order directing the juvenile personally to appear before the court at a specified time to be heard in answer to the allegations of the plaintiff and to comply with further orders of the court. Such orders shall be served by the sheriff upon the juvenile and upon any other person named as a party defendant in such action. At the time of the issuance of the order directing the juvenile to appear, the court may in the same order, or by separate order, order the sheriff to enter any house, building, structure, or conveyance for the purpose of searching for the juvenile and serving the order and for the purpose of taking custody of the person of the juvenile in order to bring the juvenile before the court. Any order issued at said hearing shall be treated as a mandatory injunction and shall remain in full force and effect until the juvenile reaches the age of 18, or until further orders of the court. Within 30 days after the hearing on the original order, the juvenile, or anyone acting in the juvenile's behalf, may file a verified answer to the complaint. Upon the filing of an answer by or on behalf of the juvenile, any district court judge holding court in the county or district court district as defined in G.S. 7A-133 where the action was instituted shall have jurisdiction to hear the matter, without a jury, and to make findings of fact, conclusions of law, and render judgment thereon. Appeals from the district court to the Court of Appeals shall be allowed as in civil actions generally. The district court issuing the original order or the district court hearing the matter after answer has been filed shall also have authority to order that any person named defendant in the order or judgment shall not harbor, keep, or allow the defendant juvenile to remain on the person's premises or in the person's home. Failure of any defendant to comply with the terms of said order or judgment shall be punishable as for contempt. (1969, c. 1080, s. 4; 1987 (Reg. Sess., 1988), c. 1037, s. 108; 1991 (Reg. Sess., 1992), c. 1031, s. 1; 1998-202, s. 6.)

ARTICLE 35.

Emancipation.

§ 7B-3500. Who may petition.

Any juvenile who is 16 years of age or older and who has resided in the same county in North Carolina or on federal territory within the boundaries of North Carolina for six months next preceding the filing of the petition may petition the court in that county for a judicial decree of emancipation. (1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

§ 7B-3501. Petition.

The petition shall be signed and verified by the petitioner and shall contain the following information:

(1) The full name of the petitioner and the petitioner's birth date, and state and county of birth;
(2) A certified copy of the petitioner's birth certificate;
(3) The name and last known address of the parent, guardian, or custodian;
(4) The petitioner's address and length of residence at that address;
(5) The petitioner's reasons for requesting emancipation; and
(6) The petitioner's plan for meeting the petitioner's needs and living expenses which plan may include a statement of employment and wages earned that is verified by the petitioner's employer. (1979, c. 815, s. 1; 1998-202, s. 6.)

§ 7B-3502. Summons.

A copy of the filed petition along with a summons shall be served upon the petitioner's parent, guardian, or custodian who shall be named as respondents. The summons shall include the time and place of the hearing and shall notify the respondents to file written answer within 30 days after service of the summons and petition. In the event that personal service cannot be obtained, service shall be in accordance with G.S. 1A-1, Rule 4(j). (1979, c. 815, s. 1; 1998-202, s. 6.)

§ 7B-3503. Hearing.

The court, sitting without a jury, shall permit all parties to present evidence and to cross-examine witnesses. The petitioner has the burden of showing by a preponderance of the evidence that emancipation is in the petitioner's best interests. Upon finding that reasonable cause exists, the court may order the juvenile to be examined by a psychiatrist, a licensed clinical psychologist, a physician, or any other expert to evaluate the juvenile's mental or physical condition. The court may continue the hearing and order investigation by a juvenile court counselor or by the county department of social services to substantiate allegations of the petitioner or respondents.

No husband-wife or physician-patient privilege shall be grounds for excluding any evidence in the hearing. (1979, c. 815, s. 1; 1998-202, s. 6; 2001-490, s. 2.34.)

§ 7B-3504. Considerations for emancipation.

In determining the best interests of the petitioner and the need for emancipation, the court shall review the following considerations:

(1) The parental need for the earnings of the petitioner;
(2) The petitioner's ability to function as an adult;
(3) The petitioner's need to contract as an adult or to marry;
(4) The employment status of the petitioner and the stability of the petitioner's living arrangements;
(5) The extent of family discord which may threaten reconciliation of the petitioner with the petitioner's family;
(6) The petitioner's rejection of parental supervision or support; and
(7) The quality of parental supervision or support. (1979, c. 815, s. 1; 1998-202, s. 6.)

§ 7B-3505. Final decree of emancipation.

After reviewing the considerations for emancipation, the court may enter a decree of emancipation if the court determines:

(1) That all parties are properly before the court or were duly served and failed to appear and that time for filing an answer has expired;
(2) That the petitioner has shown a proper and lawful plan for adequately providing for the petitioner's needs and living expenses;
(3) That the petitioner is knowingly seeking emancipation and fully understands the ramifications of the act; and
(4) That emancipation is in the best interests of the petitioner.

The decree shall set out the court's findings.

If the court determines that the criteria in subdivisions (1) through (4) are not met, the court shall order the proceeding dismissed. (1979, c. 815, s. 1; 1998-202, s. 6.)

§ 7B-3506. Costs of court.

The court may tax the costs of the proceeding to any party or may, for good cause, order the costs remitted.

The clerk may collect costs for furnishing to the petitioner a certificate of emancipation which shall recite the name of the petitioner and the fact of the petitioner's emancipation by court decree and shall have the seal of the clerk affixed thereon. (1979, c. 815, s. 1; 1998-202, s. 6.)

§ 7B-3507. Legal effect of final decree.

As of entry of the final decree of emancipation:

(1) The petitioner has the same right to make contracts and conveyances, to sue and to be sued, and to transact business as if the petitioner were an adult.
(2) The parent, guardian, or custodian is relieved of all legal duties and obligations owed to the petitioner and is divested of all rights with respect to the petitioner.
(3) The decree is irrevocable.

Notwithstanding any other provision of this section, a decree of emancipation shall not alter the application of G.S. 14-326.1 or the petitioner's right to inherit property by intestate succession. (1979, c. 815, s. 1; 1998-202, s. 6.)

§ 7B-3508. Appeals.

Any petitioner, parent, guardian, or custodian who is a party to a proceeding under this Article may appeal from any order of disposition to the Court of Appeals provided that notice of appeal is given in open court at the time of the hearing or in writing within 10 days after entry of the order. Entry of an order shall be treated in the same manner as entry of a judgment under G.S. 1A-1, Rule 58 of the North Carolina Rules of Civil Procedure. Pending disposition of an appeal, the court may enter a temporary order affecting the custody or placement of the petitioner as the court finds to be in the best interests of the petitioner or the State. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-309, s. 3.)

§ 7B-3509. Application of common law.

A married juvenile is emancipated by this Article. All other common-law provisions for emancipation are superseded by this Article. (1979, c. 815, s. 1; 1998-202, s. 6.)

Article 36.

Judicial Consent for Emergency Surgical or Medical Treatment.

§ 7B-3600. Judicial authorization of emergency treatment; procedure.

A juvenile in need of emergency treatment under Article 1A of Chapter 90 of the General Statutes, whose physician is barred from rendering necessary treatment by reason of parental refusal to consent to treatment, may receive treatment with court authorization under the following procedure:

(1) The physician shall sign a written statement setting out:
  a. The treatment to be rendered and the emergency need for treatment;
  b. The refusal of the parent, guardian, custodian, or person who has assumed the status and obligation of a parent without being awarded legal custody of the juvenile by a court to consent to the treatment; and
  c. The impossibility of contacting a second physician for a concurring opinion on the need for treatment in time to prevent immediate harm to the juvenile.

(2) Upon examining the physician's written statement prescribed in subdivision (1) of this section and finding:
  a. That the statement is in accordance with this Article, and
  b. That the proposed treatment is necessary to prevent immediate harm to the juvenile.

  The court may issue a written authorization for the proposed treatment to be rendered.

(3) In acute emergencies in which time may not permit implementation of the written procedure set out in subdivisions (1) and (2) of this section, the court may authorize treatment in person or by telephone upon receiving the oral statement of a physician satisfying the requirements of subdivision (1) of this section and upon finding that the proposed treatment is necessary to prevent immediate harm to the juvenile.

(4) The court's authorization for treatment overriding parental refusal to consent should not be given without attempting to offer the parent an opportunity to state the reasons for refusal; however, failure of the

court to hear the parent's objections shall not invalidate judicial authorization under this Article.

(5) The court's authorization for treatment under subdivisions (1) and (2) of this section shall be issued in duplicate. One copy shall be given to the treating physician and the other copy shall be attached to the physician's written statement and filed as a juvenile proceeding in the office of the clerk of court.

(6) The court's authorization for treatment under subdivision (3) of this section shall be reduced to writing as soon as possible, supported by the physician's written statement as prescribed in subdivision (1) of this section and shall be filed as prescribed in subdivision (5) of this section.

The court's authorization for treatment under this Article shall have the same effect as parental consent for treatment.

Following the court's authorization for treatment and after giving notice to the juvenile's parent, guardian, or custodian the court shall conduct a hearing in order to provide for payment for the treatment rendered. The court may order the parent or other responsible parties to pay the cost of treatment. If the court finds the parent is unable to pay the cost of treatment, the cost shall be a charge upon the county when so ordered.

This Article shall operate as a remedy in addition to the provisions in G.S. 7B-903, 7B-2503, and 7B-2506. (1979, c. 815, s. 1; 1998-202, s. 6.)

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

SUBCHAPTER V. PLACEMENT OF JUVENILES.

ARTICLE 37.

Placing or Adoption of Juvenile Delinquents or Dependents.

§ 7B-3700. Consent required for bringing child into State for placement or adoption.

(a) No person, agency, association, institution, or corporation shall bring or send into the State any child for the purpose of giving custody of the child to some person in the State or procuring adoption by some person in the State without first obtaining the written consent of the Department of Health and Human Services.

(b) The person with whom a child is placed for either of the purposes set out in subsection (a) of this section shall be responsible for the child's proper care and training. The Department of Health and Human Services or its agents shall have the same right of visitation and supervision of the child and the home in which it is placed as in the case of a child placed by the Department or its agents as long as the child shall remain within the State and until the child shall have reached the age of 18 years or shall have been legally adopted. (1931, c. 226, s. 1; 1947, c. 609, s. 1; 1973, c. 476, s. 138; 1997-443, s. 11A.118(a); 1998-202, s. 6.)

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

§ 7B-3701. Bond required.

The Social Services Commission may, in its discretion, require of a person, agency, association, institution, or corporation which brings or sends a child into the State with the written consent of the Department of Health and Human Services, as provided by G.S. 7B-3700, a continuing bond in a penal sum not in excess of one thousand dollars ($1,000) with such conditions as may be prescribed and such sureties as may be approved by the Department of Health and Human Services. Said bond shall be made in favor of and filed with the Department of Health and Human Services with the premium prepaid by the said person, agency, association, institution, or corporation desiring to place such child in the State. (1931, c. 226, s. 2; 1947, c. 609, s. 2; 1969, c. 982; 1973, c. 476, s. 138; 1997-443, s. 11A.118(a); 1998-202, s. 6.)

§ 7B-3702. Consent required for removing child from State.

No child shall be taken or sent out of the State for the purpose of placing the child in a foster home or in a child-caring institution without first obtaining the written consent of the Department of Health and Human Services. The foster home or child-caring institution in which the child is placed shall report to the Department of Health and Human Services at such times as the Department of Health and Human Services may direct as to the location and well-being of such child until the child shall have reached the age of 18 years or shall have been legally adopted. (1931, c. 226, s. 3; 1947, c. 609, s. 3; 1973, c. 476, s. 138; 1997-443, s. 11A.118(a); 1998-202, s. 6.)

§ 7B-3703. Violation of Article a misdemeanor.

Every person acting for himself or for an agency who violates any of the provisions of this Article or who shall intentionally make any false statements to the Social Services Commission or the Secretary or an employee thereof acting for the Department of Health and Human Services in an official capacity in the placing or adoption of juvenile delinquents or dependents shall, upon conviction thereof, be guilty of a Class 2 misdemeanor. (1931, c. 226, s. 7; 1957, c. 100, s. 1; 1973, c. 476, s. 138; 1993, c. 539, s. 823; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.118(a); 1998-202, s. 6.)

§ 7B-3704. Definitions.

The term “Department” wherever used in this Article shall be construed to mean the Department of Health and Human Services. The term “Secretary” wherever used in this Article shall be construed to mean the Secretary of the Department of Health and Human Services. (1931, c. 226, s. 8; 1957, c. 100, s. 1; 1973, c. 476, s. 138; 1997-443, s. 11A.118(a); 1998-202, s. 6.)

§ 7B-3705. Application of Article.

None of the provisions of this Article shall apply when a child is brought into or sent into, or taken out of, or sent out of the State, by the guardian of the person of such child, or by a parent, stepparent, grandparent, uncle or aunt of such child, or by a brother, sister, half brother, or half sister of such child, if such brother, sister, half brother, or half sister is 18 years of age or older. (1947, c. 609, s. 5; 1971, c. 1231, s. 1; 1998-202, s. 6.)

ARTICLE 38.

Interstate Compact on the Placement of Children.

§ 7B-3800. Adoption of Compact.

The Interstate Compact on the Placement of Children is hereby enacted into law and entered into with all other jurisdictions legally joining therein in a form substantially as contained in this Article. It is the intent of the General Assembly that Article 37 of this Chapter shall govern interstate placements of children between North Carolina and any other jurisdictions not a party to this Compact. It is the intent of the General Assembly that Chapter 48 of the General Statutes shall govern the adoption of children within the boundaries of North Carolina.

Article I. Purpose and Policy.

It is the purpose and policy of the party states to cooperate with each other in the interstate placement of children to the end that:

(a) Each child requiring placement shall receive the maximum opportunity to be placed in a suitable environment and with persons or institutions having appropriate qualifications and facilities to provide a necessary and desirable degree and type of care.

(b) The appropriate authorities in a state where a child is to be placed may have full opportunity to ascertain the circumstances of the proposed placement, thereby promoting full compliance with applicable requirements for the protection of the child.

(c) The proper authorities of the state from which the placement is made may obtain the most complete information on the basis of which to evaluate a projected placement before it is made.

(d) Appropriate jurisdictional arrangements for the care of children will be promoted.

Article II. Definitions.

As used in this Compact:

(a) "Child" means a person who, by reason of minority, is legally subject to parental, guardianship or similar control.

(b) "Sending agency" means a party state officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency or other entity which sends, brings, or causes to be sent or brought any child to another party state.

(c) "Receiving state" means the state to which a child is sent, brought, or caused to be sent or brought, whether by public authorities or private persons or agencies, and whether for placement with state or local public authorities of [or] for placement with private agencies or persons.

(d) "Placement" means the arrangement for the care of a child in a family free or boarding home or in a child-caring agency or institution but does not include any institution caring for the mentally ill, mentally defective, or epileptic or any institution primarily educational in character, and any hospital or other medical facility.

(e) "Appropriate public authorities" as used in Article III shall, with reference to this State, mean the Department of Health and Human Services and said agency shall receive and act with reference to notices required by Article III.

(f) "Appropriate authority in the receiving state" as used in paragraph (a) of Article V shall, with reference to this State, means the Secretary.

(g) "Executive head" as used in Article VII means the Governor.

Article III. Conditions for Placement.

(a) No sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this Article and with the applicable laws of the receiving state governing the placement of children therein.

(b) Prior to sending, bringing, or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency shall furnish the appropriate public authorities in the receiving state written notice of the intention to send, bring, or place the child in the receiving state. The notice shall contain:

(1) The name, date, and place of birth of the child.
(2) The identity and address or addresses of the parents or legal guardian.
(3) The name and address of the person, agency or institution to or with which the sending agency proposes to send, bring, or place the child.
(4) A full statement of the reasons for such proposed action and evidence of the authority pursuant to which the placement is proposed to be made.

(c) Any public officer or agency in a receiving state which is in receipt of a notice pursuant to paragraph (b) of this Article may request of the sending agency, or any other appropriate officer or agency of or in the sending agency's state, and shall be entitled to receive therefrom, such supporting or additional information as it may deem necessary under the circumstances to carry out the purpose and policy of this Compact.

(d) The child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.

Article IV. Penalty for Illegal Placement.

The sending, bringing, or causing to be sent or brought into any receiving state of a child in violation of the terms of this Compact shall constitute a violation of the laws respecting the placement of children of both the state in which the sending agency is located or from which it sends or brings the child and of the receiving state. Such violation may be punished or subjected to penalty in either jurisdiction in accordance with its laws. In addition to liability for any such punishment or penalty, any such violation shall constitute full and sufficient grounds for the suspension or revocation of any license, permit, or other legal authorization held by the sending agency which empowers or allows it to place, or care for children.

Article V. Retention of Jurisdiction.

(a) The sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment, and disposition of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state. Such jurisdiction shall also include the power to effect or cause the return of the child or its transfer to another location and custody pursuant to law. The sending agency shall continue to have financial responsibility for support and maintenance of the child during the period of the placement. Nothing contained herein shall defeat a claim of jurisdiction by a receiving state sufficient to deal with an act of delinquency or crime committed therein.

(b) When the sending agency is a public agency, it may enter into an agreement with an authorized public or private agency in the receiving state providing for the performance of one or more services in respect of such case by the latter as agent for the sending agency.

(c) Nothing in this Compact shall be construed to prevent a private charitable agency authorized to place children in the receiving state from performing services or acting as agent in that state for a private charitable agency of the sending state; nor to prevent the agency in the receiving state from discharging financial responsibility for the support and maintenance of a child who has been placed on behalf of the sending agency without relieving the responsibility set forth in paragraph (a) hereof.

Article VI. Institutional Care of Delinquent Children.

A child adjudicated delinquent may be placed in an institution in another party jurisdiction pursuant to this Compact, but no such placement shall be made unless the child is given a court hearing on notice to the parent or guardian with opportunity to be heard, prior to the child's being sent to such other party jurisdiction for institutional care and the court finds that:

(1) Equivalent facilities for the child are not available in the sending agency's jurisdiction; and

(2) Institutional care in the other jurisdiction is in the best interests of the child and will not produce undue hardship.

Article VII. Compact Administrator.

The executive head of each jurisdiction party to this Compact shall designate an officer who shall be general coordinator of activities under this Compact in the officer's jurisdiction and who, acting jointly with like officers of other party jurisdictions, shall have power to promulgate rules and regulations to carry out more effectively the terms and provisions of this Compact.

Article VIII. Limitations.

This Compact shall not apply to: (a) the sending or bringing of a child into a receiving state by the child's parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or the child's guardian and leaving the child with any such relative or nonagency guardian in the receiving state. (b) Any placement, sending or bringing of a child into a receiving state pursuant to any other interstate compact to which both the state from which the child is sent or brought and the receiving state are party, or to any other agreement between said states which has the force of law.

Article IX. Enactment and Withdrawal.

This Compact shall be open to joinder by any state, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and, with the consent of Congress, the government of Canada or any province thereof. It shall become effective with respect to any such jurisdiction when such jurisdiction has enacted the same into law. Withdrawal from this Compact shall be by the enactment of a statute repealing the same, but shall not take effect until two years after the effective date of such statute and until written notice of the withdrawal has been given by the withdrawing state to the governor of each other party jurisdiction. Withdrawal of a party state shall not affect the rights, duties, and obligations under this Compact of any sending agency therein with respect to a placement made prior to the effective date of withdrawal.

Article X. Construction and Severability.

The provisions of this Compact shall be liberally construed to effectuate the purposes thereof. The provisions of this Compact shall be severable and if any phrase, clause, sentence, or provision of this Compact is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this Compact and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this Compact shall be held contrary to the constitution of any state party thereto, the Compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. (1971, c. 453, s. 1; 1973, c. 476, s. 138; 1983, c. 454, s. 8; 1997-443, s. 11A.118(a); 1998-202, s. 6; 1999-423, s. 3.)

Editor's Note. — Session Laws 1998-202, s. 37(b), makes this Article effective July 1, 1999, and applicable to acts committed on or after that date.

Session Laws 1998-202, s. 36, contains a severability clause.

CASE NOTES

Where custody of juveniles was granted to the biological mother, under the plain meaning of G.S. 7B-3800, the trial court was not obligated to follow the mandates of the Interstate Compact on the Placement of Children. Rholetter v. Rholetter, 162 N.C. App. 653, 592 S.E.2d 237, 2004 N.C. App. LEXIS 251 (2004).

Placing Children with Grandparents Was Not Placement for Purposes of Compact. — Trial court's actions in finding that children were neglected and dependent and placing them in the guardianship of their maternal grandparents did not constitute placement mandating compliance with the Interstate Compact on the Placement of Children, G.S. 7B-3800, because it was not in foster care or as a preliminary to adoption. In re J.E., — N.C. App. —, 643 S.E.2d 70, 2007 N.C. App. LEXIS 801 (2007).

"Sending Agency" — Natural Parents. — Because defendants, a child's natural parents, were persons who sent the child to North Carolina for possible adoption by plaintiffs, they were the "sending agency" as that term is used in Article II(b) of the Compact, and as such, pursuant to Article V, they retained jurisdiction, that is, authority or control over the child until his adoption, including the power to effect or cause the return of the child to their home state and "to determine all matters in relation to the custody" of the child; therefore, the trial court properly determined that it had no jurisdiction over a custody proceeding brought by potential adoptive parents. Stancil v. Brock, 108 N.C. App. 745, 425 S.E.2d 446 (1993), decided prior to enactment of this Chapter.

Placement With Relatives. — When, in a dependency proceeding, a trial court placed a child's custody with the child's foster parents without finding it was contrary to the child's best interests to place her with willing relatives, pursuant to G.S. 7B-903(a)(2)c, this was error because, inter alia, exempting review hearings from the requirement to first consider placement with relatives risked undermining the Interstate Compact on the Placement of Children (ICPC), G.S. 7B-3800, as home studies of out-of-state relatives required by the ICPC were often not completed until a review hearing was held. In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

Cited in In re Robinson, 132 N.C. App. 122, 510 S.E.2d 190 (1999).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The opinion below was rendered prior to the enactment of this Chapter.*

Applicability When Child Is Sent Out of State. — The Interstate Compact on the Placement of Children applies when a North Carolina child is sent by a court, government agency, or child-placing agency to live with a parent, relative, or guardian in another party state. See opinion of Attorney General Dr. Sarah T. Morrow, Secretary, North Carolina Department of Human Resources, 52 N.C.A.G. 22 (1982).

§ 7B-3801. Financial responsibility under Compact.

Financial responsibility for any child placed pursuant to the provisions of the Interstate Compact on the Placement of Children shall be determined in accordance with the provisions of Article V thereof in the first instance. However, in the event of partial or complete default of performance thereunder, the provisions of any other state laws fixing responsibility for the support of children also may be invoked. (1971, c. 453, s. 2; 1998-202, s. 6.)

§ 7B-3802. Agreements under Compact.

The officers and agencies of this State and its subdivisions having authority to place children are hereby empowered to enter into agreements with appropriate officers or agencies of or in other party states pursuant to paragraph (b) of Article V of the Interstate Compact on the Placement of Children. Any such agreement which contains a financial commitment or imposes a financial obligation on this State or subdivision or agency thereof shall not be binding unless it has the approval in writing of the Secretary of the Department of Health and Human Services in the case of the State and of the county director of social services in the case of a county or other subdivision of the State. (1971, c. 453, s. 2; 1973, c. 476, s. 138; 1997-443, s. 11A.118(a); 1998-202, s. 6.)

§ 7B-3803. Visitation, inspection or supervision.

Any requirements for visitation, inspection or supervision of children, homes, institutions or other agencies in another party state which may apply under the laws of this State shall be deemed to be met if performed pursuant to an agreement entered into by appropriate officers or agencies of this State or a subdivision thereof as contemplated by paragraph (b) of Article V of the Interstate Compact on the Placement of Children. (1971, c. 453, s. 2; 1998-202, s. 6.)

§ 7B-3804. Compact to govern between party states.

The provisions of Article 37 of this Chapter shall not apply to placements made pursuant to the Interstate Compact on the Placement of Children. (1971, c. 453, s. 2; 1998-202, s. 6.)

§ 7B-3805. Placement of delinquents.

Any court having jurisdiction to place delinquent children may place such a child in an institution or in another state pursuant to Article VI of the

Interstate Compact on the Placement of Children and shall retain jurisdiction as provided in Article V thereof. (1971, c. 453, s. 2; 1998-202, s. 6.)

§ 7B-3806. Compact Administrator.

The Governor is hereby authorized to appoint a Compact Administrator in accordance with the terms of said Article VII. (1971, c. 453, s. 2; 1998-202, s. 6.)

Article 39.

Interstate Compact on Adoption and Medical Assistance.

§ 7B-3900. Legislative findings and purposes.

(a) Finding adoptive families for children, for whom state assistance is desirable pursuant to G.S. 108A-49 and G.S. 108A-50, and assuring the protection of the interests of the children affected during the entire assistance period require special measures when the adoptive parents move to another state or are residents of another state. Additionally, the provision of medical and other necessary services for children receiving State assistance encounters special difficulties when the provision of services takes place in another state.

(b) In recognition of the need for special measures, the General Assembly authorizes the Secretary of the Department of Health and Human Services to enter into interstate agreements with agencies of other states for the protection of children on behalf of whom adoption assistance is being provided by the Department of Health and Human Services and to provide procedures for interstate adoption assistance payments, including payments for medical services. (1999-190, s. 5.)

§ 7B-3901. Definitions.

Unless the context requires otherwise, as used in this Article:

(1) "Adoption assistance state" means the state that is a signatory to an adoption assistance agreement in a particular case.

(2) "Residence state" means the state where the child is living.

(3) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, or any territory or possession subject to the jurisdiction of the United States. (1999-190, s. 5.)

Editor's Note. — The definitions in the section above have been set out in alphabetical order pursuant to direction from the Revisor of Statutes.

§ 7B-3902. Compacts authorized.

The Secretary of the Department of Health and Human Services may develop, participate in the development of, negotiate, and enter into one or more interstate compacts on behalf of this State with other states to implement this Article. When entered into, and for so long as it remains in force, such a compact shall have the full force and effect of law. (1999-190, s. 5.)

§ 7B-3903. Content of compacts.

(a) A compact under this Article shall contain all of the following provisions:

(1) A provision making it available for joinder by all states.

(2) A provision for withdrawal from the compact upon written notice to the parties, with a period of at least one year between the date of the notice and effective date of the withdrawal.

(3) A requirement that the protections afforded by or under the compact continue in force for the duration of the adoption assistance and apply to all children and their adoptive parents who, on the effective date of the withdrawal, are receiving adoption assistance from a party state other than the state in which they are a resident and have their principal place of abode.

(4) A requirement that each instance of adoption assistance to which the compact applies be covered by an adoption assistance agreement in writing between the adoptive parents and the state child welfare agency of the state which undertakes to provide the adoption assistance and that any such agreement be expressly for the benefit of the adopted child and enforceable by the adoptive parents and the state child welfare agency providing the adoption assistance.

(5) Any other provisions appropriate to implement the proper administration of the compact.

(b) A compact entered into under this Article may contain any of the following provisions:

(1) Provisions establishing procedures and entitlement to medical and other necessary social services for the child in accordance with applicable laws, even though the child and the adoptive parents are in a state other than the one responsible for or providing the services or the funds to defray part or all of the expense thereof.

(2) Any other provisions appropriate or incidental to the proper administration of the compact. (1999-190, s. 5.)

§ 7B-3904. Medical assistance.

(a) A child with special needs who is a resident of this State who is the subject of an adoption assistance agreement with another state shall be accepted as being entitled to receive medical assistance certification from this State upon the filing in the department of social services of the county in which the child resides a certified copy of the adoption assistance agreement obtained from the adoption assistance state.

(b) The Division of Medical Assistance shall consider the holder of a medical assistance certification under this section to be entitled to the same medical benefits under the laws of this State as any other holder of a medical assistance certification and shall process and make payment on claims on account of that holder in the same manner and under the same conditions and procedures that apply to other recipients of medical assistance.

(c) The provisions of this section apply only to medical assistance for children under adoption assistance agreements from states that have entered into a compact with this State under which the other state provides medical assistance to children with special needs under adoption assistance agreements made by this State. (1999-190, s. 5.)

§ 7B-3905. Federal participation.

The Department of Health and Human Services, in connection with the administration of this Article and any compact entered into pursuant to this Article, shall include the provision of adoption assistance and medical assistance for which the federal government pays some or all of the cost in any state plan made pursuant to the Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272), Titles IV (E) and XIX of the Social Security Act and any other applicable federal laws. The Department shall apply for and administer all relevant federal aid in accordance with law. (1999-190, s. 5.)

§ 7B-3906. Compact Administrator.

The Secretary of the Department of Health and Human Services may appoint a Compact Administrator who shall be the general coordinator of activities under this Compact in this State and who, acting jointly with like officers of other party states, may promulgate rules to carry out more effectively the terms and provisions of this Compact. (1999-190, s. 5.)

ARTICLE 40.

Interstate Compact for Juveniles.

(Contingent effective date — see notes)

§ 7B-4000. (Contingent effective date — see notes) Short title.

This Article may be cited as "The Interstate Compact for Juveniles". (2005-194, s. 1.)

Article Has a Contingent Effective Date. — Session Laws 2005-194, which enacted this Article, in s. 5, states in part, that this Article becomes effective only when 35 states have adopted The Interstate Compact for Juveniles, as set forth in the Compact.

Session Laws 2005-194, s. 3, effective July 15, 2005, provides: "The Secretary of the Department of Juvenile Justice and Delinquency Prevention shall notify the Revisor of Statutes when The Interstate Compact for Juveniles becomes effective under the terms of the Compact. The Secretary of the Department of Juvenile Justice and Delinquency Prevention shall notify the Revisor of Statutes when The Interstate Compact for Juveniles has been adopted by all states, as defined in the Compact."

Session Laws 2005-194, s. 4, effective July 15, 2005, provides: "This act shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act. The Department of Juvenile Justice and Delinquency Prevention shall implement the provisions of this act with funds that are otherwise appropriated or available to the Department."

Session Laws 2005-194, s. 5, effective July 15, 2005, provides: "Section 1 of this act becomes effective only when 35 states have adopted The Interstate Compact for Juveniles, as set forth in the Compact. Section 2 of this act becomes effective only when all states, as defined in the Compact, have adopted The Interstate Compact for Juveniles. The remainder of this act is effective when it becomes law."

§ 7B-4001. (Contingent effective date — see notes) Governor to execute Compact; form of Compact.

The Governor of North Carolina is authorized and directed to execute a Compact on behalf of the State of North Carolina with any state of the United States legally joining therein in the form substantially as follows:

"Article I.
Purpose.

(a) The compacting states to this Interstate Compact recognize that each state is responsible for the proper supervision or return of juveniles, delinquents, and status offenders who are on probation or parole and who have absconded, escaped, or run away from supervision and control and in so doing have endangered their own safety and the safety of others. The compacting states also recognize that each state is responsible for the safe return of juveniles who have run away from home and in doing so have left their state of residence. The compacting states also recognize that Congress, by enacting the Crime Control Act, 4 U.S.C. § 112 (1965), has authorized and encouraged compacts for cooperative efforts and mutual assistance in the prevention of crime.

(b) It is the purpose of this Compact, through means of joint and cooperative action among the compacting states to:

(1) Ensure that the adjudicated juveniles and status offenders subject to this Compact are provided adequate supervision and services in the receiving state as ordered by the adjudicating judge or parole authority in the sending state;

(2) Ensure that the public safety interests of the citizens, including the victims of juvenile offenders, in both the sending and receiving states are adequately protected;

(3) Return juveniles who have run away, absconded, or escaped from supervision or control, or have been accused of an offense to the state requesting their return;

(4) Make contracts for the cooperative institutionalization in public facilities in member states for delinquent youth needing special services;

(5) Provide for the effective tracking and supervision of juveniles;

(6) Equitably allocate the costs, benefits, and obligations of the compacting states;

(7) Establish procedures to manage the movement between states of juvenile offenders released to the community under the jurisdiction of courts, juvenile departments, or any other criminal or juvenile justice agency which has jurisdiction over juvenile offenders;

(8) Ensure immediate notice to jurisdictions where defined offenders are authorized to travel or to relocate across state lines;

(9) Establish procedures to resolve pending charges (detainers) against juvenile offenders prior to transfer or release to the community under the terms of this Compact;

(10) Establish a system of uniform data collection on information pertaining to juveniles subject to this Compact that allows access by authorized juvenile justice and criminal justice officials and regular reporting of Compact activities to heads of state executive, judicial, and legislative branches and juvenile and criminal justice administrators;

(11) Monitor compliance with rules governing interstate movement of juveniles and initiate interventions to address and correct noncompliance;

(12) Coordinate training and education regarding the regulation of interstate movement of juveniles for officials involved in such activity; and

(13) Coordinate the implementation and operation of the Compact with the Interstate Compact for the Placement of Children, the Interstate Compact for Adult Offender Supervision, and other compacts affecting juveniles particularly in those cases where concurrent or overlapping supervision issues arise.

(c) It is the policy of the compacting states that the activities conducted by the Interstate Commission created herein are the formation of public policies and therefore are public business. Furthermore, the compacting states shall cooperate and observe their individual and collective duties and responsibilities for the prompt return and acceptance of juveniles subject to the provisions of this Compact. The provisions of this Compact shall be reasonably and liberally construed to accomplish the purposes and policies of the Compact.

Article 40 has contingent effective date. See notes.

Article II.
Definitions.

As used in this Compact, unless the context clearly requires a different construction:

(1) "Bylaws" means those bylaws established by the Interstate Commission for its governance or for directing or controlling its actions or conduct.

(2) "Compact Administrator" means the individual in each compacting state appointed pursuant to the terms of this Compact responsible for the administration and management of the state's supervision and transfer of juveniles subject to the terms of this Compact, the rules adopted by the Interstate Commission, and policies adopted by the State Council under this Compact.

(3) "Compacting State" means any state which has enacted the enabling legislation for this Compact.

(4) "Commissioner" means the voting representative of each compacting state appointed pursuant to Article III of this Compact.

(5) "Court" means any court having jurisdiction over delinquent, neglected, or dependent children.

(6) "Deputy Compact Administrator" means the individual, if any, in each compacting state appointed to act on behalf of a Compact Administrator pursuant to the terms of this Compact responsible for the administration and management of the state's supervision and transfer of juveniles subject to the terms of this compact, the rules adopted by the Interstate Commission, and policies adopted by the State Council under this Compact.

(7) "Interstate Commission" means the Interstate Commission for Juveniles created by Article III of this Compact.

(8) "Juvenile" means any person defined as a juvenile in any member state or by the rules of the Interstate Commission, including:

  a. Accused Delinquent. — A person charged with an offense that, if committed by an adult, would be a criminal offense;

  b. Adjudicated Delinquent. — A person found to have committed an offense that, if committed by an adult, would be a criminal offense;

  c. Accused Status Offender. — A person charged with an offense that would not be a criminal offense if committed by an adult;

  d. Adjudicated Status Offender. — A person found to have committed an offense that would not be a criminal offense if committed by an adult; and

  e. Nonoffender. — A person in need of supervision who has not been accused or adjudicated a status offender or delinquent.

(9) "Noncompacting State" means any state which has not enacted the enabling legislation for this Compact.

(10) "Probation" or "Parole" means any kind of supervision or conditional release of juveniles authorized under the laws of the compacting states.

(11) "Rule" means a written statement by the Interstate Commission promulgated pursuant to Article VI of this Compact that is of general applicability, implements, interprets, or prescribes a policy or provision of the Compact, or an organizational, procedural, or practice requirement of the Commission, and has the force and effect of statutory law in a compacting state, and includes the amendment, repeal, or suspension of an existing rule.

Article 40 has contingent effective date. See notes.

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(12) "State" means a state of the United States, the District of Columbia or its designee, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands.

Article III.
Interstate Commission for Juveniles.

(a) The compacting states hereby create the "Interstate Commission for Juveniles." The Commission shall be a body corporate and joint agency of the compacting states. The Commission shall have all the responsibilities, powers, and duties set forth herein, and such additional powers as may be conferred upon it by subsequent action of the respective legislatures of the compacting states in accordance with the terms of this Compact.

(b) The Interstate Commission shall consist of commissioners appointed by the appropriate appointing authority in each state pursuant to the rules and requirements of each compacting state and in consultation with the State Council for Interstate Juvenile Supervision created hereunder. The Commissioner shall be the compact administrator, deputy compact administrator, or designee from that state who shall serve on the Interstate Commission in such capacity under or pursuant to the applicable law of the compacting state.

(c) In addition to the commissioners who are the voting representatives of each state, the Interstate Commission shall include individuals who are not commissioners, but who are members of interested organizations. Such noncommissioner members must include a member of the national organizations of governors, legislators, state chief justices, attorneys general, Interstate Compact for Adult Offender Supervision, Interstate Compact for the Placement of Children, juvenile justice and juvenile corrections officials, and crime victims. All noncommissioner members of the Interstate Commission shall be ex officio, nonvoting members. The Interstate Commission may provide in its bylaws for such additional ex officio, nonvoting members, including members of other national organizations, in such numbers as shall be determined by the Commission.

(d) Each compacting state represented at any meeting of the Commission is entitled to one vote. A majority of the compacting states shall constitute a quorum for the transaction of business, unless a larger quorum is required by the bylaws of the Interstate Commission.

(e) The Commission shall meet at least once each calendar year. The chairperson may call additional meetings and, upon the request of a simple majority of the compacting states, shall call additional meetings. Public notice shall be given of all meetings, and meetings shall be open to the public.

(f) The Interstate Commission shall establish an executive committee, which shall include commission officers, members, and others as determined by the bylaws. The executive committee shall have the power to act on behalf of the Interstate Commission during periods when the Interstate Commission is not in session, with the exception of rule making and/or amendment to the Compact. The executive committee shall oversee the day-to-day activities of the administration of the Compact managed by an executive director and Interstate Commission staff, administer enforcement and compliance with the provisions of the Compact, its bylaws and rules, and perform other duties as directed by the Interstate Commission or set forth in the bylaws.

(g) Each member of the Interstate Commission shall have the right and power to cast a vote to which that compacting state is entitled and to participate in the business and affairs of the Interstate Commission. A member shall vote in person and shall not delegate a vote to another compacting state. However, a commissioner, in consultation with the state council, shall appoint another authorized representative, in the absence of the commissioner from that state, to cast a vote on behalf of the compacting state at a specified meeting. The bylaws may provide for members' participation in meetings by telephone or other means of telecommunication or electronic communication.

(h) The Interstate Commission's bylaws shall establish conditions and procedures under which the Interstate Commission shall make its information and official records available to the public for inspection or copying. The Interstate Commission may exempt from disclosure any information or official records to the extent they would adversely affect personal privacy rights or proprietary interests.

(i) Public notice shall be given of all meetings, and all meetings shall be open to the public, except as set forth in the Rules or as otherwise provided in the Compact. The Interstate Commission and any of its committees may close a meeting to the public where it determines by two-thirds vote that an open meeting would be likely to:

(1) Relate solely to the Interstate Commission's internal personnel practices and procedures;
(2) Disclose matters specifically exempted from disclosure by statute;
(3) Disclose trade secrets or commercial or financial information which is privileged or confidential;
(4) Involve accusing any person of a crime or formally censuring any person;
(5) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;
(6) Disclose investigative records compiled for law enforcement purposes;
(7) Disclose information contained in or related to examination, operating, or condition reports prepared by, or on behalf of or for the use of, the Interstate Commission with respect to a regulated person or entity for the purpose of regulation or supervision of such person or entity;
(8) Disclose information, the premature disclosure of which would significantly endanger the stability of a regulated person or entity; or
(9) Specifically relate to the Interstate Commission's issuance of a subpoena or its participation in a civil action or other legal proceeding.

(j) For every meeting closed pursuant to this provision, the Interstate Commission's legal counsel shall publicly certify that, in the legal counsel's opinion, the meeting may be closed to the public and shall reference each relevant exemptive provision. The Interstate Commission shall keep minutes which shall fully and clearly describe all matters discussed in any meeting and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any roll call vote (reflected in the vote of each member on the question). All documents considered in connection with any action shall be identified in the minutes.

(k) The Interstate Commission shall collect standardized data concerning the interstate movement of juveniles as directed through its rules which shall specify the data to be collected, the means of collection and data exchange, and reporting requirements. Such methods of data collection, exchange, and reporting shall insofar as is reasonably possible conform to up-to-date technology and coordinate its information functions with the appropriate repository of records.

Article 40 has contingent effective date. See notes.

Article IV.
Powers and Duties of the Interstate Commission.

(a) The Interstate Commission shall have the following powers and duties:
  (1) To provide for dispute resolution among compacting states.
  (2) To promulgate rules to effect the purposes and obligations as enumerated in this Compact, which shall have the force and effect of statutory law and shall be binding in the compacting states to the extent and in the manner provided in this Compact.
  (3) To oversee, supervise, and coordinate the interstate movement of juveniles subject to the terms of this Compact and any bylaws adopted and rules promulgated by the Interstate Commission.
  (4) To enforce compliance with the Compact provisions, the rules promulgated by the Interstate Commission, and the bylaws, using all necessary and proper means including, but not limited to, the use of judicial process.
  (5) To establish and maintain offices which shall be located within one or more of the compacting states.
  (6) To purchase and maintain insurance and bonds.
  (7) To borrow, accept, hire, or contract for services of personnel.
  (8) To establish and appoint committees and hire staff which it deems necessary for the carrying out of its functions including, but not limited to, an executive committee as required by Article III of this Compact, which shall have the power to act on behalf of the Interstate Commission in carrying out its powers and duties hereunder.
  (9) To elect or appoint such officers, attorneys, employees, agents, or consultants, and to fix their compensation, define their duties, and determine their qualifications; and to establish the Interstate Commission's personnel policies and programs relating to, inter alia, conflicts of interest, rates of compensation, and qualifications of personnel.
  (10) To accept any and all donations and grants of money, equipment, supplies, materials, and services, and to receive, utilize, and dispose of them.
  (11) To lease, purchase, accept contributions or donations of, or otherwise to own, hold, improve, or use any property, real, personal, or mixed.
  (12) To sell, convey, mortgage, pledge, lease, exchange, abandon, or otherwise dispose of any property, real, personal, or mixed.
  (13) To establish a budget and make expenditures and levy dues as provided in Article VIII of this Compact.
  (14) To sue and be sued.
  (15) To adopt a seal and bylaws governing the management and operation of the Interstate Commission.
  (16) To perform such functions as may be necessary or appropriate to achieve the purposes of this Compact.
  (17) To report annually to the legislatures, governors, judiciary, and state councils of the compacting states concerning the activities of the Interstate Commission during the preceding year. Such reports shall also include any recommendations that may have been adopted by the Interstate Commission.
  (18) To coordinate education, training, and public awareness regarding the interstate movement of juveniles for officials involved in such activity.
  (19) To establish uniform standards of the reporting, collecting, and exchanging of data.

(b) The Interstate Commission shall maintain its corporate books and records in accordance with the bylaws.

Article V.
Organization and Operation of the Interstate Commission.

(a) Bylaws. — The Interstate Commission shall, by a majority of the members present and voting, within 12 months after the first Interstate Commission meeting, adopt bylaws to govern its conduct as may be necessary or appropriate to carry out the purposes of the Compact, including, but not limited to:

(1) Establishing the fiscal year of the Interstate Commission;
(2) Establishing an executive committee and such other committees as may be necessary;
(3) Providing for the establishment of committees governing any general or specific delegation of any authority or function of the Interstate Commission;
(4) Providing reasonable procedures for calling and conducting meetings of the Interstate Commission and ensuring reasonable notice of each such meeting;
(5) Establishing the titles and responsibilities of the officers of the Interstate Commission;
(6) Providing a mechanism for concluding the operations of the Interstate Commission and the return of any surplus funds that may exist upon the termination of the Compact after the payment and/or reserving of all of its debts and obligations;
(7) Providing "start-up" rules for initial administration of the Compact; and
(8) Establishing standards and procedures for compliance and technical assistance in carrying out the Compact.

(b) Officers and Staff. — The Interstate Commission shall, by a majority of the members, elect annually from among its members a chairperson and a vice-chairperson, each of whom shall have such authority and duties as may be specified in the bylaws. The chairperson or, in the chairperson's absence or disability, the vice-chairperson shall preside at all meetings of the Interstate Commission. The officers so elected shall serve without compensation or remuneration from the Interstate Commission; provided that, subject to the availability of budgeted funds, the officers shall be reimbursed for any ordinary and necessary costs and expenses incurred by them in the performance of their duties and responsibilities as officers of the Interstate Commission.

The Interstate Commission shall, through its executive committee, appoint or retain an executive director for such period, upon such terms and conditions and for such compensation as the Interstate Commission may deem appropriate. The executive director shall serve as secretary to the Interstate Commission, but shall not be a member and shall hire and supervise such other staff as may be authorized by the Interstate Commission.

(c) Qualified Immunity, Defense, and Indemnification. — The Commission's executive director and employees shall be immune from suit and liability, either personally or in their official capacity, for any claim for damage to or loss of property or personal injury or other civil liability caused or arising out of or relating to any actual or alleged act, error, or omission that occurred, or that such person had a reasonable basis for believing occurred within the scope of Commission employment, duties, or responsibilities; provided, that any such person shall not be protected from suit or liability for any damage, loss, injury,

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or liability caused by the intentional or willful and wanton misconduct of any such person.

The liability of any commissioner, or the employee or agent of a commissioner, acting within the scope of such person's employment or duties for acts, errors, or omissions occurring within such person's state may not exceed the limits of liability set forth under the Constitution and laws of that state for state officials, employees, and agents. Nothing in this subsection shall be construed to protect any such person from suit or liability for any damage, loss, injury, or liability caused by the intentional or willful and wanton misconduct of any such person.

The Interstate Commission shall defend the executive director or the employees or representatives of the Interstate Commission and, subject to the approval of the Attorney General of the state represented by any commissioner of a compacting state, shall defend such commissioner or the commissioner's representatives or employees in any civil action seeking to impose liability arising out of any actual or alleged act, error, or omission that occurred within the scope of Interstate Commission employment, duties, or responsibilities, or that the defendant had a reasonable basis for believing occurred within the scope of Interstate Commission employment, duties, or responsibilities, provided that the actual or alleged act, error, or omission did not result from intentional or willful and wanton misconduct on the part of such person.

The Interstate Commission shall indemnify and hold the commissioner of a compacting state, or the commissioner's representatives or employees, or the Interstate Commission's representatives or employees, harmless in the amount of any settlement or judgment obtained against such persons arising out of any actual or alleged act, error, or omission that occurred within the scope of Interstate Commission employment, duties, or responsibilities, or that such persons had a reasonable basis for believing occurred within the scope of Interstate Commission employment, duties, or responsibilities, provided that the actual or alleged act, error, or omission did not result from intentional or willful and wanton misconduct on the part of such persons.

Article VI.

Rule-Making Functions of the Interstate Commission.

(a) The Interstate Commission shall promulgate and publish rules in order to effectively and efficiently achieve the purposes of the Compact.

(b) Rule making shall occur pursuant to the criteria set forth in this Article and the bylaws and rules adopted pursuant thereto. Such rule making shall substantially conform to the principles of the "Model State Administrative Procedures Act," 1981 Act, Uniform Laws Annotated, Vol. 16, p. 1 (2000), or such other administrative procedures acts, as the Interstate Commission deems appropriate consistent with due process requirements under the United States Constitution as now or hereafter interpreted by the United States Supreme Court. All rules and amendments shall become binding as of the date specified, as published with the final version of the rule as approved by the Commission.

(c) When promulgating a rule, the Interstate Commission shall, at a minimum:

- (1) Publish the proposed rule's entire text stating the reason for that proposed rule;
- (2) Allow and invite any and all persons to submit written data, facts, opinions, and arguments, which information shall be added to the record and be made publicly available;

(3) Provide an opportunity for an informal hearing if petitioned by 10 or more persons;

(4) Promulgate a final rule and its effective date, if appropriate, based on input from state or local officials, or interested parties; and

(5) Allow, not later than 60 days after a rule is promulgated, any interested person to file a petition in the United States District Court for the District of Columbia or in the Federal District Court where the Interstate Commission's principal office is located for judicial review of such rule.

(d) If the court finds that the Interstate Commission's action is not supported by substantial evidence in the rule-making record, the court shall hold the rule unlawful and set it aside. For purposes of this subsection, evidence is substantial if it would be considered substantial evidence under the Model State Administrative Procedures Act.

(e) If a majority of the legislatures of the compacting states rejects a rule, those states may, by enactment of a statute or resolution in the same manner used to adopt the Compact, cause that rule to have no further force and effect in any compacting state.

(f) The existing rules governing the operation of the Interstate Compact on Juveniles superseded by this act shall be null and void when all states, as defined in the Compact, have adopted The Interstate Compact for Juveniles.

(g) Upon determination by the Interstate Commission that a state of emergency exists, it may promulgate an emergency rule which shall become effective immediately upon adoption, provided that the usual rule-making procedures provided hereunder shall be retroactively applied to said rule as soon as reasonably possible but no later than 90 days after the effective date of the emergency rule.

Article VII.

Oversight, Enforcement, and Dispute Resolution by the Interstate Commission.

(a) Oversight. — The Interstate Commission shall oversee the administration and operations of the interstate movement of juveniles subject to this Compact in the compacting states and shall monitor such activities being administered in noncompacting states which may significantly affect compacting states.

The courts and executive agencies in each compacting state shall enforce this Compact and shall take all actions necessary and appropriate to effectuate the Compact's purposes and intent. The provisions of this Compact and the rules promulgated hereunder shall be received by all the judges, public officers, commissions, and departments of the state government as evidence of the authorized statute and administrative rules, and all courts shall take judicial notice of the Compact and the rules. In any judicial or administrative proceeding in a compacting state pertaining to the subject matter of this Compact which may affect the powers, responsibilities, or actions of the Interstate Commission, it shall be entitled to receive all service of process in any such proceeding and shall have standing to intervene in the proceeding for all purposes.

(b) Dispute Resolution. — The compacting states shall report to the Interstate Commission on all issues and activities necessary for the administration of the Compact as well as issues and activities pertaining to compliance with the provisions of the Compact and its bylaws and rules.

The Interstate Commission shall attempt, upon the request of a compacting state, to resolve any disputes or other issues which are subject to the Compact and which may arise among compacting states and between compacting and noncompacting states. The Commission shall promulgate a rule providing for both mediation and binding dispute resolution for disputes among the compacting states.

The Interstate Commission, in the reasonable exercise of its discretion, shall enforce the provisions and rules of this Compact using any or all means set forth in Article XI of this Compact.

Article VIII.
Finance.

(a) The Interstate Commission shall pay or provide for the payment of the reasonable expenses of its establishment, organization, and ongoing activities.

(b) The Interstate Commission shall levy on and collect an annual assessment from each compacting state to cover the cost of the internal operations and activities of the Interstate Commission and its staff which must be in a total amount sufficient to cover the Interstate Commission's annual budget as approved each year. The aggregate annual assessment amount shall be allocated based upon a formula to be determined by the Interstate Commission, taking into consideration the population of each compacting state and the volume of interstate movement of juveniles in each compacting state and shall promulgate a rule binding upon all compacting states which governs said assessment.

(c) The Interstate Commission shall not incur any obligations of any kind prior to securing the funds adequate to meet the same; nor shall the Interstate Commission pledge the credit of any of the compacting states, except by and with the authority of the compacting state.

(d) The Interstate Commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Interstate Commission shall be subject to the audit and accounting procedures established under its bylaws. However, all receipts and disbursements of funds handled by the Interstate Commission shall be audited yearly by a certified or licensed public accountant, and the report of the audit shall be included in and become part of the annual report of the Interstate Commission.

Article IX.
The State Council.

Each member state shall create a State Council for Interstate Juvenile Supervision. While each state may determine the membership of its own state council, its membership must include at least one representative from the legislative, judicial, and executive branches of government, victims groups, and the compact administrator, deputy compact administrator, or designee. Each compacting state retains the right to determine the qualifications of the compact administrator or deputy compact administrator. Each state council will advise and may exercise oversight and advocacy concerning that state's participation in Interstate Commission activities and other duties as may be determined by that state, including, but not limited to, development of policy concerning operations and procedures of the Compact within that state.

Article 40 has contingent effective date. See notes.

Article X.
Compacting States, Effective Date, and Amendment.

(a) Any state, the District of Columbia or its designee, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands, as defined in Article II of this Compact, is eligible to become a compacting state.

(b) The Compact shall become effective and binding upon legislative enactment of the Compact into law by no less than 35 of the states. The initial effective date shall be the later of July 1, 2004, or upon enactment into law by the 35th jurisdiction. Thereafter, it shall become effective and binding as to any other compacting state upon enactment of the Compact into law by that state. The governors of nonmember states or their designees shall be invited to participate in the activities of the Interstate Commission on a nonvoting basis prior to adoption of the Compact by all states and territories of the United States.

(c) The Interstate Commission may propose amendments to the Compact for enactment by the compacting states. No amendment shall become effective and binding upon the Interstate Commission and the compacting states unless and until it is enacted into law by unanimous consent of the compacting states.

Article XI.
Withdrawal, Default, Termination, and Judicial Enforcement.

(a) Withdrawal. — Once effective, the Compact shall continue in force and remain binding upon each and every compacting state; provided that a compacting state may withdraw from the Compact by specifically repealing the statute which enacted the Compact into law.

The effective date of withdrawal is the effective date of the repeal.

The withdrawing state shall immediately notify the chairperson of the Interstate Commission in writing upon the introduction of legislation repealing this Compact in the withdrawing state. The Interstate Commission shall notify the other compacting states of the withdrawing state's intent to withdraw within 60 days of its receipt thereof.

The withdrawing state is responsible for all assessments, obligations, and liabilities incurred through the effective date of withdrawal, including any obligations, the performance of which extend beyond the effective date of withdrawal.

Reinstatement following withdrawal of any compacting state shall occur upon the withdrawing state reenacting the Compact or upon such later date as determined by the Interstate Commission.

(b) Technical Assistance, Fines, Suspension, Termination, and Default. — If the Interstate Commission determines that any compacting state has at any time defaulted in the performance of any of its obligations or responsibilities under this Compact, or the bylaws or duly promulgated rules, the Interstate Commission may impose any or all of the following penalties:

(1) Remedial training and technical assistance as directed by the Interstate Commission;

(2) Alternative Dispute Resolution;

(3) Fines, fees, and costs in such amounts as are deemed to be reasonable as fixed by the Interstate Commission; and

(4) Suspension or termination of membership in the Compact, which shall be imposed only after all other reasonable means of securing compliance under the bylaws and rules have been exhausted, and the

Interstate Commission has therefore determined that the offending state is in default. Immediate notice of suspension shall be given by the Interstate Commission to the Governor, the Chief Justice, or the Chief Judicial Officer of the state, the majority and minority leaders of the defaulting state's legislature, and the state council.

The grounds for default include, but are not limited to, failure of a compacting state to perform such obligations or responsibilities imposed upon it by this Compact, the bylaws, or duly promulgated rules, and any other grounds designated in Commission bylaws and rules. The Interstate Commission shall immediately notify the defaulting state in writing of the penalty imposed by the Interstate Commission and of the default pending a cure of the default. The Commission shall stipulate the conditions and the time period within which the defaulting state must cure its default. If the defaulting state fails to cure the default within the time period specified by the Commission, the defaulting state shall be terminated from the Compact upon an affirmative vote of a majority of the compacting states, and all rights, privileges, and benefits conferred by this Compact shall be terminated from the effective date of termination.

Within 60 days of the effective date of termination of a defaulting state, the Commission shall notify the Governor, the Chief Justice or Chief Judicial Officer, the majority and minority leaders of the defaulting state's legislature, and the state council of the termination.

The defaulting state is responsible for all assessments, obligations, and liabilities incurred through the effective date of termination, including any obligations, the performance of which extends beyond the effective date of termination.

The Interstate Commission shall not bear any costs relating to the defaulting state unless otherwise mutually agreed upon in writing between the Interstate Commission and the defaulting state.

Reinstatement following termination of any compacting state requires both a reenactment of the Compact by the defaulting state and the approval of the Interstate Commission pursuant to the rules.

(c) Judicial Enforcement. — The Interstate Commission may, by majority vote of the members, initiate legal action in the United States District Court for the District of Columbia or, at the discretion of the Interstate Commission, in the federal district where the Interstate Commission has its offices to enforce compliance with the provisions of the Compact and its duly promulgated rules and bylaws, against any compacting state in default. In the event judicial enforcement is necessary, the prevailing party shall be awarded all costs of such litigation, including reasonable attorneys' fees.

(d) Dissolution of Compact. — The Compact dissolves effective upon the date of the withdrawal or default of the compacting state, which reduces membership in the Compact to one compacting state.

Upon the dissolution of this Compact, the Compact becomes null and void and shall be of no further force or effect, and the business and affairs of the Interstate Commission shall be concluded, and any surplus funds shall be distributed in accordance with the bylaws.

Article XII.
Severability and Construction.

(a) The provisions of this Compact shall be severable, and if any phrase, clause, sentence, or provision is deemed unenforceable, the remaining provisions of the Compact shall be enforceable.

(b) The provisions of this Compact shall be liberally construed to effectuate its purposes.

Article XIII.
Binding Effect of Compact and Other Laws.

(a) Other Laws. — Nothing herein prevents the enforcement of any other law of a compacting state that is not inconsistent with this Compact.

All compacting states' laws, other than state Constitutions and other interstate compacts, conflicting with this Compact are superseded to the extent of the conflict.

(b) Binding Effect of the Compact. — All lawful actions of the Interstate Commission, including all rules and bylaws promulgated by the Interstate Commission, are binding upon the compacting states.

All agreements between the Interstate Commission and the compacting states are binding in accordance with their terms.

Upon the request of a party to a conflict over meaning or interpretation of Interstate Commission actions, and upon a majority vote of the compacting states, the Interstate Commission may issue advisory opinions regarding such meaning or interpretation.

In the event any provision of this Compact exceeds the constitutional limits imposed on the legislature of any compacting state, the obligations, duties, powers, or jurisdiction sought to be conferred by such provision upon the Interstate Commission shall be ineffective, and such obligations, duties, powers, or jurisdiction shall remain in the compacting state and shall be exercised by the agency thereof to which such obligations, duties, powers, or jurisdiction are delegated by law in effect at the time this Compact becomes effective." (2005-194, s. 1.)

Editor's Note. — For contingent effective date of Article 40, see the editor's note under G.S. 7B-4000.

§ 7B-4002. (Contingent effective date — see notes) Implementation of the Compact.

(a) The North Carolina State Council for Interstate Juvenile Supervision is hereby established. The Secretary of the Department of Juvenile Justice and Delinquency Prevention, or the Secretary's designee, shall serve as the Compact Administrator for the State of North Carolina and as North Carolina's Commissioner to the Interstate Commission. The Secretary of the Department of Juvenile Justice and Delinquency Prevention, or the Secretary's designee, is a member of the State Council and serves as chairperson of the State Council. In addition to the chairperson, the State Council shall consist of 10 members as follows:

(1) One member representing the executive branch, to be appointed by the Governor;
(2) One member from a victim's assistance group, to be appointed by the Governor;
(3) One at-large member, to be appointed by the Governor;
(4) One member of the Senate, to be appointed by the President Pro Tempore of the Senate;
(5) One member of the House of Representatives, to be appointed by the Speaker of the House of Representatives;

(6) A district court judge, to be appointed by the Chief Justice of the Supreme Court; and

(7) Four members representing the juvenile court counselors, to be appointed by the Secretary of the Department of Juvenile Justice and Delinquency Prevention.

(b) The State Council shall meet at least twice a year and may also hold special meetings at the call of the chairperson. All terms are for three years.

(c) The State Council may advise the Compact Administrator on participation in the Interstate Commission activities and administration of the Compact.

(d) The members of the State Council shall serve without compensation but shall be reimbursed for necessary travel and subsistence expenses in accordance with the policies of the Office of State Budget and Management.

(e) The State Council shall act in an advisory capacity to the Secretary of the Department of Juvenile Justice and Delinquency Prevention concerning this State's participation in Interstate Commission activities and other duties as may be determined by each member state, including recommendations for policy concerning the operations and procedures of the Compact within this State.

(f) The Governor shall by executive order provide for any other matters necessary for implementation of the Compact at the time that it becomes effective, and, except as otherwise provided for in this section, the State Council may promulgate rules or regulations necessary to implement and administer the Compact. (2005-194, s. 1.)

Editor's Note. — For contingent effective date of Article 40, see the editor's note under G.S. 7B-4000.

Table of Comparable Sections for Chapters 7A and 7B Prepared by Legislative Services Office

Present Section	Former Section
7B-100	7A-516
7B-101	7A-517
7B-200	7A-523
7B-201	7A-524
7B-300	7A-542
7B-301	7A-543
7B-302	7A-544
7B-303	7A-544.1
7B-304	7A-545
7B-305	7A-546
7B-306	7A-547
7B-307	7A-548
7B-308	7A-549
7B-309	7A-550
7B-310	7A-551
7B-311	7A-552
7B-400	7A-558
7B-401	7A-559
7B-402	7A-560
7B-403	7A-561
7B-404	7A-562
7B-405	7A-563
7B-406	7A-564
7B-407	7A-565
7B-500	7A-571
7B-501	7A-572
7B-502	7A-573
7B-503	7A-574
7B-504	7A-575
7B-505	7A-576
7B-506	7A-577
7B-507	7A-577.1
7B-508	7A-578
7B-600	7A-585
7B-601	7A-586
7B-602	7A-587
7B-603	7A-588
7B-700	7A-620
7B-800	7A-627
7B-801	7A-629
7B-802	7A-631
7B-803	7A-632
7B-804	7A-634
7B-805	7A-635
7B-806	7A-636
7B-807	7A-637
7B-808	7A-639
7B-900	7A-646
7B-901	7A-640
7B-902	7A-641
7B-903	7A-647
7B-904	7A-650
7B-905	7A-651
7B-906	7A-657
7B-907	7A-657.1
7B-908	7A-659
7B-909	7A-660
7B-910	7A-661
7B-1000	7A-664
7B-1001	7A-666
7B-1002	7A-667
7B-1003	7A-668
7B-1004	7A-669
7B-1100	7A-289.22
7B-1101	7A-289.23
7B-1102	7A-289.23A
7B-1103	7A-289.24
7B-1104	7A-289.25
7B-1105	7A-289.26
7B-1106	7A-289.27
7B-1107	7A-289.28
7B-1108	7A-289.29
7B-1109	7A-289.30
7B-1110	7A-289.31
7B-1111	7A-289.32
7B-1112	7A-289.33
7B-1113	7A-289.34
7B-1200	7A-489
7B-1201	7A-490
7B-1202	7A-491
7B-1203	7A-492
7B-1204	7A-493
7B-1300	110-147
7B-1301	110-148 110-149
7B-1302	110-150
7B-1400	143-571
7B-1401	143-572
7B-1402	143-573
7B-1403	143-574
7B-1404	143-575
7B-1405	143-576
7B-1406	143-576.1
7B-1407	143-576.2
7B-1408	143-576.3
7B-1409	143-576.4
7B-1410	143-576.5
7B-1411	143-576.6
7B-1412	143-577
7B-1413	143-578
7B-1414	143-579
7B-1500	7A-516
7B-1501	7A-517
7B-1600	7A-523
7B-1601	7A-523
7B-1602	7A-524
7B-1603	7A-523

Present Section	Former Section
7B-1604	7A-523 7A-524
7B-1700	7A-530
7B-1701	7A-531
7B-1702	7A-532
7B-1703	7A-533
7B-1704	7A-535
7B-1705	7A-536
7B-1706	7A-534
7B-1800	7A-558
7B-1801	7A-559
7B-1802	7A-560
7B-1803	7A-561
7B-1804	7A-562 7A-563
7B-1805	7A-564
7B-1806	7A-565
7B-1807	NEW
7B-1808	NEW
7B-1900	7A-571
7B-1901	7A-572
7B-1902	7A-573
7B-1903	7A-574
7B-1904	7A-575
7B-1905	7A-576
7B-1906	7A-577
7B-1907	7A-578
7B-2000	7A-584
7B-2001	7A-585
7B-2002	7A-588
7B-2100	7A-594
7B-2101	7A-595
7B-2102	7A-603
7B-2103	7A-596
7B-2104	7A-597
7B-2105	7A-598
7B-2106	7A-599
7B-2107	7A-600
7B-2108	7A-601
7B-2109	7A-602
7B-2200	7A-608
7B-2201	7A-608.1
7B-2202	7A-609
7B-2203	7A-610
7B-2204	7A-611
7B-2300	7A-618
7B-2301	7A-619
7B-2302	7A-620
7B-2303	7A-621
7B-2400	7A-627
7B-2401	7A-628
7B-2402	7A-629
7B-2403	7A-629
7B-2404	7A-630
7B-2405	7A-631
7B-2406	7A-632
7B-2407	7A-633
7B-2408	7A-634
7B-2409	7A-635
7B-2410	7A-636
7B-2411	7A-637
7B-2412	7A-638
7B-2413	7A-639
7B-2414	7A-612
7B-2500	7A-646
7B-2501	7A-640
7B-2502	7A-647
7B-2503	7A-647
7B-2504	7A-648
7B-2505	NEW
7B-2506	7A-647 7A-648 7A-649
7B-2507	NEW
7B-2508	NEW
7B-2509	NEW
7B-2510	7A-649(8) 7A-658
7B-2511	7A-658
7B-2512	7A-651
7B-2513	7A-652
7B-2514	7A-654 7A-655
7B-2515	NEW
7B-2516	7A-656
7B-2517	7A-653
7B-2600	7A-664
7B-2601	7A-665
7B-2602	7A-666
7B-2603	7A-666
7B-2604	7A-667
7B-2605	7A-668
7B-2606	7A-669
7B-2700	NEW
7B-2701	NEW
7B-2702	7A-647 7A-650
7B-2703	NEW
7B-2704	NEW 7A-647 7A-650
7B-2705	NEW
7B-2706	NEW
7B-2800	7A-684
7B-2801	7A-685
7B-2802	7A-686
7B-2803	7A-687
7B-2804	7A-688
7B-2805	7A-689
7B-2806	7A-690
7B-2807	7A-691
7B-2808	7A-692
7B-2809	7A-693
7B-2810	7A-694
7B-2811	7A-695
7B-2812	7A-696
7B-2813	7A-697
7B-2814	7A-698
7B-2815	7A-699
7B-2816	7A-700
7B-2817	7A-701
7B-2818	7A-702

ART. 40. INTERSTATE COMPACT FOR JUVENILES

Present Section	Former Section
7B-2819	7A-703
7B-2820	7A-704
7B-2821	7A-705
7B-2822	7A-706
7B-2823	7A-707
7B-2824	7A-708
7B-2825	7A-709
7B-2826	7A-710
7B-2827	7A-711
7B-2900	NEW
7B-2901	7A-675
7B-2902	7A-675.1
7B-3000	7A-675
7B-3001	NEW 7A-675
7B-3100	7A-675(g) 7A-675(h)
7B-3101	7A-675.2
7B-3200	7A-676
7B-3201	7A-677
7B-3202	7A-678
7B-3300	7A-675.3
7B-3400	110-44.1
7B-3401	NEW
7B-3402	110-44.2
7B-3403	110-44.3

Present Section	Former Section
7B-3404	110-44.4
7B-3500	7A-717
7B-3501	7A-718
7B-3502	7A-719
7B-3503	7A-720
7B-3504	7A-721
7B-3505	7A-722
7B-3506	7A-723
7B-3507	7A-724
7B-3508	7A-725
7B-3509	7A-726
7B-3600	7A-732
7B-3700	110-50
7B-3701	110-51
7B-3702	110-52
7B-3703	110-55
7B-3704	110-56
7B-3705	110-57
7B-3800	110-57.1
7B-3801	110-57.2
7B-3802	110-57.3
7B-3803	110-57.4
7B-3804	110-57.5
7B-3805	110-57.6
7B-3806	110-57.7

Chapter 8.

Evidence.

Article 1.

Statutes.

Sec.
8-1. Printed statutes and certified copies evidence.
8-2. Martin's collection of private acts.
8-3. Laws of other states or foreign countries.
8-4. Judicial notice of laws of United States, other states and foreign countries.
8-5. Town ordinances certified.

Article 2.

Grants, Deeds and Wills.

8-6. Copies certified by Secretary of State or State Archivist.
8-7. Certified copies of grants and abstracts.
8-8. Certified copies of grants and abstracts recorded.
8-9. Copies of grants certified by clerk of Secretary of State validated.
8-10. Copies of grants in Burke.
8-11. Copies of grants in Moore.
8-12. Copies of grants in Onslow.
8-13. Certain deeds dated before 1835 evidence of due execution.
8-14. Certified copies of maps of Cherokee lands.
8-15. Certified copies of certain surveys and maps obtained from the State of Tennessee.
8-16. Evidence of title under H.E. McCulloch grants.
8-17. Conveyances or certified copies evidence of title under McCulloch.
8-18. Certified copies of registered instruments evidence.
8-19. Common survey of contiguous tracts evidence.
8-20. [Repealed.]
8-21. Deeds and records thereof lost, presumed to be in due form.
8-22. Local: recitals in tax deeds in Haywood and Henderson.
8-22.1. Local: tax deeds in Richmond.
8-23. Local: copies of records from Tyrrell.
8-24. Local: records of partition in Duplin.
8-25. Local: records of wills in Duplin.
8-26. Local: records of deeds and wills in Anson.
8-27. Local: records of wills in Brunswick.
8-28. Copies of wills.
8-29. Copies of wills in Secretary of State's office.
8-30. Copies of wills recorded in wrong county.
8-31. Copy of will proved and lost before recorded.

Sec.
8-32. Certified copies of deeds and wills from other states.
8-33. Copies of lost records in Bladen.

Article 3.

Public Records.

8-34. Copies of official writings.
8-35. Authenticated copies of public records.
8-35.1. Division of Motor Vehicles' record admissible as prima facie evidence of convictions of offenses involving impaired driving.
8-35.2. Records of clerk of court criminal index admissible in certain cases.
8-36. Authenticated copy of record of administration.
8-37. Certificate of Commissioner of Motor Vehicles as to ownership of automobile.

Article 3A.

Findings, Records and Reports of Federal Officers and Employees.

8-37.1. Finding of presumed death.
8-37.2. Report or record that person missing, interned, captured, etc.
8-37.3. Deemed signed and issued pursuant to law; evidence of authority to certify.

Article 4.

Other Writings in Evidence.

8-38. [Repealed.]
8-39. Parol evidence to identify land described.
8-40, 8-40.1. [Repealed.]
8-41. Bills of lading in evidence.
8-42. Book accounts under sixty dollars.
8-43. Book accounts proved by personal representative.
8-44. Copies of book accounts in evidence.
8-44.1. Hospital medical records.
8-45. Itemized and verified accounts.

Article 4A.

Photographic Copies of Business and Public Records.

8-45.1. Photographic reproductions admissible; destruction of originals.
8-45.2. Uniformity of interpretation.
8-45.3. Photographic reproduction of records of Department of Revenue and Employment Security Commission.
8-45.4. Title of Article.

Article 4B.

Evidence of Fraud, Duress, Undue Influence.

Sec.
8-45.5. Statements, releases, etc., obtained from persons in shock or under the influence of drugs; fraud presumed.

Article 5.

Life Tables.

8-46. Mortality tables as evidence.
8-47. Present worth of annuities.

Article 6.

Calendars.

8-48. Clark's Calendar; proof of dates.

Article 7.

Competency of Witnesses.

8-49. Witness not excluded by interest or crime.
8-50. Parties competent as witnesses.
8-50.1. Competency of blood tests; jury charge; taxing of expenses as costs.
8-50.2. Results of speed-measuring instruments; admissibility.
8-50.3. [Expired.]
8-51. [Repealed.]
8-51.1. Dying declarations.
8-52. [Repealed.]
8-53. Communications between physician and patient.
8-53.1. Physician-patient and nurse privilege; limitations.
8-53.2. Communications between clergymen and communicants.
8-53.3. Communications between psychologist and client or patient.
8-53.4. School counselor privilege.
8-53.5. Communications between licensed marital and family therapist and client(s).
8-53.6. No disclosure in alimony and divorce actions.
8-53.7. Social worker privilege.
8-53.8. Counselor privilege.
8-53.9. Optometrist/patient privilege.
8-53.10. Peer support group counselors.
8-53.11. Persons, companies, or other entities engaged in gathering or dissemination of news.
8-53.12. Communications with agents of rape crisis centers and domestic violence programs privileged.
8-53.13. Nurse privilege.
8-54. Defendant in criminal action competent but not compellable to testify.

Sec.
8-55. Testimony enforced in certain criminal investigations; immunity.
8-56. Husband and wife as witnesses in civil action.
8-57. Husband and wife as witnesses in criminal actions.
8-57.1. Husband-wife privilege waived in child abuse.
8-57.2. Presumed father or mother as witnesses where paternity at issue.
8-58. [Repealed.]
8-58.1. Injured party as witness when medical charges at issue.
8-58.2 through 8-58.5. [Reserved.]

Article 7A.

Restrictions on Evidence in Rape Cases.

8-58.6 through 8-58.11. [Repealed.]

Article 7B.

Expert Testimony.

8-58.12 through 8-58.14. [Repealed.]
8-58.15 through 8-58.19. [Reserved.]

Article 7C.

Admissibility of Forensic Evidence.

8-58.20. Forensic analysis admissible as evidence.

Article 8.

Attendance of Witness.

8-59. Issue and service of subpoena.
8-60. [Repealed.]
8-61. Subpoena for the production of documentary evidence.
8-62. [Repealed.]
8-63. Witnesses attend until discharge; effect of nonattendance.
8-64. Witnesses exempt from civil arrest.

Article 9.

Attendance of Witnesses from Without State.

8-65 through 8-70. [Transferred.]

Article 10.

Depositions.

8-71 through 8-73. [Repealed.]
8-74. Depositions for defendant in criminal actions.
8-75. [Repealed.]
8-76. Depositions before municipal authorities.
8-77. [Repealed.]
8-78. Commissioner may subpoena witness and punish for contempt.
8-79. Attendance before commissioner enforced.

Sec.
8-80. Remedies against defaulting witness before commissioner.
8-81. Objection to deposition before trial.
8-82. Deposition not quashed after trial begun.
8-83. When deposition may be read on the trial.
8-84. [Repealed.]

Article 11.

Perpetuation of Testimony.

8-85. Court reporter's certified transcription.
8-86 through 8-88. [Repealed.]

Article 12.

Inspection and Production of Writings.

8-89 through 8-91. [Repealed.]
8-92 through 8-96. [Reserved.]

Article 13.

Photographs.

Sec.
8-97. Photographs as substantive or illustrative evidence.
8-98 through 8-102. [Reserved.]

Article 14.

Chain of Custody.

8-103. Courier service and contract carriers.
8-104 through 8-109. [Reserved.]

Article 15.

Mediation Negotiations.

8-110. Inadmissibility of negotiations.

Cross References. — For the North Carolina Rules of Evidence, see Chapter 8C.

ARTICLE 1.

Statutes.

§ 8-1. Printed statutes and certified copies evidence.

All statutes, or joint resolutions, passed by the General Assembly may be read in evidence from the printed statute book; or a copy of any act of the General Assembly certified by the Secretary of State shall be received in evidence in every court. (1826, c. 7; R.C., c. 44, ss. 4, 5; Code, ss. 1339, 1340; Rev., ss. 1592, 1593; C.S., s. 1747.)

Legal Periodicals. — For case law survey on evidence, see 41 N.C.L. Rev. 476 (1963); 44 N.C.L. Rev. 1005 (1966); 45 N.C.L. Rev. 934 (1967).

For article, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

CASE NOTES

Public Statute Admissible. — Where the public printer has published a certain act with other public acts of the General Assembly, it is made, presumptively at least, a part of the public laws of the State, and every person having occasion to do so has the right to read it in evidence in any court of the State as the law. Wrought Iron Range Co. v. Carver, 118 N.C. 328, 24 S.E. 352 (1896).

Private Statute Not Admissible. — The statute incorporating the North Carolina Railroad Company was a private act, and it was error to permit it to be read and commented on to the court or jury until it had been properly introduced as evidence. Town of Durham v. Richmond & D.R.R., 108 N.C. 399, 12 S.E. 1040, 13 S.E. 1 (1891).

Whether the statute, or some enactment in it, is public or private, is a question of law, which the court must determine, in the absence of statutory enactment declaring and settling its nature. Town of Durham v. Richmond & D.R.R., 108 N.C. 399, 12 S.E. 1040, 13 S.E. 1 (1891).

Journal of Legislature. — A copy of the journal of the legislature deposited with the Secretary of State is not evidence for any purpose. It is the journal, which is the original, which is to be filed in the office of the Secretary of State, and it is this original or an exemplification made therefrom by him which, when competent, is to be used in evidence. Wilson v. Markley, 133 N.C. 616, 45 S.E. 1023 (1903).

Judicial Notice of Certain Regulations. — Where neither of the promulgating agencies is subject to the North Carolina Administrative Procedure Act (G.S. 150B-1 et seq.), the court is only required to take judicial notice of their regulations if submitted in accordance with certain procedures designed to insure their accuracy. Southern Ry. v. O'Boyle Tank Lines, 70 N.C. App. 1, 318 S.E.2d 872 (1984).

Applied in C.C.T. Equip. Co. v. Hertz Corp., 256 N.C. 277, 123 S.E.2d 802 (1962).

Cited in Continental Tel. Co. v. Gunter, 99 N.C. App. 741, 394 S.E.2d 228 (1990).

§ 8-2. Martin's collection of private acts.

Any private act published by Francis X. Martin, in his collection of private acts, shall be received in evidence in every court. (1826, c. 7, s. 2; R.C., c. 44, s. 5; Code, s. 1340; Rev., s. 1593; C.S., s. 1748.)

§ 8-3. Laws of other states or foreign countries.

(a) A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree or ordinance, by the executive thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the judicial tribunals thereof, shall be evidence of the statute law, proclamation, edict, decree, or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of the reports of cases, adjudged in the courts thereof, shall also be admitted as evidence of the unwritten or common law thereof.

(b) Any party may exhibit a copy of the law of another state, territory, or foreign country copied from a printed volume of the laws of such state, territory, or country on file in

(1) The offices of the Governor or the Secretary of State, and duly certified by the Secretary of State, or
(2) The State Library and certified as provided in G.S. 125-6, or
(3) The Supreme Court Library and certified as provided in G.S. 7A-13 (f). (1823, c. 1193, ss. 1, 3, P.R.; R.C., c. 44, s. 3; C.C.P., s. 360; Code, s. 1338; Rev., s. 1594; C.S., s. 1749; 1967, c. 565.)

CASE NOTES

Editor's Note. — *The cases cited in this annotation were decided prior to the enactment of G.S. 8-4.*

Prior to the enactment of § 8-4, when any question arose as to the law of any other state or territory, or of the United States, or of any foreign country, the parties were required to prove such law. Gooch v. Faucett, 122 N.C. 270, 29 S.E. 362 (1898); Miller v. Atlantic C.L.R.R., 154 N.C. 441, 70 S.E. 838 (1911); Kelly Springfield Tire Co. v. Lester, 192 N.C. 642, 135 S.E. 778 (1926).

Presumption as Regards Common Law. — In the absence of proof to the contrary, the common law will generally be presumed to be in force in a sister state, except in those states whose jurisprudence is not founded on the common law. Miller v. Atlantic C.L.R.R., 154 N.C. 441, 70 S.E. 838 (1911).

What Common Law Is as Question for Jury. — Where the common law of another state is proved, the court must leave the evidence of what that law is to the jury and cannot inform them what the law is. Moore v. Gwynn, 27 N.C. 187 (1844).

Certificate of Secretary of State as Evidence. — The certificate of the Secretary of State, in relation to the statutes of another state, given in pursuance of this section is evidence in criminal and civil cases. State v. Patterson, 24 N.C. 346 (1842).

A transcript of a statute duly certified by the Secretary of State is evidence at all times of its being in force according to its terms unless a repeal is shown. State v. Cheek, 35 N.C. 114 (1851).

Publication of Foreign Laws Admissible. — A book purporting to be the publication of the statute laws of another state, and to be published by the authority of such state, is admissible as evidence of such laws. Copeland v. Collins, 122 N.C. 619, 30 S.E. 315 (1898).

Admissibility of Printed Copy of Foreign Laws. — By the terms of this section, a printed copy of the acts of the legislature of another state is admissible in the courts of this State to prove the statute law of such other state. Under the law as it stood prior to the enactment of this section, a printed copy of the acts of the legislature of a foreign state was not admissible in evidence. State v. Behrman, 114 N.C. 797, 19 S.E. 220 (1894).

While a copy of a foreign homicide statute was admissible as evidence of the statutory law of the foreign state under G.S. 8-3(a), the State presented no evidence that the statute was unchanged from the version of the statute under which defendant was convicted; thus, the State failed to show that defendant's prior conviction was substantially similar to an offense in North Carolina. State v. Morgan, 164 N.C. App. 298, 595 S.E.2d 804, 2004 N.C. App. LEXIS 819 (2004).

United States Agricultural Regulations Judicially Noticed. — The regulations of the United States Department of Agriculture concerning the transportation of cattle are not foreign laws within the meaning of this section, and the courts are required to take judicial notice of them. State v. Southern Ry., 141 N.C. 846, 54 S.E. 294 (1906).

Witnesses. — Any person who claims to know the provisions of the common or unwritten laws of a foreign country may, under this section, testify to and explain them before courts and juries. State v. Behrman, 114 N.C. 797, 19 S.E. 220 (1894).

The law of another state may be proven in transitory actions brought in the courts of this State by witnesses learned in the law of such other state, and by its authorized statutes and reports of decisions of its courts of last resort, and when properly offered in evidence they must be interpreted by our courts as matters of law. Howard v. Howard, 200 N.C. 574, 158 S.E. 101 (1931).

Necessity of Instructions to Jury. — Where the foreign law has been proved it is the duty of the court to instruct the jury as to the meaning of the law, its applicability to the case at hand, and its effect on the case, and it is error to refer the whole case to the jury without instructions. Hooper v. Moore, 50 N.C. 130 (1857).

Cited in State v. Rich, 130 N.C. App. 113, 502 S.E.2d 49 (1998), cert. denied, 349 N.C. 237, 516 S.E.2d 605 (1998).

§ 8-4. Judicial notice of laws of United States, other states and foreign countries.

When any question shall arise as to the law of the United States, or of any other state or territory of the United States, or of the District of Columbia, or of any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this State. (1931, c. 30.)

Cross References. — As to judicial notice of private statutes, see G.S. 1A-1, Rule 9(h).

Legal Periodicals. — For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

CASE NOTES

Sua Sponte Notice of Law of Foreign Countries. — When State courts are confronted with cases involving questions of the law of foreign countries, this section requires that they, sua sponte, take notice of such law. La Grenade v. Gordon, 60 N.C. App. 650, 299 S.E.2d 809 (1983).

The party seeking to have the law of a foreign jurisdiction applied has the burden of bringing such law to the attention of the court. If the foreign jurisdiction has no law, either statutory or decisional, on the question involved, the courts of this State will not speculate on what law such jurisdiction might adopt and will apply the law of North Carolina. Leonard v. Johns-Manville Sales Corp., 309 N.C. 91, 305 S.E.2d 528 (1983).

Traffic Laws of South Carolina. — Trial court did not err in taking judicial notice of similarity between South Carolina impaired driving statutes and North Carolina statute. Sykes v. Hiatt, 98 N.C. App. 688, 391 S.E.2d 834 (1990).

Absence of Reference by Parties. — Under this section judicial notice of foreign law is required, even in the absence of reference thereto by the parties, when foreign law governs the action. Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981).

Allegation of Survivability Under Law

of Another State. — In an action to recover for the alleged tortious conversion of personalty by a nonresident, instituted in this State after the death of the nonresident against his personal representative, the failure of the complaint to allege that the cause of action survived under the laws of the state in which it arose did not render the complaint demurrable. Suskin v. Hodges, 216 N.C. 333, 4 S.E.2d 891 (1939).

Negligent Injury Occurring in Another State. — In an action instituted in this State to recover for negligent injury occurring in another state, liability must be determined according to the substantive law of such other state, of which the North Carolina courts must take notice. Thames v. Nello L. Teer Co., 267 N.C. 565, 148 S.E.2d 527 (1966), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998).

Collision in Virginia. — In an action brought in this State under the Tort Claims Act for a collision which occurred in Virginia, the substantive law of Virginia and the procedural law of North Carolina applied. Parsons v. Alleghany County Bd. of Educ., 4 N.C. App. 36, 165 S.E.2d 776 (1969).

Applied in Suskin v. Hodges, 216 N.C. 333, 4 S.E.2d 891 (1939); Charnock v. Taylor, 223 N.C. 360, 26 S.E.2d 911, 148 A.L.R. 1126 (1943); Lewis v. Furr, 228 N.C. 89, 44 S.E.2d 604 (1947); Caldwell v. Abernathy, 231 N.C. 692, 58 S.E.2d 763 (1950); Johnson v. Salsbury, 232 N.C. 432, 61 S.E.2d 327 (1950); Handley Motor Co. v. Wood, 238 N.C. 468, 78 S.E.2d 391 (1953); Johnson v. Catlett, 246 N.C. 341, 98 S.E.2d 458 (1957); Kirby v. Fulbright, 262 N.C. 144, 136 S.E.2d 652 (1964); Arnold v. Ray Charles Enters., Inc., 264 N.C. 92, 141 S.E.2d 14 (1965); American Inst. of Mktg. Sys. v. Willard Realty Co., 277 N.C. 230, 176 S.E.2d 775 (1970); Tennessee Carolina Transp., Inc. v. Strick Corp., 283 N.C. 423, 196 S.E.2d 711 (1973).

Cited in Tennessee-Carolina Transp., Inc. v. Strick Corp., 286 N.C. 235, 210 S.E.2d 181 (1974); State v. Johnston, 39 N.C. App. 179, 249 S.E.2d 879 (1978); Tanglewood Land Co. v. Wood, 40 N.C. App. 133, 252 S.E.2d 546 (1979); Employment Sec. Comm'n v. Lachman, 305 N.C. 492, 290 S.E.2d 616 (1982); Leonard v. Johns-Manville Sales Corp., 59 N.C. App. 454, 297 S.E.2d 147 (1982); State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994).

§ 8-5. Town ordinances certified.

In a trial in which the offense charged is the violation of a town ordinance, a copy of the ordinance alleged to have been violated, proven as provided in G.S. 160A-79, shall be prima facie evidence of the existence of such ordinance. (1899, c. 277, s. 2; Rev., s. 1595; C.S., s. 1750; 1971, c. 381, s. 3; 1973, c. 1446, s. 17.)

CASE NOTES

When Certification Unnecessary. — The certification of a town ordinance as required by this section, was only prima facie evidence of its existence, and this was unnecessary when the ordinance had been proven by the production of the official records of the town by the proper officer, which showed its passage. State v. Razook, 179 N.C. 708, 103 S.E. 67 (1929).

Evidence Insufficient to Rebut Prima Facie Case. — When the defendant, convicted of the violation of a city ordinance, on appeal introduced in evidence the minutes of the meeting of the governing authorities of the town held on the date when the purported ordinance was alleged to have been adopted, which did not show its passage on that date, it was not conclusive that the ordinance had not been passed at some other time, against the statutory certificate of the mayor that it was in existence at the time of the defendant's conviction. State v. Gill, 195 N.C. 425, 142 S.E. 328 (1928).

No Evidence of Certification or Publication. — The refusal to permit police officer to testify on cross-examination as to existence and contents of a paper-writing which purported to be an ordinance of the city, was not error where there was no evidence that purported ordinance had been certified, as required by this section, or that it had been printed and published by the city as provided in G.S. 160-272 (now repealed). Toler v. Savage, 226 N.C. 208, 37 S.E.2d 485 (1946).

Cited in State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958); Black v. Penland, 255 N.C. 691, 122 S.E.2d 504 (1961).

ARTICLE 2.

Grants, Deeds and Wills.

§ 8-6. Copies certified by Secretary of State or State Archivist.

Copies of the plats and certificates of survey, or their accompanying warrants, and all abstracts of grants, which may be filed in the office of the Secretary of State, or in the Department of Cultural Resources, which copies, upon certification by the Secretary of State as to those records in his office, or the State Archivist as to those records in the Department of Cultural Resources, as true copies, shall be as good evidence, in any court, as the original. (1822, c. 1154, P.R.; R.C., c. 44, s. 6; Code, s. 1341; Rev., s. 1596; C.S., s. 1751; 1961, c. 740, s. 1; 1973, c. 476, s. 48.)

Cross References. — As to certification by clerk of Secretary of State, see G.S. 8-9.

CASE NOTES

Material Discrepancy from Original. — This section does not make the copies better evidence than the original; and where there is a material discrepancy, it is for the jury to find as a fact which one is correct. Richards v. W.M. Ritter Lumber Co., 158 N.C. 54, 73 S.E. 485 (1911), modified on other grounds, 159 N.C. 455, 74 S.E. 1016 (1912).

Certified Abstract Competent to Show Title. — Abstracts of grants in the usual form, duly certified as correct copies by the Secretary of State and recorded in the office of the register of deeds, are competent to show title out of the state. Marshall v. Corbett, 137 N.C. 555, 50 S.E. 210 (1905).

Applied in Meekins v. Miller, 245 N.C. 567, 96 S.E.2d 715 (1957).

Cited in Whichard v. Oliver, 56 N.C. App. 219, 287 S.E.2d 461 (1982).

§ 8-7. Certified copies of grants and abstracts.

For the purpose of showing title from the State of North Carolina to the grantee or grantees therein named and for the lands therein described, duly certified copies of all grants and of all memoranda and abstracts of grants on record in the office of the Secretary of State, or in the Department of Cultural Resources, given in abstract or in full, and with or without the signature of the Governor and the great seal of the State appearing upon such record, shall be competent evidence in the courts of this State or of the United States or of any territory of the United States, and in the absence of the production of the original grant shall be conclusive evidence of a grant from the State to the grantee or grantees named and for the lands described therein. (1915, c. 249, s. 1; C.S., s. 1752; 1961, c. 740, s. 2; 1973, c. 476, s. 48.)

CASE NOTES

Constitutionality. — This section was held constitutional and valid. Howell v. Hurley, 170 N.C. 401, 87 S.E. 107 (1915).

Copy Conclusive as to Regularity of Original. — An abstract of a grant of the State's land by the Secretary of State imported the regularity of its issuance, and that the constitutional mandate of affixing the seal of the original had been legally complied with, though the abstract gave no indication thereof, the regularity of the official conduct in granting the original being presumed; furthermore, the abstract could be introduced as competent evidence on the trial of an action involving the title to the lands described in the grant, by one claiming under it. Howell v. Hurley, 170 N.C. 401, 87 S.E. 107 (1915).

§ 8-8. Certified copies of grants and abstracts recorded.

Duly certified copies of such grants and of such memoranda and abstracts of grants may be recorded in the county where the lands therein described are situated, and the records thereof in such counties, or certified copies thereof, shall likewise be competent evidence for the purpose of showing title from the State of North Carolina to the grantee or grantees named and for the lands described therein. (1915, c. 249, s. 2; C.S., s. 1753.)

Cross References. — As to registration of certified copies of any deeds or writings, and their use in evidence, see G.S. 47-31.

§ 8-9. Copies of grants certified by clerk of Secretary of State validated.

All copies of grants heretofore issued from the office of the Secretary of State, duly certified under the great seal of the State, and to which the name of the Secretary has been written or affixed by the clerk of the said Secretary of State, are hereby ratified and approved and declared to be good and valid copies of the original grants and admissible in evidence in all courts of this State when duly registered in the counties in which the land lies; all such copies heretofore registered in said counties are hereby declared to be lawful and regular in all respects as if the same had been signed by the Secretary of State in person and duly registered. (1901, c. 613; Rev., s. 1597; C.S., s. 1754.)

Cross References. — As to copies of destroyed record as evidence generally, see G.S. 98-1 et seq.

CASE NOTES

History. — As to the lack of authority of the clerk of the Secretary of State to certify and affix the great seal of the State to copies of grants and other papers from the Secretary of State's office prior to the enactment of this section, see Beam v. Jennings, 96 N.C. 82, 2 S.E. 245 (1887).

§ 8-10. Copies of grants in Burke.

Copies of grants issued by the State within the County of Burke prior to the destruction of the records of said county by General Stoneman in the year 1865, shall be admitted in evidence in all actions when the same are duly registered; and when the original grants are lost, destroyed or cannot be found after due search, it shall be presumed that the same were duly registered within the time prescribed by law, as provided upon the face of original grant. (1901, c. 513; Rev., s. 1610; C.S., s. 1755.)

§ 8-11. Copies of grants in Moore.

Copies of grants for land situated in Moore County and the counties of which Moore was a part, entered in a book, and the book being certified under the seal of the Secretary of State, shall have the force and effect of the originals and be evidence in all courts. (1903, c. 214; Rev., s. 1613; C.S., s. 1756.)

§ 8-12. Copies of grants in Onslow.

The copies of grants made by the register of deeds of Onslow County under laws of 1907, chapter 434, of grants, abstracts of grants, and other documents pertaining to titles of land in Onslow County issued prior to the year 1800, and contained in a book called Book of Transcribed Grants Issued Prior to One Thousand Eight Hundred, duly authenticated as prescribed in said Chapter 434 of the laws of 1907, shall be received as evidence in all courts of the State, and certified copies therefrom shall be received as evidence. (1907, c. 434; C.S., s. 1757.)

§ 8-13. Certain deeds dated before 1835 evidence of due execution.

In all actions hereafter instituted in which the title or ownership of any lands situated in North Carolina is at issue or in dispute, any deed or release, or a duly certified copy thereof, in which the people of the State of North Carolina are grantees and bearing date prior to the year 1835 and purporting to have been filed and recorded in the office of the Secretary of State of North Carolina prior to said year and now on file and of record in said office, and executed or purporting to have been executed by any person or persons as the representatives or agents or for or on behalf of any society, tribe, nation or aggregation of persons, whether signed or executed individually or in their representative capacity, and any such deed or release having been authorized to be executed by an act of the General Assembly of North Carolina by the properly authorized agents of such society, tribe, nation or aggregation of persons, shall be prima facie evidence that the person or persons signing or executing any such deed or release were the properly authorized agent or agents of such society, tribe, nation or aggregation of persons. Any recitals or statements of fact in any such deed or release shall be prima facie evidence of the truth thereof in any such actions. (1915, c. 75; C.S., s. 1758.)

§ 8-14. Certified copies of maps of Cherokee lands.

Certified copies by the Secretary of State of the copies, or parts thereof, of the maps of the Cherokee lands and of the Cherokee Country, as provided for and described in Chapter 175 of the laws of 1911, shall have the same force and effect and be entitled to the same force and effect as evidence as certified copies of the whole or parts of the original maps. (1911, c. 175; C.S., s. 1759.)

§ 8-15. Certified copies of certain surveys and maps obtained from the State of Tennessee.

A certified copy of the report of the survey made by the North Carolina commissioners, McDowell, Vance and Matthews, of that portion of the State of Tennessee extending from a point on the Virginia line to a point on the Smoky Mountain west of the Pigeon River, as obtained and filed by the Secretary of State under the provisions of Chapter 162 of the laws of 1913, shall, when certified under the hand and seal of the Secretary of State, be competent evidence in the trial of any action in the courts of the State. (1913, c. 162; C.S., s. 1760.)

§ 8-16. Evidence of title under H.E. McCulloch grants.

In all actions or suits, wherein it may be necessary for either party to prove title, by virtue of a grant or grants made by the king of Great Britain or Earl

Granville to Henry McCulloch, or Henry Eustace McCulloch, it shall be sufficient for such party, in the usual manner, to give evidence of the grant or conveyance from the king of Great Britain or Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, and the mesne conveyances thereafter, without giving any evidence of the deed or deeds of release, relinquishment or confirmation of Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, or the power or powers of attorney by which the conveyances from the said Henry McCulloch, or Henry Eustace McCulloch, purport to have been made. (1819, c. 1021, P.R.; R.C., c. 44, s. 1; Code, s. 1336; Rev., s. 1600; C.S., s. 1761.)

§ 8-17. Conveyances or certified copies evidence of title under McCulloch.

In all trials where the title of either plaintiff or defendant shall be derived from Henry Eustace McCulloch, or Henry McCulloch, out of their tracts numbers one and three, it shall not be required of such party to produce, in support of his title, either the original grant from the crown to the proprietors, or a registered copy thereof; but in all such cases the grant or deed executed by such reputed proprietors, or by his or their lawful attorney, or a certified copy thereof, shall be deemed and held sufficient proof of the title of such proprietors, in the same manner as though the original grants were produced in evidence. (1807, c. 724, P.R.; R.C., c. 44, s. 2; Code, s. 1337; Rev., s. 1601; C.S., s. 1762.)

§ 8-18. Certified copies of registered instruments evidence.

A copy of the record of any deed, mortgage, power of attorney, or other instrument required or allowed to be registered, duly authenticated by the certificate and official seal of the register of deeds of the county where the original or duly certified copy has been registered, may be given in evidence in any of the courts of the State where the original of such copy would be admitted as evidence, although the party offering the same shall be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for according to the course and practice of the court. (1846, c. 68, s. 1; R.C., c. 37, s. 16; Code, s. 1251; 1893, c. 119, s. 2; Rev., s. 1598; C.S., s. 1763.)

Cross References. — As to recordation and use in evidence of certified copies generally, see G.S. 47-31.

CASE NOTES

This section is not applicable when the original instrument is offered in evidence with the certificate of the register of deeds appearing thereon with respect to the time filed for registration and the book and page where it has been registered and the date of such registration. State v. Dunn, 264 N.C. 391, 141 S.E.2d 630 (1965).

Signature of Clerk Essential. — The failure of the clerk (now the register of deeds) to sign his name to the certificate for registration, a requirement found in the provisions of G.S. 47-14, renders the instrument inadmissible as evidence under this section. Woodlieff v. Woodlieff, 192 N.C. 634, 135 S.E. 612 (1926).

The record of a registered deed is competent evidence without producing the original where no rule of court for the production of the original has been issued. Ratliff v. Ratliff, 131 N.C. 425, 42 S.E. 887 (1902).

The "registry" or copy of the record of a bond to make title to land made by a deceased person, under which a deed had been made by the administrator of said obligor, was within the spirit and meaning of this section, and was admissible without accounting for the absence of the original. Doe v. Shelton, 46 N.C. 370 (1854).

Copy of Record of Clerk's Bond. — Inasmuch as the duly certified copy of the record of any instrument required to be registered was admissible as full and sufficient evidence of such instrument, and as the register of deeds was required to register and keep the bond of the superior court clerk, a duly certified copy of the record of such bond was competent evidence of its provisions. State ex rel. Battle v. Baird, 118 N.C. 854, 24 S.E. 668 (1896).

Lack of Seal No Effect. — A copy of a grant from the register's office, which affirmatively showed that it was issued under the great seal of the State, was admissible in evidence, though the registry did not show the impress of the seal, or scroll to indicate it. And while the seal may have been necessary to authenticate the grant, it would be presumed to have been affixed as required by law. Aycock v. Raleigh & Augusta Air-Line R.R., 89 N.C. 321 (1883).

Production of Original to Correct Mistakes. — The original deed may be shown in evidence to correct an omission by the register of deeds of the signature of the justice of the peace before whom the deed was acknowledged. Brown v. Hutchinson, 155 N.C. 205, 71 S.E. 302 (1911).

Parol Evidence to Explain Variance. — Where the original deed was lost, and it was contended that there was a material variance between the certified copy and the original deed, parol evidence to prove the correct description contained in the original instrument was rejected, this section being construed as to have no application to such a case. Hooper v. Justice, 111 N.C. 418, 16 S.E. 626 (1892).

Time and Manner of Objecting. — A party against whom the registry of a deed (or other instrument), or a copy thereof has been introduced in evidence, cannot then raise the objection that there is a variance between such registry, or copy, and the original instrument; if he desired to avail himself of such objection he should have required the production of the original in the way provided by this section. Devereux v. McMahon, 108 N.C. 134, 12 S.E. 902 (1891).

Applied in Jones v. Arehart, 125 N.C. App. 89, 479 S.E.2d 254 (1996).

Cited in Merchants & Farmers Bank v. Sherrill, 231 N.C. 731, 58 S.E.2d 741 (1950); Hi-Fort, Inc. v. Burnette, 42 N.C. App. 428, 257 S.E.2d 85 (1979); Whichard v. Oliver, 56 N.C. App. 219, 287 S.E.2d 461 (1982).

§ 8-19. Common survey of contiguous tracts evidence.

Whenever any person owns several tracts of land which are contiguous or adjoining, but held under different deeds and different surveys, it may be lawful for any such person to have all such bodies of land included in one common survey by running around the lines of the outer tracts, and thereupon the possession of any part of said land covered by such common survey shall be deemed and held in law as a possession of the whole and every part thereof: Provided, that nothing in this section shall be construed to affect the rights or claims of persons which have already accrued to any part of said land. In all cases where such common surveys are made as directed by this section, the same may be recorded and registered as in cases of deeds, and shall be evidence in like manner. (1869-70, c. 34, ss. 1, 2; Code, s. 1277; Rev., s. 1505; C.S., s. 1764.)

CASE NOTES

When Possession of Part Is Equivalent to Whole. — Under the provisions of this section, by recording and registering a survey of the outer lines of several contiguous tracts, so as to exhibit their outer boundaries as if the whole territory had been covered by one tract, a possession at any one point on either of the separate tracts will become equivalent to a possession of "the whole and every part." McNamee v. Alexander, 109 N.C. 242, 13 S.E. 777 (1891).

Sufficiency of Proof. — The surveyor's testimony that the map was correct was sufficient to make it competent. Greenleaf v. Bartlett, 146 N.C. 495, 60 S.E. 419 (1908).

§ 8-20: Repealed by Session Laws 1993, c. 288, s. 1.

Cross References. — For present provision concerning use of certified registered copies as evidence, see G.S. 47-31.

§ 8-21. Deeds and records thereof lost, presumed to be in due form.

Whenever it is shown in any judicial proceeding that a deed or conveyance of real estate has been lost or destroyed, and that the same had been registered, and that the register's book containing the copy has been destroyed by fire or other accident, so that a copy thereof cannot be had, it shall be presumed and held, unless the contents be shown to have been otherwise, that such deed or conveyance transferred an estate in fee simple, if the grantor was entitled to such an estate at the time of conveyance, and that it was made upon sufficient consideration. (1854, c. 17; R.C., c. 44, s. 14; Code, s. 1348; Rev., s. 1602; C.S., s. 1766.)

Cross References. — As to burnt and lost records, see G.S. 98-1 et seq.

CASE NOTES

Presumption of Regularity. — The registration of a deed is presumed to be correct. Cochran v. Linville Imp. Co., 127 N.C. 386, 37 S.E. 496 (1900).

§ 8-22. Local: recitals in tax deeds in Haywood and Henderson.

In all legal controversies touching lands in the Counties of Haywood and Henderson, in which either party shall claim title under any sale for taxes alleged to have been due and laid, in and for the year one thousand seven hundred and ninety-six, or any preceding year, the recital contained in the deed or assurance, made by the sheriff or other officer conveying or assuring the same, of the taxes having been laid and assessed, and of the same having remained due and unpaid, shall be held and taken to be prima facie evidence of the truth of each and every of the matters so recited. (R.C., c. 44, s. 11; Code, s. 1346; Rev., s. 1606, C.S., s. 1767.)

§ 8-22.1. Local: tax deeds in Richmond.

Proof of execution and delivery of a deed recorded before 1971 to a grantee by the sheriff of Richmond County pursuant to sale under execution in a tax foreclosure proceeding brought by Richmond County under G.S. 105-375 establishes a presumption that all notices required by G.S. 105-375 and Article 29B of Chapter 1 of the General Statutes were duly given and served, as required by law, to all persons entitled to receive the notices. (1981, c. 517.)

§ 8-23. Local: copies of records from Tyrrell.

Copies of records of the County of Tyrrell between the years one thousand seven hundred and thirty-five and one thousand seven hundred and ninety-nine, when copied in a book and certified to by the clerk of the Superior Court of Tyrrell County as to the records of his office and by the register of deeds as to the records of his office, and deposited in their respective offices in

Washington County, shall be treated in all respects as original records and received as evidence in all courts of Washington County. (1903, c. 199; Rev., s. 1612, C.S., s. 1768.)

§ 8-24. Local: records of partition in Duplin.

The transcripts made by the clerk of the Superior Court of Duplin County, in accordance with Chapter three hundred and ninety-five of the laws of one thousand nine hundred and seven, of the reports of committees relating to the partition of real estate on file in his office prior and up to the year one thousand eight hundred and fifty-six, entered and indexed in a book entitled Reports of Committees, A, and the reports of committees beginning with and subsequent to the year one thousand eight hundred and fifty-six, entered and indexed in a book entitled Reports of Committees, B, shall be as competent evidence as are the original reports of the committees. (1907, c. 395, ss. 3, 4; C.S., s. 1769.)

§ 8-25. Local: records of wills in Duplin.

The transcripts made by the clerk of the Superior Court of Duplin County, in accordance with Chapter three hundred and ninety-five of the laws of one thousand nine hundred and seven, of all wills and entries of probate and dates of registration appearing on the same, on file in his office prior and up to the January term of the County Court of Duplin County, one thousand eight hundred and thirty, and entered in a book designated as Records of Wills, A, and duly indexed as provided by law, shall be as competent evidence in any court as are the originals of such wills. (1907, c. 395, ss. 1, 2; C.S., s. 1770.)

§ 8-26. Local: records of deeds and wills in Anson.

The copies of the deeds and deed books and of the wills and will books made in Anson County under the act of March second, one thousand nine hundred and five, shall have the same force and effect as the original deeds and deed books copied and as the original wills and will books copied, and shall take the place of said original deeds and deed books and wills and will books as evidence in all court procedure; and wherever said deed books or will books are ordered or directed to be produced in court by subpoena or other order of court, the copies made under such act shall be produced, unless the court shall specially order the production of the original books, and the copies so produced in court shall have the same validity and effect and be used for the same purposes, with the same effect, as the original books. (1905, c. 663, s. 3; Rev., s. 1615; C.S., s. 1771.)

§ 8-27. Local: records of wills in Brunswick.

Under the provisions of Chapter one hundred and six of the laws of one thousand nine hundred and eight, authorizing and directing that all unrecorded wills, dated prior to January first, one thousand eight hundred and seventy-five, on file in the office of the clerk of the Superior Court of Brunswick County, and which have been duly proved in the form required by law, and bearing the adjudication certificate of the proper officer, shall be recorded in the books of wills in the said office and properly indexed; that all wills recorded in the minutes of the court of pleas and quarter sessions or other books of record in said office shall be transcribed and indexed in the book of wills in said office; and that all wills recorded in the office of the register of deeds of said county shall be properly indexed in the book kept for the purpose in the office of the clerk of the superior court of the county; the record of any instrument or certified copy thereof, recorded under the provisions of this Article, shall be admitted in evidence in the trial of any cause, subject to the same rules upon which other wills are admitted. (1908, s. 106; C.S., s. 1772.)

§ 8-28. Copies of wills.

Copies of wills, duly certified by the proper officer, may be given in evidence in any proceeding wherein the contents of the will may be competent evidence. (1784, c. 225, s. 6, P.R.; R.C., c. 119, s. 21; Code, s. 2175; Rev., s. 1603; C.S., s. 1773.)

Cross References. — As to probate of copy of lost will, see G.S. 98-4 and 98-5.

CASE NOTES

Certified Copy as Evidence. — Under this section a certified copy of a will is competent evidence in any case wherein the contents of the will would be competent evidence. Hampton v. Hardin, 88 N.C. 592 (1883), overruled on other grounds, McEwan v. Brown, 176 N.C. 249, 97 S.E. 20 (1918).

§ 8-29. Copies of wills in Secretary of State's office.

Copies of wills filed or recorded in the office of the Secretary of State, attested by the Secretary, may be given in evidence in any court, and shall be taken as sufficient proof of the devise of real estate, and are declared good and effectual to pass the estate therein devised: Provided, that no such will may be given in evidence in any court nor taken as sufficient proof of the devise unless a certificate of probate appear thereon. (1852, c. 172; R.C., c. 44, s. 12; 1856-7, c. 22; Code, s. 2181; Rev., s. 1607; C.S., s. 1774.)

§ 8-30. Copies of wills recorded in wrong county.

Whereas, by reason of the uncertainty of the boundary lines of many of the counties of the State, wills have been proved, recorded and registered in the wrong county, whereby titles are insecure; for remedy whereof: The registry or duly certified copy of the record of any will, duly recorded, may be given in evidence in any of the courts of this State. (1858-9, c. 18; Code, s. 2182; Rev., s. 1608; C.S., s. 1775.)

§ 8-31. Copy of will proved and lost before recorded.

When any will which has been proved and ordered to be recorded was destroyed during the war between the states, before it was recorded, a copy of such will, so entitled to be admitted to record, though not certified by any officer, shall, when the court shall be satisfied of the genuineness thereof, be ordered to be recorded, and shall be received in evidence whenever the original or duly certified exemplification would be; and such copies may be proved and admitted to record under the same rules, regulations and restrictions as are prescribed in Chapter 98 entitled Burnt and Lost Records. (1866-7, c. 127; Code, s. 2183; Rev., s. 1609; C.S., s. 1776.)

§ 8-32. Certified copies of deeds and wills from other states.

In cases where inhabitants of other states or territories, by will or deed, devise or convey property situated in this State, and the original will or deed cannot be obtained for registration in the county where the land lies, or where the property shall be in dispute, a copy of said will or deed (after the same has been proved and registered or deposited, agreeable to the laws of the state where the person died or made the same) being properly certified, either according to the act of Congress or by the proper officer of the said state or territory, shall be read as evidence. (1802, c. 623, P.R.; R.C., c. 44, s. 9; Code, s. 1344; Rev., s. 1619; C.S., s. 1777.)

CASE NOTES

Records of other states, to be used in evidence in this State, must have the attestation of the clerk of the court whose record is offered, and the seal of the court, if it has one. If there be no seal, this must appear in the certificate of the clerk, and the judge, chief justice, or presiding magistrate of such court must certify that the record is properly attested. Hunter v. Kelly, 92 N.C. 285 (1885); Kinseley v. Rumbough, 96 N.C. 193, 2 S.E. 174 (1887); Riley v. Carter, 158 N.C. 484, 74 S.E. 463 (1912).

Properly Authenticated Copy Is Admissible. — A copy of a will made in another state, with its probate certified by the judge of the court in which it was proved, and accompanied by the testimonial of the governor of that state that the person who gave that certificate was the proper officer to take such probate and to certify the same, was a sufficient authentication of the will to authorize its reception as evidence in the courts of this State. Knight v. Wall, 19 N.C. 125 (1836).

Test for Admission Under Section. — The copy, to be admissible in evidence, must be of such a will as would be admitted to record in North Carolina; hence, where a will was executed in Tennessee and from the certificate of probate on the exemplified copy produced, it appeared that but one witness swore that he subscribed the will as witness in the presence of the testator and other witness to the will did not appear to have been sworn at all, it was held that such a will should not be read in evidence. Blount v. Patton, 9 N.C. 237 (1822).

Incomplete Authentication. — Where a will, proved in another state, bore the certificate of the clerk of the court wherein the probate was had to the oath of the attesting witnesses, but had no other authentication, it was held inadmissible in evidence. Hunter v. Kelly, 92 N.C. 285 (1885).

§ 8-33. Copies of lost records in Bladen.

The clerk of the Superior Court of Bladen County shall transcribe the judgment docket and index books and the will books in his office, and all other books in said office containing records made since the year one thousand eight hundred and sixty-eight, and the records so transcribed shall have the same force and effect as the original records would have, and shall be received in evidence as the original records and be prima facie evidence of their correctness and of the sufficiency of their probate, though the probates are lost and are not transcribed. (1895, c. 415; 1903, c. 65; Rev., s. 1611; C.S., s. 1778.)

Article 3.

Public Records.

§ 8-34. Copies of official writings.

(a) Copies of all official bonds, writings, papers, or documents, recorded or filed as records in any court, or public office, or lodged in the office of the Governor, Treasurer, Auditor, Secretary of State, Attorney General, Adjutant General, or the State Department of Cultural Resources, shall be as competent evidence as the originals, when certified by the keeper of such records or writings under the seal of the keeper's office when there is such seal, or under the keeper's hand when there is no such seal, unless the court shall order the production of the original. Copies of the records of the board of county commissioners shall be evidence when certified by the clerk of the board under the clerk's hand and seal of the county.

(b) The provisions of subsection (a) of this section shall apply to records stored on any form of permanent, computer-readable media, such as a CD-ROM, if the medium is not subject to erasure or alteration. Nonerasable, computer-readable storage media shall not be used for preservation duplicates, as defined in G.S. 132-8.2, or for the preservation of permanently valuable records as provided in G.S. 121-5(d), except to the extent expressly approved by the Department of Cultural Resources pursuant to standards and conditions established by the Department. (1792, c. 368, s. 11, P.R.; R.C., c. 44, s. 8; 1868-9, c. 20, s. 21; 1871-2, c. 91; Code, ss. 715, 1342; Rev., s. 1616; C.S., s. 1779; 1961, c. 739; 1973, c. 476, s. 48; 1999-131, s. 3; 1999-456, s. 47(c).)

CASE NOTES

"Copy" Defined. — A copy, within the meaning of this section, is a transcript of the original, i.e., a writing exactly like another writing. State v. Champion, 116 N.C. 987, 21 S.E. 700 (1895); Wiggins v. Rogers, 175 N.C. 67, 94 S.E. 685 (1917).

Certification of Copy. — The power of an officer, who is the keeper of certain public records, to certify copies is confined to a certification of their contents as they appear by the records themselves, and the records must, therefore, be so certified, for he has no authority to certify to the substance of them, nor that any particular fact, as a date, appears on them. Wiggins v. Rogers, 175 N.C. 67, 94 S.E. 685 (1917).

Original Record Is Admissible. — This section does not prevent the admission in evidence of the original record itself. State v. Voight, 90 N.C. 741 (1884); State ex rel. Carolina Iron Co. v. Abernathy, 94 N.C. 545 (1886). See State v. Hunter, 94 N.C. 829 (1886); Charles S. Riley & Co. v. Carter, 165 N.C. 334, 81 S.E. 414 (1914); Blalock v. Whisnant, 216 N.C. 417, 5 S.E.2d 130 (1939).

While certified copies of records are admitted in evidence, the originals are not thereby made incompetent. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

And Copy Is Admissible Where Original Is Lost. — Where a superior court record is lost, a certified copy of the transcript of the same in the appellate court is sufficient evidence of the record. Aiken v. Lyon, 127 N.C. 171, 37 S.E. 199 (1900).

A certified copy of a petition in a suit was admissible in evidence upon proof of the loss of the original records. Weeks v. McPhail, 128 N.C. 130, 38 S.E. 472, rehearing denied, 129 N.C. 73, 39 S.E. 732 (1901).

But Certified Statement Not Admissible. — This section makes competent only the "copies" of official records, etc., and a mere certified statement from the register's office was only evidence of the correctness of the record, and could not be admitted in evidence in place of the original record. State v. Champion, 116 N.C. 987, 21 S.E. 700 (1895); Wiggins v. Rogers, 175 N.C. 67, 94 S.E. 685 (1917).

Incriminating Evidence Contained in Document. — Where the document admitted under the provisions of this section contains incriminating evidence, the defense often interposed by the accused is that to admit such paper would be in violation of the constitutional right of the defendant on trial for crime to have opportunity to confront his accusers and the witnesses offered to sustain the charge. It is settled, however, that this section is not violative of this constitutional right, since these provisions constitute a well-recognized exception to the privilege given by the Constitution. State v. Behrman, 114 N.C. 797, 19 S.E. 220 (1894); State v. Dowdy, 145 N.C. 432, 58 S.E. 1002 (1907).

Admissibility of "Written Hearsay". — North Carolina countenances the introduction of test results, certified copies of official documents and records, as well as other writings, which, but for statute or decisional authority, would be written hearsay. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev'd on other grounds, 291 N.C. 640, 231 S.E.2d 614 (1977).

Document Reclassifying Prisoner's Status. — An authenticated copy of a department of correction document reclassifying a person's status as a prisoner and disclosing that he had been removed from the work release program for having returned therefrom in a highly intoxicated condition was a relevant and properly certified copy of an official record and was admissible in action to terminate parental rights. In re Bradley, 57 N.C. App. 475, 291 S.E.2d 800 (1982).

Applied in Moye v. Thrifty Gas Co., 40 N.C. App. 310, 252 S.E.2d 837 (1979).

Cited in State v. Beamon, 2 N.C. App. 583, 163 S.E.2d 544 (1968); In re Arthur, 291 N.C. 640, 231 S.E.2d 614 (1977); State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977).

§ 8-35. Authenticated copies of public records.

All copies of bonds, contracts, notes, mortgages, or other papers relating to or connected with any loan, account, settlement of any account or any part thereof, or other transaction, between the United States or any state thereof or any corporation all of whose stock is beneficially owned by the United States or any state thereof, either directly or indirectly, and any person, natural or artificial; or extracts therefrom when complete on any one subject, or copies from the books or papers on file, or records of any public office of the State or the United States or of any corporation all of whose stock is beneficially owned by the United States or by any state thereof, directly or indirectly, shall be received in evidence and entitled to full faith and credit in any of the courts of this State when certified to by the chief officer or agent in charge of such public office or of such office of such corporation, or by the secretary or an assistant secretary of such corporation, to be true copies, and authenticated under the seal of the office, department, or corporation concerned. Any such certificate shall be prima facie evidence of the genuineness of such certificate and seal, the truth of the statements made in such certificate, and the official character of the person by which it purports to have been executed. (1891, c. 501; Rev., s. 1617; C.S., s. 1780; 1939, c. 149.)

Cross References. — As to judicial notice of laws of other states and foreign countries, see G.S. 8-3 and 8-4.

Legal Periodicals. — For article, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

CASE NOTES

Section 14-7.4 is very similar in form and purpose to this section. State v. Aldridge, 67 N.C. App. 655, 314 S.E.2d 139 (1984).

Admissibility of "Written Hearsay". — North Carolina countenances the introduction of test results, certified copies of official documents and records, as well as other writings, which, but for statute or decisional authority, would be written hearsay. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev'd on other grounds, 291 N.C. 640, 231 S.E.2d 614 (1977).

The purpose of authentication and certification of records is to avoid the inconvenience and sometimes the impossibility of producing original public documents in court, and admission of certified records tends to expedite trial of cases. State v. Watts, 289 N.C. 445, 222 S.E.2d 389 (1976).

A valid, properly authenticated judgment is admissible under North Carolina law. State v. Maynard, 311 N.C. 1, 316 S.E.2d 197, cert. denied, 469 U.S. 963, 105 S. Ct. 363, 83 L. Ed. 2d 299 (1984), aff'd, 943 F.2d 407 (4th Cir. 1991), cert. denied, 502 U.S. 1110, 112 S. Ct. 1211, 117 L. Ed. 2d 450 (1992).

But Authentication Is Essential. — Proper authentication is essential to the admission in evidence of the copies of the original records, and papers purporting to be exemplification from the Treasury Department of the United States, not authenticated, will not be admitted. Mott v. Ramsay, 92 N.C. 152 (1885).

In order for this section to apply it must affirmatively appear that the evidence was offered as a properly authenticated copy of a public record in accordance with this section. State v. Bovender, 233 N.C. 683, 65 S.E.2d 323 (1951), overruled on other grounds, State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989).

Parol Evidence Inadmissible. — The contents of the original record may not be proved by parol evidence under this section, but must be shown by a certified copy. National Sur. Co. v. Brock, 176 N.C. 507, 97 S.E. 417 (1918).

Reading of Record by District Attorney. — There is no error in allowing a properly certified copy of a record to be read into evidence by the district attorney, as opposed to having the document passed among the jurors. State v. Miller, 288 N.C. 582, 220 S.E.2d 326 (1975).

Public documents may be authenticated by mechanical reproduction of signature of authorized officer when he intends to adopt the mechanical reproduction as his signature. State v. Watts, 289 N.C. 445, 222 S.E.2d 389 (1976).

This section does not impose the restriction upon the general rule that for a stamped, printed or typewritten signature to be a good signature, the signature must be made under the hand of the person making it. State v. Watts, 289 N.C. 445, 222 S.E.2d 389 (1976).

Same — Presumption. — When the authorized officer of the D.M.V. provides records of the Division pursuant to statute, it may be presumed that he intends to authenticate the documents and to adopt the mechanical reproduction of his name as his own signature. State v. Watts, 289 N.C. 445, 222 S.E.2d 389 (1976).

This section has no application to an uncertified copy of a coroner's report but only to a duly certified copy. Robinson v. Life & Cas. Ins. Co., 255 N.C. 669, 122 S.E.2d 801 (1961).

Initialed certificate lacking notary's authentication meets all the requirements of G.S. 20-48 and provides prima facie evidence of the genuineness of such certificate, the truth of the statements made in such certificate, and the official character of the person who purportedly initialed and executed it. State v. Johnson, 25 N.C. App. 630, 214 S.E.2d 278, cert. denied, 288 N.C. 247, 217 S.E.2d 671 (1975).

The matters appearing in the transcript of any paper on file or records of any public office of this State or the United States, being relevant to an account which a referee was directed to take, are admissible in evidence by virtue of the provisions of this section. Wallace Bros. v. Douglas, 114 N.C. 450, 19 S.E. 668 (1894). See also Hinton v. Lake Drummond Canal Co., 166 N.C. 484, 82 S.E. 844 (1914).

A record of the D.M.V., disclosing that defendant's license was in a state of revocation under official D.M.V. action during the period defendant was charged with driving on a highway of this State, was competent under this section when the record was certified under seal of the D.M.V. State v. Mercer, 249 N.C. 371, 106 S.E.2d 866 (1959).

The records of the D.M.V., properly authenticated, were competent for the purpose of establishing the status of a person's operator's license and driving privilege. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838, appeal dismissed, 277 N.C. 459, 177 S.E.2d 900 (1970); State v. Rhodes, 10 N.C. App. 154, 177 S.E.2d 754 (1970).

Same — Employee's Certification of Original Renders Copy Admissible. — Certification by an employee of the D.M.V. that the original of an order of security requirement or suspension of driving privilege was mailed to defendant on a specified date at his address shown on the records of the D.M.V. was sufficient to render admissible a copy of the document in a prosecution of a defendant for driving while his license was suspended. State v. Herald, 10 N.C. App. 263, 178 S.E.2d 120 (1970).

Same — Certified Copy of Driver's License Record Admissible to Show Revocation. — In a prosecution of a defendant for driving while his license was suspended, a properly certified copy of the driver's license record of defendant on file with the D.M.V. is admissible as evidence that the defendant's license was in a state of revocation for a period covering the date of the offense for which he was charged. State v. Herald, 10 N.C. App. 263, 178 S.E.2d 120 (1970).

Applied in Dunes Club, Inc. v. Cherokee Ins. Co., 259 N.C. 294, 130 S.E.2d 625 (1963); State v. Williams, 17 N.C. App. 39, 193 S.E.2d 452 (1972).

Cited in Taylor v. Garrett, 7 N.C. App. 473, 173 S.E.2d 31 (1970); State v. Parker, 20 N.C. App. 146, 201 S.E.2d 35 (1973); In re Arthur, 291 N.C. 640, 231 S.E.2d 614 (1977); State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977).

§ 8-35.1. Division of Motor Vehicles' record admissible as prima facie evidence of convictions of offenses involving impaired driving.

Notwithstanding the provisions of G.S. 15A-924(d), a properly certified copy under G.S. 8-35 or G.S. 20-26(b) of the license records of a defendant kept by the Division of Motor Vehicles under G.S. 20-26(a) is admissible as prima facie evidence of any prior conviction of a defendant for an offense involving impaired driving as defined in G.S. 20-4.01(24a). (1975, c. 642, s. 1; c. 716, s. 5; 1983, c. 435, s. 3.)

§ 8-35.2. Records of clerk of court criminal index admissible in certain cases.

Notwithstanding the provisions of G.S. 15A-924(d) or 15A-1340.4(e), certified copies of the records contained in the criminal index or similar records maintained manually or by automatic data processing equipment by the clerk of superior court, are admissible as prima facie evidence of any prior convictions of the person named in the records, if the original documents upon which the records are based have been destroyed pursuant to law. The index must contain at least the following information:

(1) The case file number;
(2) The name, sex, and race of the defendant;
(3) His address;
(4) His driver's license number, if the conviction is for a motor vehicle offense and the number is available;
(5) The date of birth of the defendant, if it is available;
(6) The offense for which he was charged and the date of same;
(7) The disposition of the charge and the date of same;
(8) Whether the defendant was indigent;
(9) Whether he was represented by an attorney, and if so, the name of the attorney;
(10) Whether the defendant waived his right to an attorney, and
(11) The name and address of any victim, if available. (1985, c. 606, s. 1; 1997-456, s. 27.)

CASE NOTES

Cited in State v. Ellis, 130 N.C. App. 596, 504 S.E.2d 787 (1998).

§ 8-36. Authenticated copy of record of administration.

When letters testamentary or of administration on the goods and chattels of any person deceased, being an inhabitant in another state or territory, have been granted, or a return or inventory of the estate has been made, a copy of the record of administration or of the letters testamentary, and a copy of an inventory or return of the effects of the deceased, after the same has been granted or made, agreeable to the laws of the state where the same has been done, being properly certified, either according to the act of Congress or by the proper officer of such state or territory, shall be allowed as evidence. (1834, c. 4; R.C., c. 44, s. 7; Code, s. 1343; Rev., s. 1618; C.S., s. 1781.)

§ 8-37. Certificate of Commissioner of Motor Vehicles as to ownership of automobile.

In any civil or criminal action in which the ownership of a motor vehicle is relevant, evidence as to the letters and numbers appearing upon the registration plate attached to such vehicle or of the motor vehicle identification number, together with certified copies of records furnished pursuant to G.S. 20-42 by the Commissioner of Motor Vehicles showing the name of the owner of the vehicle to which such registration plate or vehicle identification number is assigned, or a certified copy of the certificate of title for such motor vehicle on file with the Commissioner of Motor Vehicles, is prima facie evidence of the ownership of such motor vehicle. (1931, c. 88, s. 1; 1943, c. 650; 1979, c. 980.)

Cross References. — As to registration and certificate of title for motor vehicles generally, see G.S. 20-50 et seq.

CASE NOTES

Admissibility of "Written Hearsay". — North Carolina countenances the introduction of test results, certified copies of official documents and records, as well as other writings, which, but for statute or decisional authority, would be written hearsay. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev'd on other grounds, 291 N.C. 640, 231 S.E.2d 614 (1977).

Applied in Woodruff v. Holbrook, 255 N.C. 740, 122 S.E.2d 709 (1961).

Cited in In re Arthur, 291 N.C. 640, 231 S.E.2d 614 (1977).

ARTICLE 3A.

Findings, Records and Reports of Federal Officers and Employees.

§ 8-37.1. Finding of presumed death.

(a) A written finding of presumed death, made by the Secretary of War, the Secretary of the Navy, or other officer or employee of the United States authorized to make such finding, pursuant to the Federal Missing Persons Act (56 Stat. 143, 1092, and P.L. 408, ch. 371, 2d Sess. 78th Cong.; 50 U.S.C. App. Supp. 1001-17), as now or hereafter amended, or a duly certified copy of such finding, shall be received in any court, office or other place in this State as prima facie evidence of the death of the person therein found to be dead, and the date, circumstances and place of his disappearance. This subsection applies only to findings of presumed death made prior to the effective date of Section 5(b) of Public Law 89-554.

(b) A written finding of presumed death, made by the Secretary pursuant to Chapter 10 of Title 37 of the U.S. Code, P.L. 89-554 as now or hereafter amended, or a duly certified copy of such finding, shall be received in any court, office, or other place in this State as prima facie evidence of the death of the person therein found to be dead, and the date, circumstances, and place of his disappearance. This subsection applies only to findings of presumed death made on or after the effective date of Section 5(b) of Public Law 89-554. (1945, c. 731, s. 1; 1995, c. 379, s. 3.)

§ 8-37.2. Report or record that person missing, interned, captured, etc.

An official written report or record, or duly certified copy thereof, that a person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead, or is alive, made by any officer or employee of the United States authorized by the act referred to in § 8-37.1, or by any other law of the United States to make same, shall be received in any court, office or other place in this State as prima facie evidence that such person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead, or is alive, as the case may be. (1945, c. 731, s. 2.)

§ 8-37.3. Deemed signed and issued pursuant to law; evidence of authority to certify.

For the purposes of §§ 8-37.1 and 8-37.2 any finding, report or record, or duly certified copy thereof, purporting to have been signed by such an officer or employee of the United States as is described in said sections, shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing same shall prima facie be deemed to have acted within the scope of his authority. If a copy purports to have been certified by a person authorized by law to certify the same, such certified copy shall be prima facie evidence of his authority so to certify. (1945, c. 731, s. 3.)

ARTICLE 4.

Other Writings in Evidence.

§ 8-38: Repealed by Session Laws 1983 (Regular Session, 1984), c. 1037, s. 13.

Cross References. — As to provision that a subscribing witness' testimony is not necessary, see G.S. 8C-1, Rule 903.

§ 8-39. Parol evidence to identify land described.

In all actions for the possession of or title to any real estate parol testimony may be introduced to identify the land sued for, and fit it to the description contained in the paper-writing offered as evidence of title or of the right of possession, and if from this evidence the jury is satisfied that the land in question is the identical land intended to be conveyed by the parties to such paper-writing, then such paper-writing shall be deemed and taken to be sufficient in law to pass such title to or interest in such land as it purports to pass: Provided, that such paper-writing is in all other respects sufficient to pass such title or interest. (1891, c. 465, s. 1; Rev., s. 1605; C.S., s. 1783.)

Cross References. — As to vagueness of description in deeds, see G.S. 39-2 and note thereto.

CASE NOTES

Section Not Retroactive in Operation. — There is a general presumption against the retroactive operation of a statute where it would impair vested rights; therefore, this section cannot be held to operate retrospectively so as to allow parol testimony to locate land referred to and ambiguously described in a contract made before the passage of this section. Lowe v. Harris, 112 N.C. 472, 17 S.E. 539 (1893).

Deed Must Contain Some Description. — This section applies only where there is a description which can be aided by parol, but not when there is no description. Lowe v. Harris, 112 N.C. 472, 17 S.E. 539 (1893); Hemphill v. Annis, 119 N.C. 514, 26 S.E. 152 (1896); Harris v. Woodward, 130 N.C. 580, 41 S.E. 790 (1902).

A deed which fails to describe any land is as void now as it was before the passage of this section, but a description by name, where lands have a known name, is sufficient. Moore v. Fowle, 139 N.C. 51, 51 S.E. 796 (1905).

And Description Must Identify Land or Refer to Source of Identification. — The statute applies only when there is a description which can be aided by parol, and cannot be held to validate a deed where the description is too vague and indefinite to identify the land claimed and to fit it to the description. At all events, the description as it may be explained by oral testimony must identify and make certain the land intended to be conveyed. Failing in this, the deed is void. Holloman v. Davis, 238 N.C. 386, 78 S.E.2d 143 (1953).

The statutory rule permitting the use of parol testimony to fit the description in the deed to the land intended to be conveyed does not relieve the invalidity due to vagueness, indefiniteness and uncertainty unless there are elements of description which are either certain in themselves or are capable of being reduced to certainty by reference to something extrinsic, to which the deed refers. The liberal rule of construction does not permit the passing of title to land by parol. Such evidence cannot be used to enlarge the scope of the descriptive words. The deed itself must point to the source from which evidence aliunde to make the description complete is to be sought. Holloman v. Davis, 238 N.C. 386, 78 S.E.2d 143 (1953).

The description must identify the land, or it must refer to something that will identify it with certainty. Cummings v. Dosam, Inc., 273 N.C. 28, 159 S.E.2d 513 (1968).

A deed purporting to convey an interest in land is void unless it contains a description of the land sufficient to identify it or refers to something extrinsic by which the land may be identified with certainty. Overton v. Boyce, 289 N.C. 291, 221 S.E.2d 347 (1976).

Parol Evidence Alone Cannot Establish Boundary. — While parol evidence is competent to "fit the description to the thing," it is not competent to establish a line or corner when the instrument by its terms wholly fails to identify such line or corner; in other words, it is competent to find but not to make a corner. Holmes v. Sapphire Valley Co., 121 N.C. 410, 28 S.E. 545 (1897).

Description in Deed Must Be Fitted to Earth's Surface. — In an action to recover for the wrongful cutting and removal of timber from land claimed by plaintiffs, plaintiffs must locate the land by fitting the description in their deeds to the earth's surface, regardless of whether they rely upon their deeds as proof of title or color of title, or, in the absence of title or color of title, they are required to establish the known and visible lines and boundaries of the land actually occupied by them for the statutory period. Andrews v. Bruton, 242 N.C. 93, 86 S.E.2d 786 (1955).

Those having the burden of proof must locate the land they claim title to by fitting the description contained in the paper-writing offered as evidence of title to the land's surface. State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

Allegations as to title having been denied, it was incumbent upon plaintiffs in ejectment action to establish both ownership and trespass. Whether relying upon their deeds as proof of title or of color of title, they were required to locate the land by fitting the description in the deeds to the earth's surface and showing that such deeds embraced the land in controversy. In the absence of title or color of title, they were required to establish the known and visible lines and boundaries of the land actually occupied for the statutory period. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

Scope of Descriptive Words in Deed May Not Be Enlarged by Parol Evidence. — Parol evidence is admissible to fit the description in a deed showing color of title to the land. Such evidence cannot, however, be used to enlarge the scope of the descriptive words. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

As the purpose of parol evidence is to fit the description to the property, not to create a description. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965); Cummings v. Dosam, Inc., 273 N.C. 28, 159 S.E.2d 513 (1968); Builders Supplies Co. v. Gainey, 282 N.C. 261, 192 S.E.2d 449 (1972).

Evidence dehors the deed is admissible to "fit the description to the thing" only when it tends to explain, locate, or make certain some call or descriptive term used in the deed. It is the deed that must speak. The oral evidence must only interpret what has been said therein. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

Parol evidence is admissible to fit the description to the land. Such evidence cannot, however, be used to enlarge the scope of the descriptive words. The deed itself must point to the source from which evidence aliunde to make the description complete is to be sought. State v. Brooks, 279 N.C. 45, 181 S.E.2d 553 (1971); Builders Supplies Co. v. Gainey, 282 N.C. 261, 192 S.E.2d 449 (1972).

Parol evidence is not admissible to enlarge the scope of the description in the deed, but when the deed itself, including the references to extrinsic things, describes with certainty the property intended to be conveyed, parol evidence is admissible to fit the description in the deed to the land. Overton v. Boyce, 289 N.C. 291, 221 S.E.2d 347 (1976).

Ambiguous or Indefinite Terms Generally. — Where the written terms contained in the contract are sufficient to pass the property, but are ambiguous or indefinite, then parol evidence of the expressions of the parties and attendant facts and circumstances may be heard to aid in ascertaining the correct meaning of the terms used, but not to alter or add to what has been written. Ward v. Gay, 137 N.C. 397, 49 S.E. 884 (1905).

Patently Ambiguous Description. — When it is apparent upon the face of the deed, itself, that there is uncertainty as to the land intended to be conveyed and the deed, itself, refers to nothing extrinsic by which such uncertainty can be resolved, the description is said to be patently ambiguous. Overton v. Boyce, 289 N.C. 291, 221 S.E.2d 347 (1976).

A patent ambiguity in the description of the land is such an uncertainty appearing on the face of the instrument that the court, reading the language in the light of all the facts and circumstances referred to in the instrument, is unable to derive therefrom the intention of the parties as to what land was to be conveyed. Overton v. Boyce, 289 N.C. 291, 221 S.E.2d 347 (1976).

A patent ambiguity in the description of the land cannot be removed by parol evidence. Cummings v. Dosam, Inc., 273 N.C. 28, 159 S.E.2d 513 (1968).

Parol evidence may not be introduced to remove a patent ambiguity in the description of the land since to do so would not be a use of such evidence to fit the description to the land but a use of such evidence to create a description by adding to the words of the instrument. Overton v. Boyce, 289 N.C. 291, 221 S.E.2d 347 (1976).

And Deed Containing Such Description Is Void. — Where the description of land in a deed under which plaintiffs claimed was patently ambiguous, the deed was void and could not be the basis for a valid claim of title in the plaintiffs to the land claimed by them. Overton v. Boyce, 289 N.C. 291, 221 S.E.2d 347 (1976).

The identity or location of the land may be shown by documentary evidence, such as plats, surveys, and field notes. A map made by a surveyor of the premises sued for and of other tracts adjacent thereto, when proved to be correct, is admissible to illustrate other testimony in the case and throw light on the location of the land in controversy; and a draft of a survey, proved to be correct, is admissible in evidence as explanatory of what the surveyor testified he had done in making the survey. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

When Description Is Sufficient. — A description of land in a deed as all that tract of land in two certain counties lying on "both sides of old road between" designated points, and bounded by lands of named owners "and others," being parts of certain State grants, conveyed by the patentee or enterer to certain grantees, etc., was sufficient to admit parol evidence in aid of the identification of the lands as those intended to be conveyed. Buckhorn Land & Timber Co. v. Yarbrough, 179 N.C. 335, 102 S.E. 630 (1920).

Applied in McKay v. Bullard, 219 N.C. 589, 14 S.E.2d 657 (1941); Taylor v. Tri-County Elec. Membership Corp., 10 N.C. App. 277, 178 S.E.2d 130 (1970).

Cited in Peel v. Calais, 224 N.C. 421, 31 S.E.2d 440 (1944); Brown v. Hurley, 243 N.C. 138, 90 S.E.2d 324 (1955); Baldwin v. Hinton, 243 N.C. 113, 90 S.E.2d 316 (1955); Lane v. Lane, 255 N.C. 444, 121 S.E.2d 893 (1961); Garrison v. Blakeney, 37 N.C. App. 73, 246 S.E.2d 144 (1978); Chappell v. Donnelly, 113 N.C. App. 626, 439 S.E.2d 802 (1994).

§ 8-40: Repealed by Session Laws 1983 (Regular Session, 1984), c. 1037, s. 12.

Cross References. — As to comparison by the trier of factor expert witnesses with specimens which have been authenticated, see G.S. 8C-1, Rule 901(b)(3).

§ 8-40.1: Repealed by Session Laws 1983 (Regular Session, 1984), c. 1037, s. 10.

Cross References. — As to present provisions relating to the learned treatise exception to the hearsay rule, see G.S. 8C-1, Rule 803(18).

§ 8-41. Bills of lading in evidence.

In all actions by or against common carriers or in the trial of any criminal action in which it shall be thought necessary to introduce in evidence any bills of lading issued by said common carrier or by a connecting carrier, it shall be competent to introduce in evidence any paper-writing purporting to be the original bill of lading, or a duplicate thereof, upon proof that such paper purporting to be such bill of lading or duplicate was received in due course of mail from consignor or agent of said carrier or connecting carrier, or delivered by said common carrier to the consignee or other person entitled to the possession of the property for which said paper purports to be the bill of lading: Provided, that such purported bill of lading shall not be declared to be the bill of lading unless the said purported bill of lading is first exhibited by the plaintiff or his agent or attorney to the defendant or its attorney, or its agent upon whom process may be served, ten days before the trial where the point of shipment is in the State, and twenty days when the point of shipment is without the State. Upon such proof and introduction of the bill of lading, the due execution thereof shall be prima facie established. (1915, c. 287; C.S., s. 1785; 1945, c. 97.)

§ 8-42. Book accounts under sixty dollars.

When any person shall bring an action upon a contract, or shall plead, or give notice of, a setoff or counterclaim for goods, wares and merchandise by him sold and delivered, or for work done and performed, he shall file his account with his complaint, or with his plea or notice of setoff or counterclaim, and if upon the trial of the issue, or executing a writ of inquiry of damages in such action, he shall declare upon his oath that the matter in dispute is a book account, and that he hath no means to prove the delivery of any of the articles which he then shall propose to prove by himself but by this book, in that case such book may be given in evidence, if he shall make out by his own oath that it doth contain a true account of all the dealings, or the last settlement of accounts between himself and the opposing party, and that all the articles therein contained, and by him so proved, were bona fide delivered, and that he hath given the opposing party all just credits; and such book and oath shall be received as evidence for the several articles so proved to be delivered within two years next before the commencement of the action, but not for any article of a longer standing, nor for any greater amount than sixty dollars ($60.00). (1756, c. 57, ss. 2, 6, 7, P.R.; R.C., c. 15, s. 1; Code, s. 591; Rev., s. 1622; C.S., s. 1786.)

CASE NOTES

Terms Construed. — In an early case, the words "to make out on his oath" and "to prove," used in the former statute, were construed to be synonymous terms. Kitchen v. Tyson, 7 N.C. 314 (1819).

Construction with Former § 8-51. — Notwithstanding the restrictions contained in former G.S. 8-51, in relation to a person's testifying as to any matter between himself and a deceased person, when his executor or administrator is a party, he may, as heretofore, be permitted to testify under this section. Leggett v. Glover, 71 N.C. 211 (1874). See Nall v. Kelly, 169 N.C. 717, 86 S.E. 627 (1915).

Applicability of Section. — This section is applicable only to actions brought under the "book-debt law," hence in an action on a contract for sawing timber, it was not necessary to set out the items in the pleadings. McPhail Bros. v. Johnson, 115 N.C. 298, 20 S.E. 373 (1894).

Where Original Account Exceeds Sixty Dollars. — Under this section, a plaintiff may prove by his own oath a balance of sixty dollars, due to him, although his account produced appears to have been originally for more than sixty dollars ($60.00), but is reduced by credits below that amount. McWilliams v. Cosby, 26 N.C. 110 (1843).

Same — Dismissal of Part for Jurisdictional Purposes. — Where divers dealings were included in an account, the aggregate of which exceeded sixty dollars ($60.00), the plaintiff could omit or give credit for any item he chose, so as to bring the case within the jurisdiction of a single magistrate. But after thus obtaining jurisdiction the plaintiff could not prove the account under this section for he was required to swear that the account rendered contained a true account of all the dealings. Joseph Waldo & Co. v. Jolly, 49 N.C. 173 (1856).

Proof of Setoff Allowed. — The defendant may, under this section, prove a setoff. Webber v. Webber, 79 N.C. 572 (1878).

Book and Oath Not Exclusive Evidence. — The book and the oath under this section are not evidence that the book contains all the credits and a full and true account of all the dealings between the parties, so as to show that nothing is due to the other party. Alexander v. Smoot, 35 N.C. 461 (1852).

Swearing as to Price of Goods. — It is competent for a party under this section to swear to the price, as well as to the delivery of the articles stated in his account. Colbert v. Piercy, 25 N.C. 77 (1842).

Cross-Examination. — It is competent for the opposite party to cross-examine the party taking his oath as required by this section, both as to the article and the prices charged, with a view to contradict or discredit him as he might do in regard to any other witness swearing to the account, the party so swearing being considered as a witness in his own cause. Colbert v. Piercy, 25 N.C. 77 (1842).

Books of Decedent Admissible. — Under this section it is admissible to the amount of sixty dollars ($60.00) to offer the book accounts of a decedent, containing charges against third persons, and made by him. Bland v. Warren, 65 N.C. 372 (1871).

Unverified Entries on Own Book. — A party to an action may not show unverified entries of credit in his behalf on his own books involved in a disputed account, the same not falling within the intent and meaning of this section and G.S. 8-43 and 8-44, especially when it has not been made to appear that the person having made them is dead or cannot be had to give his sworn statement of the transaction. Branch v. Ayscue, 186 N.C. 219, 119 S.E. 201 (1923).

Cited in Perry v. First-Citizens Bank & Trust Co., 223 N.C. 642, 27 S.E.2d 636 (1943).

§ 8-43. Book accounts proved by personal representative.

In all actions where executors and administrators are parties, such book account for all articles delivered within two years previous to the death of the deceased may be proved under the like circumstances, rules and conditions; and in such case, the executor or administrator may prove by himself that he found the account so stated on the books of the deceased; that there are no witnesses, to his knowledge, capable of proving the delivery of the articles which he shall propose to prove by said book, and that he believes the same to be just, and doth not know of any other or further credit to be given than what is therein mentioned: Provided, that if two years shall not have elapsed previous to the death of the deceased, the executor or administrator may prove the said book account, if the suit shall be commenced within three years from the delivery of the articles: Provided further, that whenever by the aforesaid proviso the time of proving a book account in manner aforesaid is enlarged as to the one party, to the same extent shall be enlarged the time as to the other party. (1756, c. 57, s. 2, P.R.; 1796, c. 465, P.R.; R.C., c. 15, s. 2; Code, s. 592; Rev., s. 1623; C.S., s. 1787.)

CASE NOTES

An administrator may offer in evidence the book accounts of a decedent, containing charges against third persons, and made by him. Bland v. Warren, 65 N.C. 372 (1871).

Cited in Perry v. First-Citizens Bank & Trust Co., 223 N.C. 642, 27 S.E.2d 636 (1943).

§ 8-44. Copies of book accounts in evidence.

A copy from the book of accounts proved in manner above directed may be given in evidence in any such action or setoff as aforesaid, and shall be as available as if such book had been produced, unless the party opposing such proof shall give notice to the adverse party or his attorney, at the joining of the issue, or 10 days before the trial, that he will require the book to be produced at the trials; and in that case no such copy shall be admitted as evidence. (1756, c. 57, s. 33, P.R.; R.C., c. 15, s. 3; C.C.P., s. 343c; Code, s. 593; Rev., s. 1624; C.S., s. 1788.)

CASE NOTES

Production of Original After Notice. — In all cases under this section and G.S. 8-42 and 8-43, it is the duty of the party, who wishes to prove his debt by his own oath, to produce the original account when notice to that effect has been given to him by the other party. Coxe v. Skeen, 25 N.C. 443 (1843).

A voluntary destruction of the original will not authorize the introduction of a copy. Coxe v. Skeen, 25 N.C. 443 (1843).

§ 8-44.1. Hospital medical records.

Copies or originals of hospital medical records shall not be held inadmissible in any court action or proceeding on the grounds that they lack certification, identification, or authentication, and shall be received as evidence if otherwise admissible, in any court or quasi-judicial proceeding, if they have been tendered to the presiding judge or designee by the custodian of the records, in accordance with G.S. 1A-1, Rule 45(c), or if they are certified, identified, and authenticated by the live testimony of the custodian of such records.

Hospital medical records are defined for purposes of this section and G.S. 1A-1, Rule 45(c) as records made in connection with the diagnosis, care and treatment of any patient or the charges for such services except that records covered by G.S. 122-8.1, G.S. 90-109.1 and federal statutory or regulatory provisions regarding alcohol and drug abuse, are subject to the requirements of said statutes. (1973, c. 1332, s. 1; 1983, c. 665, s. 2.)

Editor's Note. — Section 122-8.1, referred to in this section, was repealed by Session Laws 1985, c. 589, s. 1. See now Chapter 122C.

CASE NOTES

Admissibility of Hospital Records. — A hospital record is a business record, and is admissible into evidence upon the laying of a proper foundation. A proper foundation consists of testimony from a hospital librarian or custodian of the records or other qualified witness as to the identity and authenticity of the record and the mode of its preparation, including testimony that the entries were made at or near the time of the act or event recorded, that the entries were made by persons having personal knowledge of the event or act, and that the entries were made ante litem motam. The court, however, should exclude from jury consideration entries which amount to hearsay on hearsay. Donavant v. Hudspeth, 75 N.C. App. 321, 330 S.E.2d 517, rev'd on other grounds, 318 N.C. 1, 347 S.E.2d 797 (1986); In re Parker, 90 N.C. App. 423, 368 S.E.2d 879 (1988).

Authenticating Hospital Records. — This section merely eliminated the necessity of taking original hospital records to court, where they were often kept for long periods to the dismay of record keepers and the inconvenience of those who needed to use the records for any purpose, including the later treatment of the patient. It did not modify the then-existing process of authenticating hospital records but, to the contrary, it ratified and reinforced the process by continuing to require authenticating testimony. In re Will of Cromartie, 64 N.C. App. 115, 306 S.E.2d 853 (1983).

The key to authenticating hospital records is not personal knowledge by anyone of particular entries or occurrences, but evidence of system and practice; evidence that a business-like system of compiling records exists, which requires that entries be made at or near the time involved by those who examine, observe, test and treat patients; and that in practice the system is generally followed. When that is testified to by someone familiar with the system, and the purported record involved is testified to be genuine, the authenticating process is complete. In re Will of Cromartie, 64 N.C. App. 115, 306 S.E.2d 853 (1983).

It is a matter of common knowledge among those familiar with hospital records that entries requiring dictation and transcription are done late by many doctors because they give priority to their other medical duties. Nevertheless, such entries, when regularly made, are still parts of the patients' record and should be so considered, except when there is evidence of duplicity or bad faith. In re Will of Cromartie, 64 N.C. App. 115, 306 S.E.2d 853 (1983).

Mental Health Records Previously Admitted Into Evidence. — Trial court did not err by considering mental health records of a mother contained within the underlying file and previously admitted into evidence in proceedings to terminate her parental rights, because the mental health records challenged by the mother were originally admitted into evidence during a permanency planning review hearing and were not challenged by the mother at that time. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

It is not required that the authenticating proof be only by personal knowledge. Such a requirement would, for all intents and purposes, abrogate the use of business records in court; because under the conditions that most businesses and hospitals are conducted today, it is a rare person indeed, that has personal knowledge of any work or undertaking done by others. In re Will of Cromartie, 64 N.C. App. 115, 306 S.E.2d 853 (1983).

Mental Health Records Admissible. — Rutherford County Department of Social Services was not precluded from admitting the mother's mental health records into evidence. In re J.S.L., 177 N.C. App. 151, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006).

Applied in State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

§ 8-45. Itemized and verified accounts.

In any actions instituted in any court of this State upon an account for goods sold and delivered, for rents, for services rendered, or labor performed, or upon any oral contract for money loaned, a verified itemized statement of such account shall be received in evidence, and shall be deemed prima facie evidence of its correctness. (1897, c. 480; Rev., s. 1625; 1917, c. 32; C.S., s. 1789; 1941, c. 104.)

Legal Periodicals. — For survey of 1976 case law on evidence, see 55 N.C.L. Rev. 1033 (1977).

CASE NOTES

Purpose. — This section was designed to facilitate the collection of such accounts where there was no bona fide dispute, and to relieve the plaintiff in such instances of the expense and delay of formally taking depositions. Nall v. Kelly, 169 N.C. 717, 86 S.E. 627 (1915).

This section was designed to facilitate the collection of accounts about which there is no bona fide dispute. Bramco Elec. Corp. v. Shell, 31 N.C. App. 717, 230 S.E.2d 576 (1976); Dixie Chem. Corp. v. Edwards, 68 N.C. App. 714, 315 S.E.2d 747 (1984).

This section was designed to facilitate the collection of accounts not in dispute. Santora, McKay & Ranieri v. Franklin, 79 N.C. App. 585, 339 S.E.2d 799 (1986).

This statute is applicable only where there is no dispute about an account. Durham Life Broadcasting, Inc. v. International Carpet Outlet, Inc., 63 N.C. App. 787, 306 S.E.2d 459 (1983).

Construction of Section. — This section must be strictly construed. Bramco Elec. Corp. v. Shell, 31 N.C. App. 717, 230 S.E.2d 576 (1976).

Since many states have statutes similar to this section it is appropriate to review decisions from those states for guidance in construing this section. Bramco Elec. Corp. v. Shell, 31 N.C. App. 717, 230 S.E.2d 576 (1976).

Use Not Limited to Absence of Witness. — Nothing in this section or case law limits the use of a verified statement of the account to only those situations where the witness is unavailable to testify. Johnson Serv. Co. v. Richard J. Curry & Co., 29 N.C. App. 166, 223 S.E.2d 565 (1976).

Verification Essential. — An itemized account to be prima facie evidence of its correctness must be properly verified and stated so as to show an indebtedness. Knight v. Taylor, 131 N.C. 84, 42 S.E. 537 (1902).

Sufficiency of Verification. — Verification of the itemized account is sufficient if the affiant has personal knowledge of the account or is familiar with the books and records of the business and is in a position to testify as to the correctness of the records. Johnson Serv. Co. v. Richard J. Curry & Co., 29 N.C. App. 166, 223 S.E.2d 565 (1976).

Where the verifier has no personal knowledge of all the matters contained therein will not disqualify the exhibit as a verified statement if such verifier certifies familiarity with the books and records of the business and is competent to testify to their correctness. The law requires no more. VanLandingham v. Northeastern Motors, Inc., 63 N.C. App. 778, 306 S.E.2d 169, cert. denied, 309 N.C. 826, 310 S.E.2d 359 (1983).

In an action for accounting and tax services rendered, the different itemized bills for each period showing the services rendered, the time required, expenses incurred, charges made, the previous balance, the amount then due, and the different ledger sheets showing charges, payments, and balances all along, are ingredients enough for a good, verified statement of account. VanLandingham v. Northeastern Motors, Inc., 63 N.C. App. 778, 306 S.E.2d 169, cert. denied, 309 N.C. 826, 310 S.E.2d 359 (1983).

Unverified Statements of Account Admissible as Business Records. — In an action to recover for labor and materials supplied by plaintiff in repairing defendant's truck, plaintiff's exhibit which consisted of itemized statements of account for materials supplied and labor performed by plaintiff upon defendant's truck was not admissible pursuant to this section because it was not verified; however, the exhibit was admissible under the business records exception to the hearsay rule where there was testimony that the exhibit properly reflected the work done by plaintiff's shop foreman and charges made pursuant to the work he performed. Bond Park Truck Serv. v. Hill, 53 N.C. App. 443, 281 S.E.2d 61 (1981).

Where it affirmatively appears from the record that the various entries on the papers comprising the exhibit admitted as a verified statement of account were made in the regular course of business, at or near the time of the transactions involved, and were authenticated by a witness familiar with the system under which they were made, the exhibit was admissible under the business records exception to the hearsay rule. VanLandingham v. Northeastern Motors, Inc., 63 N.C. App. 778, 306 S.E.2d 169, cert. denied, 309 N.C. 826, 310 S.E.2d 359 (1983).

Statements showing amounts due for services rendered, attached to complaint, and based upon an unverified computer printout were not admissible as verified itemized statements under this section. However, as this evidence was admissible under the business records exception to the hearsay rule, and as the jury was correctly instructed on the law pertaining to an account stated by an implied agreement, this error was rendered harmless. Santora, McKay & Ranieri v. Franklin, 79 N.C. App. 585, 339 S.E.2d 799 (1986).

Competency of Witness Required. — Under the terms of this section, as now drawn, an affiant, verifying an account so as to make the same prima facie evidence, must be a competent witness to the facts, and, when it appears on the face of the account that he has no personal knowledge of these facts, or it is established that he is otherwise an incompetent witness, the ex parte account so verified should not be received in evidence. Nall v. Kelly, 169 N.C. 717, 86 S.E. 627 (1915). And it must appear that he is not excluded under former § 8-51. See William M. Lloyd & Co. v. Poythress, 185 N.C. 180, 116 S.E. 584 (1923).

An itemized, verified statement of an account is an ex parte statement and this section, governing its admission, must be strictly complied with, and the person who verifies the account, being treated as a witness pro tanto, must be competent to testify as a witness in respect to the account if called upon at the trial; but where an itemized statement of account offered at the trial was verified by the treasurer of the plaintiff corporation who declared in his affidavit that "he is familiar with the books and business" of the plaintiff, it could not be held as a matter of law that the affiant had no personal knowledge of the transaction, and the exclusion of the statement by the trial court was reversible error. Nall v. Kelly, 169 N.C. 717, 86 S.E. 627 (1915), cited and distinguished, in Endicott-Johnson Corp. v. Schochet, 198 N.C. 769, 153 S.E. 403 (1930).

The account must be sworn to by some person who would be a competent witness to testify to the correctness of the account. Johnson Serv. Co. v. Richard J. Curry & Co., 29 N.C. App. 166, 223 S.E.2d 565 (1976).

An affiant who verifies an account of goods sold and delivered, which is to be received into evidence and taken as prima facie evidence of its correctness pursuant to this section, shall be regarded and dealt with as a witness pro tanto, and to such extent must meet the requirements and is subject to the qualifications and restrictions as other witnesses. Bramco Elec. Corp. v. Shell, 31 N.C. App. 717, 230 S.E.2d 576 (1976).

Where plaintiff's purported itemized statement was verified by a woman who was identified in the verification as the president of plaintiff corporation, but the verification contained no statement to the effect, and there was no other showing, that affiant had any personal knowledge of the matters set forth in the affidavit or that she was familiar with the books and records of plaintiff corporation, and the burden was on plaintiff to establish a prima facie case, it failed to show that the affiant would have been competent to testify if called as a witness at trial. Bramco Elec. Corp. v. Shell, 31 N.C. App. 717, 230 S.E.2d 576 (1976).

Prima Facie Case. — In an action to recover for goods sold and delivered, where a verified statement of the account shows that it is for goods sold by the plaintiff to the defendant and sets out the number and kind of articles, the catalogue numbers, price per dozen and discounts allowed, and there are trade terms and abbreviations well understood in the trade, which show more fully the kind of articles, it is properly itemized to make out a prima facie case under this section. Claus v. Lee, 140 N.C. 552, 53 S.E. 433 (1906); Lipinsky v. Revell, 167 N.C. 508, 83 S.E. 820 (1914).

To make out a prima facie case under this section, the account not only must be properly verified and itemized, it must also be stated so as to show an indebtedness. Kight v. Harris, 33 N.C. App. 200, 234 S.E.2d 637 (1977); Santora, McKay & Ranieri v. Franklin, 79 N.C. App. 585, 339 S.E.2d 799 (1986).

Nonsuit. — Where a verified account or affidavit to a statement for goods sold and delivered is insufficient to establish a prima facie case under the provision of this section, and this is the only evidence offered, a judgment of nonsuit upon the evidence is properly allowed. Nall v. Kelly, 169 N.C. 717, 86 S.E. 627 (1915).

Burden of Proof. — Where a prima facie case had been made out by the plaintiff in his action to recover the purchase price of goods sold and delivered to the defendant, and the latter contended that he, as the agent for the former, was to sell upon commission, and that he had accounted for such sales, except a small balance which he tendered, or offered to submit to judgment for that amount, the burden was upon defendant to show the fact of agency, and of accounting thereon, which was for the determination of the jury upon the question of indebtedness. Carr v. Alexander & Garsed, 169 N.C. 665, 86 S.E. 613 (1915).

Husband as Agent of Wife. — Itemized statement of goods held insufficient to establish agency of husband in purchasing goods for use on wife's farm. Pitt v. Speight, 222 N.C. 585, 24 S.E.2d 350 (1943).

Subordination of Section to Former § 8-51. — In William M. Lloyd & Co. v. Poythress, 185 N.C. 180, 116 S.E. 584 (1923), the court said: "We have held that this section, appearing as a section on the law of evidence, should be construed in subordination to C.S., 1795, [former G.S. 8-51] under the principle announced in Cecil v. City of High Point, 165 N.C. 431, 81 S.E. 616 (1914)." See Nall v. Kelly, 169 N.C. 717, 86 S.E. 627 (1915).

Applied in Wright Co. v. Green, 196 N.C. 197, 145 S.E. 16 (1928); United States Leasing Corp. v. Hall, 264 N.C. 110, 141 S.E.2d 30 (1965); Planters Indus., Inc. v. Wiggins, 17 N.C. App. 132, 193 S.E.2d 303 (1972); Harrell v. W.B. Lloyd Constr. Co., 300 N.C. 353, 266 S.E.2d 626 (1980).

Cited in Haines v. Clark, 230 N.C. 751, 55 S.E.2d 693 (1949); Forsyth County Hosp. Auth. v. Sales, 82 N.C. App. 265, 346 S.E.2d 212 (1986); Roy Burt Enters., Inc. v. Marsh, 328 N.C. 262, 400 S.E.2d 425 (1991).

ARTICLE 4A.

Photographic Copies of Business and Public Records.

§ 8-45.1. Photographic reproductions admissible; destruction of originals.

(a) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation, X ray or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original.

(b) The provisions of subsection (a) of this section shall apply to records stored on any form of permanent, computer-readable media, such as a CD-ROM, if the medium is not subject to erasure or alteration. Nonerasable, computer-readable storage media shall not be used for preservation duplicates, as defined in G.S. 132-8.2, or for the preservation of permanently valuable records as provided in G.S. 121-5(d), except to the extent expressly approved by the Department of Cultural Resources pursuant to standards and conditions established by the Department. (1951, ch. 262, s. 1; 1977, ch. 569; 1999-131, s. 1; 1999-456, s. 47(a).)

Cross References. — As to admissibility of contents of writings, recordings and photographs, see Chapter 8C, Article 10.

Legal Periodicals. — For article, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

CASE NOTES

Admissibility of "Written Hearsay". — North Carolina countenances the introduction of test results, certified copies of official documents and records, as well as other writings, which, but for statute or decisional authority, would be written hearsay. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev'd on other grounds, 291 N.C. 640, 231 S.E.2d 614 (1977).

Reproductions Are Primary Evidence. — Reproductions are made and kept among the records of many banks in due course of business. Their accuracy is not questioned. As proof of payment they constitute not secondary but primary evidence. State v. Shumaker, 251 N.C. 678, 111 S.E.2d 878 (1960).

Photostatic copies of deposit slips and checks made by an employee of a bank in the usual course of business and identified by such employee are competent as primary evidence without proof of the loss or destruction of the originals. Jones v. Metropolitan Life Ins. Co., 5 N.C. App. 570, 169 S.E.2d 6 (1969).

Photocopies are admissible as originals. Pinner v. Southern Bell Tel. & Tel. Co., 60 N.C. App. 257, 298 S.E.2d 749, cert. denied, 308 N.C. 387, 302 S.E.2d 253 (1983).

Business records are admissible as an exception to the hearsay rule when they (1) are made in the regular course of business, at or near the time of the events recorded; (2) are original entries; (3) are based on the personal knowledge of the individual making the entries; and (4) are authenticated by a witness familiar with the system by which they were made. Pinner v. Southern Bell Tel. & Tel. Co., 60 N.C. App. 257, 298 S.E.2d 749, cert. denied, 308 N.C. 387, 302 S.E.2d 253 (1983).

Failure to Show That Copy Was Made in Regular Course of Business or by Whom It Was Made. — A photostatic copy of a purported written designation of plaintiff by deceased as the beneficiary of deceased's governmental life insurance benefits should not be admitted as evidence where plaintiff failed to show that the copy was made in the regular course of business or activity of any federal agency or by whom it was made. Jones v. Metropolitan Life Ins. Co., 5 N.C. App. 570, 169 S.E.2d 6 (1969).

A photostatic copy of a computerized report from the operations center of a bank was admissible in a prosecution for the issuance of checks with knowledge of insufficient funds to pay the checks upon presentation. State v. Passmore, 37 N.C. App. 5, 245 S.E.2d 107, cert. denied, 295 N.C. 556, 248 S.E.2d 734 (1978).

Cited in In re Arthur, 291 N.C. 640, 231 S.E.2d 614 (1977); Sutton v. Sutton, 35 N.C. App. 670, 242 S.E.2d 644 (1978).

§ 8-45.2. Uniformity of interpretation.

This Article shall be so interpreted and construed as to effectuate its general purpose of making uniform the law of those states which enact it. (1951, c. 262, s. 2.)

§ 8-45.3. Photographic reproduction of records of Department of Revenue and Employment Security Commission.

(a) The State Department of Revenue is hereby specifically authorized to have photographed, photocopied, or microphotocopied all records of the Department, including tax returns required by law to be made to the Department, and said photographs, photocopies, or microphotocopies, when certified by the Department as true and correct photographs, photocopies, or microphotocopies, shall be as admissible in evidence in all actions, proceedings and matters as the originals thereof would have been.

(a1) The Employment Security Commission is hereby specifically authorized to have photographed, photocopied, or microphotocopied all records of the Commission, including filings required by law to be made to the Commission, and said photographs, photocopies, or microphotocopies, when certified by the Commission as true and correct photographs, photocopies, or microphotocopies, shall be as admissible in evidence in all actions, proceedings, and matters as the originals thereof would have been.

(b) The provisions of this section shall apply to records stored on any form of permanent, computer-readable media, such as a CD-ROM, if the medium is not subject to erasure or alteration. Nonerasable, computer-readable storage media shall not be used for preservation duplicates, as defined in G.S. 132-8.2, or for the preservation of permanently valuable records as provided in G.S. 121-5(d), except to the extent expressly approved by the Department of

Cultural Resources pursuant to standards and conditions established by the Department. (1951, c. 262, s. 3; 1999-131, s. 2; 1999-456, s. 47(b); 2001-115, s. 1.)

§ 8-45.4. Title of Article.

This Article may be cited as the "Uniform Photographic Copies of Business and Public Records as Evidence Act." (1951, c. 262, s. 4.)

Article 4B.

Evidence of Fraud, Duress, Undue Influence.

§ 8-45.5. Statements, releases, etc., obtained from persons in shock or under the influence of drugs; fraud presumed.

Any oral or written statement, waiver, release, receipt, or other representation of any kind by any person made or executed while a patient in any hospital and taken by any person in connection with any type of insurance coverage on or for the benefit of said patient which shall have been taken while such patient was in shock or appreciably under the influence of any drug, including drugs given primarily for sedation, shall be deemed to have been obtained by means of fraud, duress or undue influence on the part of the person or persons taking same, and the same shall be incompetent and inadmissible in evidence to prove or disprove any fact or circumstance relating to any claim for which any insurance company may be liable under any policy of insurance issued to, or which may indemnify or provide coverage or protection for the person making or executing any such statement or other instrument while a patient in a hospital, nor may any such person making or executing the same be examined or cross-examined in regard thereto. (1967, c. 928.)

Legal Periodicals. — For note on avoidance of releases in personal injury cases in North Carolina, see 5 Wake Forest Intra. L. Rev. 359 (1969).

CASE NOTES

Cited in Tate v. Golding, 1 N.C. App. 38, 159 S.E.2d 276 (1968).

Article 5.

Life Tables.

§ 8-46. Mortality tables as evidence.

Whenever it is necessary to establish the expectancy of continued life of any person from any period of the person's life, whether the person is living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation, as evidence, with other evidence as to the health, constitution and habits of the person, of such expectancy represented by the figures in the columns headed by the words "completed age" and "expectation" respectively:

Completed Age	*Expectation*
0	75.8
1	75.4
2	74.5
3	73.5
4	72.5
5	71.6
6	70.6
7	69.6
8	68.6
9	67.6
10	66.6
11	65.6
12	64.6
13	63.7
14	62.7
15	61.7
16	60.7
17	59.8
18	58.8
19	57.9
20	56.9
21	56.0
22	55.1
23	54.1
24	53.2
25	52.2
26	51.3
27	50.4
28	49.4
29	48.5
30	47.5
31	46.6
32	45.7
33	44.7
34	43.8
35	42.9
36	42.0
37	41.0
38	40.1
39	39.2
40	38.3
41	37.4
42	36.5
43	35.6
44	34.7
45	33.8
46	32.9
47	32.0
48	31.1
49	30.2

Completed Age	*Expectation*
50	29.3
51	28.5
52	27.6
53	26.8
54	25.9
55	25.1
56	24.3
57	23.5
58	22.7
59	21.9
60	21.1
61	20.4
62	19.7
63	18.9
64	18.2
65	17.5
66	16.8
67	16.1
68	15.5
69	14.8
70	14.2
71	13.5
72	12.9
73	12.3
74	11.7
75	11.2
76	10.6
77	10.0
78	9.5
79	9.0
80	8.5
81	8.0
82	7.5
83	7.1
84	6.6
85 and over	6.6

(1883, c. 225; Code, s. 1352; Rev., s. 1626; C.S., s. 1790; 1955, c. 870; 1971, c. 968; 1997-133, s. 1.)

Legal Periodicals. — For article, "Economic Valuation for Wrongful Death," see 6 Campbell L. Rev. 47 (1984).

For 1997 legislative survey, see 20 Campbell L. Rev. 389.

CASE NOTES

Tables Need Not Be Specially Put in Evidence. — This section being a public act, the tables herein contained are competent as evidence without being specially put in evidence. Coley v. City of Statesville, 121 N.C. 301, 28 S.E. 482 (1897).

The mortuary table in this section is one of the prevailing mortality tables put into statutory form so as to permit its use without formal proof. Rea v. Simowitz, 225 N.C. 575, 35 S.E.2d 871, 162 A.L.R. 999 (1945).

The mortuary table is statutory and need not be introduced in evidence, but may receive judicial notice when facts are in evidence requiring or permitting its application. Chandler v. Moreland Chem. Co., 270 N.C. 395, 154 S.E.2d 502 (1967); Thomas v. Dixson, 88 N.C. App. 337, 363 S.E.2d 209 (1988).

The table, being statutory, need not be introduced in evidence in order to make use of it upon the question of damages when other facts are in evidence permitting its application. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

Mortuary table is competent evidence bearing upon life expectancy and future earning capacity of the injured person in actions for personal injuries resulting in permanent disability. Gillikin v. Burbage, 263 N.C. 317, 139 S.E.2d 753 (1965).

But it is not admissible unless there is evidence of permanent injury. Gillikin v. Burbage, 263 N.C. 317, 139 S.E.2d 753 (1965); McCoy v. Dowdy, 16 N.C. App. 242, 192 S.E.2d 81 (1972).

Where testimony tended to show that plaintiff's injuries were permanent, etc. in character, it was proper for the presiding judge to permit plaintiff to introduce and the jury to consider the mortuary tables formerly embodied in this section. Hunt v. Wooten, 238 N.C. 42, 76 S.E.2d 326 (1953).

The mortuary tables were properly introduced into evidence on the issue of damages over defendant's objection where plaintiff introduced evidence that he received permanently disfiguring scars from sulphuric acid burns as a result of defendant's negligence. Chandler v. Moreland Chem. Co., 270 N.C. 395, 154 S.E.2d 502 (1967).

Before evidence of life expectancy under this section can be introduced, there must be evidence to a reasonable certainty of permanent injury. Mitchem v. Sims, 55 N.C. App. 459, 285 S.E.2d 839 (1982).

Where sufficient evidence existed to establish that slip and fall plaintiff suffered permanent injuries, the introduction of a mortuary table was not error. Matthews v. Food Lion, Inc., 135 N.C. App. 784, 522 S.E.2d 587, 1999 N.C. App. LEXIS 1229 (1999).

Tables Not Conclusive. — In an action to recover damages for a personal injury, the expectation of life tables contained in this section are not conclusive but are merely evidential on the issue as to damages. Sledge v. Lumber Co., 140 N.C. 459, 53 S.E. 295 (1906); Odom v. Canfield Lumber Co., 173 N.C. 134, 91 S.E. 716 (1917); Young v. E.A. Wood & Co., 196 N.C. 435, 146 S.E. 70 (1929).

And Must Be Considered with Other Evidence. — The tables must be considered in connection with the "other evidence as to the health, constitution and habits" of the deceased. Russell v. Windsor Steamboat Co., 126 N.C. 961, 36 S.E. 191 (1900). See Wachovia Bank & Trust Co. v. Atlantic Greyhound Lines, 210 N.C. 293, 186 S.E. 320 (1936); Hancock v. Wilson, 211 N.C. 129, 189 S.E. 631 (1937).

The mortuary table is merely evidence of life expectancy to be considered with other evidence as to the health, constitution and habits of the deceased, and an instruction making the expectancy set out in this section definitive and conclusive not only violated the evidence rule, but also G.S. 1-180 (now repealed) prohibiting the expression of an opinion "whether a fact is fully or sufficiently proven." Starnes v. Tyson, 226 N.C. 395, 38 S.E.2d 211 (1946).

This section does not, like § 8-47, give a mathematical result which the court can apply. The table given is merely evidentiary. Waggoner v. Waggoner, 246 N.C. 210, 97 S.E.2d 887 (1957).

Value of Life Tenancy. — When a life tenant and the remainderman sell the lands, the life tenant is entitled to the present cash value of her life estate in the purchase price, computed according to her life expectancy at the date of the execution of the deed, and the remainderman is entitled to the balance of the purchase price. Thompson v. Avery County, 216 N.C. 405, 5 S.E.2d 146 (1939).

Value of Dower. — Because the mortuary table is only evidentiary, the cash value of dower inchoate depended on the ages of husband and wife, and on their health, habits and all other circumstances tending to show the probabilities as to the length of life; there is no reason for differing rules for determining life expectancy as between married women entitled to dower inchoate and widows entitled to dower consummate. Waggoner v. Waggoner, 246 N.C. 210, 97 S.E.2d 887 (1957). As to abolition of dower, see § 29-4.

Failure to Instruct Jury as to Life Expectancy of Plaintiff. — In the absence of a request, the judge did not commit reversible error in failing to instruct the jury in an action for personal injury that the plaintiff had a life expectancy of 15.27 years according to the mortuary table, which he had introduced in evidence, where, although the charge did not contain a direct reference to the plaintiff's life expectancy, the court did instruct the jury to take into consideration all the evidence bearing on the issue, including the plaintiff's age. Derby v. Owens, 245 N.C. 591, 96 S.E.2d 851 (1957).

Erroneous Instruction. — Where the element of future damages figured largely in consideration of the issue, an instruction to the effect that the jury could take into consideration the mortuary tables as to the life expectancy of plaintiff, without reference to the evidence as to plaintiff's health prior and subsequent to the accident and without charging that the mortuary tables could be considered only as evidence together with other evidence as to the health, constitution and habits of plaintiff, was incomplete and erroneous. Harris v. Atlantic Greyhound Corp., 243 N.C. 346, 90 S.E.2d 710 (1956).

Applied in Brenkworth v. Lanier, 260 N.C. 279, 132 S.E.2d 623 (1963); Kinsey v. Town of Kenly, 263 N.C. 376, 139 S.E.2d 686 (1965); Knight v. Seymour, 263 N.C. 790, 140 S.E.2d 410 (1965); Dolan v. Simpson, 269 N.C. 438, 152 S.E.2d 523 (1967); Teachey v. Woolard, 16 N.C. App. 249, 191 S.E.2d 903 (1972); Livingston v. United States, 817 F. Supp. 601 (E.D.N.C. 1993).

Cited in Waddell v. United Cigar Stores of Am., 195 N.C. 434, 142 S.E. 585 (1928); Farris v. Hendricks, 196 N.C. 439, 146 S.E. 77 (1929); White v. North Carolina R.R., 216 N.C. 79, 3 S.E.2d 310 (1939); McClamroch v. Colonial Ice Co., 217 N.C. 106, 6 S.E.2d 850 (1940); Queen City Coach Co. v. Lee, 218 N.C. 320, 11 S.E.2d 341 (1940); Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952); Bryant v. Woodlief, 252 N.C. 488, 114 S.E.2d 241 (1960); Skidmore v. Austin, 261 N.C. 713, 136 S.E.2d 99 (1964); Redevelopment Comm'n v. Capehart, 268 N.C. 114, 150 S.E.2d 62 (1966); Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966); Mattox v. Huneycutt, 3 N.C. App. 63, 164 S.E.2d 28 (1968); Leonard v. United States, 303 F. Supp. 1282 (E.D.N.C. 1969); Vanhoy v. Phillips, 15 N.C. App. 102, 189 S.E.2d 557 (1972); Fortune v. First Union Nat'l Bank, 323 N.C. 146, 371 S.E.2d 483 (1988); Wooten v. Warren ex rel. Gilmer, 117 N.C. App. 350, 451 S.E.2d 342 (1994); Johnson v. Southern Indus. Constructors, Inc., 126 N.C. App. 103, 484 S.E.2d 574 (1997); Downs v. State, 159 N.C. App. 220, 582 S.E.2d 638, 2003 N.C. App. LEXIS 1440 (2003), aff'd, 358 N.C. 213, 593 S.E.2d 763 (2004); Shaver v. United States, 319 F. Supp. 2d 649, 2004 U.S. Dist. LEXIS 9539 (M.D.N.C. 2004).

§ 8-47. Present worth of annuities.

Whenever it is necessary to establish the present worth or cash value of an annuity to a person, payable annually during the person's life, such present worth or cash value may be ascertained by the use of the following table in connection with the mortality tables established by law, the first column representing the number of years the annuity is to run and the second column representing the present cash value of an annuity of one dollar for such number of years, respectively:

No. of Years Annuity is to Run	Cash Value of the Annuity of $1
1	$ 0.943
2	1.833
3	2.673
4	3.465
5	4.212
6	4.917
7	5.582
8	6.210
9	6.802
10	7.360
11	7.887
12	8.384
13	8.853
14	9.295
15	9.712
16	10.106
17	10.477
18	10.828
19	11.158
20	11.470
21	11.764
22	12.042

No. of Years Annuity is to Run	Cash Value of the Annuity of $1
23	12.303
24	12.550
25	12.783
26	13.003
27	13.211
28	13.406
29	13.591
30	13.765
31	13.929
32	14.084
33	14.230
34	14.368
35	14.498
36	14.621
37	14.737
38	14.846
39	14.949
40	15.046
41	15.138
42	15.225
43	15.306
44	15.383
45	15.456
46	15.524
47	15.589
48	15.650
49	15.708
50	15.762
51	15.813
52	15.861
53	15.907
54	15.950
55	15.991
56	16.029
57	16.065
58	16.099
59	16.131
60	16.161
61	16.190
62	16.217
63	16.242
64	16.266
65	16.289
66	16.310
67	16.331

The present cash value of the annuity for a fraction of a year may be ascertained as follows: Multiply the difference between the cash value of the annuities for the preceding and succeeding full years by the fraction of the year in decimals and add the sum to the present cash value for the preceding full year. When a person is entitled to the use of a sum of money for life, or for a given time, the interest thereon for one year, computed at four and one half percent (4 1/2%), may be considered as an annuity and the present cash value be ascertained as herein provided: Provided, the interest rate in computing the present cash value of a life interest in land shall be six percent (6%).

Whenever the mortality tables set out in G.S. 8-46 are admissible in evidence in any action or proceeding to establish the expectancy of continued life of any person from any period of the person's life, whether the person is living at the time or not, the annuity tables herein set forth shall be evidence, but not conclusive, of the loss of income during the period of life expectancy of the person. (1905, c. 347; Rev., s. 1627; C.S., s. 1791; 1927, c. 215; 1943, c. 543; 1957, c. 497; 1959, c. 879, s. 3; 1965, c. 991; 1997-133, s. 2.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 389.

CASE NOTES

This section was intended to apply strictly to annuities, and therefore, in an action to recover damages for injuries causing death, it was error to permit the jury to consider the provisions thereof for the purpose of ascertaining the present value of the intestate's life. Poe v. Raleigh & Augusta Air Lines R.R., 141 N.C. 525, 54 S.E. 406 (1906). See Brown v. Lipe, 210 N.C. 199, 185 S.E. 681 (1936).

Interest Rate. — Annuities, under this section, must be computed at 4.5% and not at 6%. Smith v. Smith, 223 N.C. 433, 27 S.E.2d 137 (1943).

As to the value of a widow's annuity, see Brenkworth v. Lanier, 260 N.C. 279, 132 S.E.2d 623 (1963).

Cited in American Blower Co. v. MacKenzie, 197 N.C. 152, 147 S.E. 829 (1929); Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952); Hunt v. Wooten, 238 N.C. 42, 76 S.E.2d 326 (1953); Waggoner v. Waggoner, 246 N.C. 210, 97 S.E.2d 887 (1957); Redevelopment Comm'n v. Capehart, 268 N.C. 114, 150 S.E.2d 62 (1966); Downs v. State, 159 N.C. App. 220, 582 S.E.2d 638, 2003 N.C. App. LEXIS 1440 (2003), aff'd, 358 N.C. 213, 593 S.E.2d 763 (2004).

ARTICLE 6.

Calendars.

§ 8-48. Clark's Calendar; proof of dates.

(a) In any controversy or inquiry in any court or before any fact finding board, commission, administrative agency or other body, where it becomes necessary or pertinent to determine any information which may be established by reference to a calendar for any year between the years 1753 A.D. and 2002 A.D., inclusive, it is permissible to introduce in evidence "Clark's Calendar, a Calendar Covering 250 Years, 1753 A.D. to 2002 A.D.," as supplemented, copyrighted, 1940, by E. B. Clark, Entry: Class AA, Number 328,573, Copyright Office of the United States of America, Washington, or any reprint of the 1940 edition certified by the Secretary of State to be an accurate copy of it, and the calendar or reprint, when so introduced, shall be prima facie evidence that the information disclosed by the calendar or reprint is true and correct.

(b) The Secretary of State shall prepare and publish a perpetual calendar similar to Clark's Calendar covering years beginning with 2003 A.D. The perpetual calendar published by the Secretary of State shall be admissible in evidence to the same degree and in the same manner as Clark's Calendar for years beginning with 2003. (1941, c. 312; 1997-58, s. 1.)

Article 7.

Competency of Witnesses.

§ 8-49. Witness not excluded by interest or crime.

No person offered as a witness shall be excluded, by reason of incapacity from interest or crime, from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit or proceeding, civil or criminal, in any court, or before any judge, justice, jury or other person having, by law, authority to hear, receive and examine evidence; and every person so offered shall be admitted to give evidence, notwithstanding such person may or shall have an interest in the matter in question, or in the event of the trial of the issue, or of the suit or other proceeding in which he is offered as a witness. This section shall not be construed to apply to attesting witnesses to wills. (1866, c. 43, ss. 1, 4; C.C.P., c. 342; 1869-70, c. 177; 1871-2, c. 4; Code, ss. 589, 1350; Rev., ss. 1628, 1629; C.S., s. 1792.)

Cross References. — As to witnesses, generally, see Chapter 8C, Article 6. As to disqualification of certain interested persons, see G.S. 8C-1, Rule 601(c).

Legal Periodicals. — For note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

For article, "An Analysis of the New North Carolina Evidence Code," see 20 Wake Forest L. Rev. 1 (1984).

CASE NOTES

This section abolishes the common-law rule which prevented a party who was interested in the result of the verdict and judgment from appearing as a witness. A similar enactment will be found in the statutes of practically all the states. The trend of the development of the rules of evidence has been to remove personal disqualification to testify. State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948).

Section Construed with Former Dead Man's Statute. — The provisions of this section must be considered in the light of those contained in former G.S. 8-51 (see now G.S. 8C-1, Rule 601(c)) which place certain restrictions on the general rule embodied in this section. In other words, the provisions of former G.S. 8-51 formed exceptions to this section, and took them from the operation of its principle, leaving the parties falling within these exceptions to stand upon the same footing as they did prior to the enactment of this section. See Charlotte Oil & Fertilizer Co. v. Rippy, 124 N.C. 643, 32 S.E. 980 (1899).

And with §§ 8-50 and 8-56. — The construction of this section should also be in connection with the provisions of G.S. 8-50 and 8-56, since they all relate to the same subject, i.e., the competency of the witnesses. Powell v. Strickland, 163 N.C. 393, 79 S.E. 872 (1913).

Burden on Challenger to Show Disqualification. — The general rule established by this section and G.S. 8-50 is that no person offered as a witness shall be excluded on account of interest or because a party to the action, except as otherwise provided. Hence, it is incumbent upon one who challenges the competency of the witness to show disqualification. Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

Party Testifying in Own Behalf. — The provisions of this section make it permissible for a party to testify in his own behalf. State v. McIntosh, 64 N.C. 607 (1870); Autry v. Floyd, 127 N.C. 186, 37 S.E. 208 (1900).

Legatee Under Will as Witness. — Under this section, removing the disqualification on account of interest, the widow of the testator, who was named as a legatee and devisee in a will, was a competent witness to prove the fact that the script propounded was found among the papers of the deceased. Nor would the last provision of the section prevent the widow from testifying, since this provision applies only to attesting witnesses to the execution of a will. Cornelius v. Brawley, 109 N.C. 542, 14 S.E. 78 (1891).

Beneficiary Under Holographic Will. — Under this section and G.S. 8-50, one who is a beneficiary under a holographic will may testify to such competent relevant and material facts as tend to establish it as a valid will without rendering void the benefits he is to receive thereunder. It is otherwise as to an attesting witness of a will that the statute requires to be attested by witness thereto. In re Will of Westfeldt, 188 N.C. 702, 125 S.E. 531 (1924).

Executor as Witness. — An executor, named in a will, was a competent witness to testify as to the existence, probate and registration of a will, he being rendered competent by this section, and he was not disqualified by former G.S. 8-51 (see now G.S. 8C-1, Rule 601(c)), as to transactions occurring after the death of the testator, as they could in no sense be considered as transactions between the witness and the testator. Cox v. Beaufort County Lumber Co., 124 N.C. 78, 32 S.E. 381 (1899).

The widow of a deceased vendor, who was present at the sale of a mule by her husband to the plaintiff, was a competent witness under this section, and was not excluded under former G.S. 8-51 (see now G.S. 8C-1, Rule 601(c)), as she was not a party to the action and had no interest in the same. Little v. Ratliff, 126 N.C. 262, 35 S.E. 469 (1900).

Mortgagee. — Where he is not excluded under the provisions of former G.S. 8-51 (see now G.S. 8C-1, Rule 601(c)), the mortgagee in a chattel mortgage is competent, as a subscribing witness thereto, to prove its execution for admission to probate, inasmuch as this section removes the disqualification formerly attaching to witnesses having an interest. Clark v. Hodge, 116 N.C. 761, 21 S.E. 562 (1895).

Fornication and Adultery. — In a trial for fornication and adultery a former defendant as to whom a nolle prosequi had been entered was a competent witness against the other defendant. State v. Phipps, 76 N.C. 203 (1877).

Cited in In re Farmer, 60 N.C. App. 421, 299 S.E.2d 262 (1983); In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1, 2004 N.C. App. LEXIS 129 (2004).

§ 8-50. Parties competent as witnesses.

(a) On the trial of any issue, or of any matter or question, or on any inquiry arising in any action, suit or other proceeding in court, or before any judge, justice, jury or other person having, by law, authority to hear and examine evidence, the parties themselves and the person in whose behalf any suit or other proceeding may be brought or defended, shall, except as otherwise provided, be competent and compellable to give evidence, either viva voce or by deposition, according to the practice of the court, in behalf of either or any of the parties to said action, suit or other proceeding. Nothing in this section shall be construed to apply to any action or other proceeding in any court instituted in consequence of adultery, or to any action for criminal conversation.

(b), (c) Repealed by Session Laws 1967, c. 954, s. 4. (1866, c. 43, ss. 2, 3; Code, s. 1351; Rev., s. 1630; C.S., s. 1793; 1953, c. 885, s. 1; 1967, c. 954, s. 4.)

Cross References. — As to competency of witnesses, see G.S. 8C-1, Rule 601.

Legal Periodicals. — For article, "An Analysis of the New North Carolina Evidence Code," see 20 Wake Forest L. Rev. 1 (1984).

For note on the admissibility of a criminal defendant's hypnotically refreshed testimony, see 10 Campbell L. Rev. 311 (1988).

CASE NOTES

Evidence of Spouse's Conduct. — This section, G.S. 8-49, and former G.S. 8-51 (see now G.S. 8C-1, Rule 601(c)) should be construed together, and thus construed, they do not prohibit the evidence of the husband as to the conduct of his wife, where she is not a party, in his action against another for damages for criminal conversation with his wife and the alienation of her affections. Powell v. Strickland, 163 N.C. 393, 79 S.E. 872 (1913).

Same — Introduction Prohibited by Common Law. — At common law, neither the husband nor the wife is allowed to prove the fact of access or nonaccess; and as such rule is founded "upon decency, morality and public policy," it is not changed by this section, allowing parties to testify in their own behalf. Boykin v. Boykin, 70 N.C. 262 (1874).

Testifying Against Codefendant. — A defendant in a criminal case is, under this section, competent and compellable to testify for or against a codefendant, provided his testimony does not incriminate himself. State v. Smith, 86 N.C. 705 (1882); State v. Medley, 178 N.C. 710, 100 S.E. 591 (1919).

Same — Practice Not Commendable. — The practice of sending codefendants to the grand jury to testify against each other, while allowable, is not commended. State v. Frizell, 111 N.C. 722, 16 S.E. 409 (1892).

Consolidation and Testimony of Codefendant. — Where the testimony of codefendant would have carried equal force if it had been received without an order of consolidation, there was no abuse of discretion in the trial judge's order consolidating cases for trial. State

v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Defendant's contention that consolidation of cases resulted in prejudicial error to him because he was deprived of his right to open and close the jury arguments when his codefendant elected to testify was without merit. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Testimony of an Accomplice. — An accomplice could not testify on direct examination to facts tending to incriminate defendant and at the same time refuse to answer questions on cross-examination relating to matters embraced in his examination-in-chief, and where he refused to answer relevant questions on cross-examination on the ground that his answers might tend to incriminate him, it was error for the court to refuse defendant's motion that his testimony-in-chief be stricken from the record, the refusal to answer the questions on cross-examination rendering the testimony-in-chief incompetent. State v. Perry, 210 N.C. 796, 188 S.E. 639 (1936).

It is well established that an accomplice is always a competent witness. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Fact that accomplice's testimony is usually induced by promise of or hope for leniency goes only to his credibility as a witness, and not to his competency as a witness. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Instructing Witness Not to Incriminate Himself. — In an indictment for an affray, it was not error for the presiding judge to caution the witness (a defendant) before the counsel for the other defendant cross-examined him, that he need not tell anything to incriminate himself. State v. Weaver, 93 N.C. 595 (1885).

Applied in Powell v. Cross, 263 N.C. 764, 140 S.E.2d 393 (1965).

Cited in State v. Wright, 274 N.C. 380, 163 S.E.2d 897 (1968); In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1, 2004 N.C. App. LEXIS 129 (2004).

§ 8-50.1. Competency of blood tests; jury charge; taxing of expenses as costs.

(a) In the trial of any criminal action or proceeding in any court in which the question of parentage arises, regardless of any presumptions with respect to parentage, the court before whom the matter may be brought, upon motion of the State or the defendant, shall order that the alleged-parent defendant, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged-parent defendant, the known natural parent, and the child. The results of those blood tests and comparisons, including the statistical likelihood of the alleged parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist, duly qualified geneticist, or other duly qualified person. Upon receipt of a motion and the entry of an order under the provisions of this subsection, the court shall proceed as follows:

(1) Where the issue of parentage is to be decided by a jury, where the results of those blood tests and comparisons are not shown to be inconsistent with the results of any other blood tests and comparisons, and where the results of those blood tests and comparisons indicate that the alleged-parent defendant cannot be the natural parent of the child, the jury shall be instructed that if they believe that the witness presenting the results testified truthfully as to those results, and if they believe that the tests and comparisons were conducted properly, then it will be their duty to decide that the alleged-parent is not the natural parent; whereupon, the court shall enter the special verdict of not guilty; and

(2) By requiring the State or defendant, as the case may be, requesting the blood tests and comparisons pursuant to this subsection to initially be responsible for any of the expenses thereof and upon the entry of a special verdict incorporating a finding of parentage or nonparentage, by taxing the expenses for blood tests and comparisons, in addition to any fees for expert witnesses allowed per G.S. 7A-314 whose testimonies supported the admissibility thereof, as

costs in accordance with G.S. 7A-304; G.S. Chapter 6, Article 7; or G.S. 7A-315, as applicable.

(b) Repealed by Session Laws 1993, c. 333, s. 2.

(b1) In the trial of any civil action in which the question of parentage arises, the court shall, on motion of a party, order the mother, the child, and the alleged father-defendant to submit to one or more blood or genetic marker tests, to be performed by a duly certified physician or other expert. The court shall require the person requesting the blood or genetic marker tests to pay the costs of the tests. The court may, in its discretion, tax as part of costs the expenses for blood or genetic marker tests and comparisons. Verified documentary evidence of the chain of custody of the blood specimens obtained pursuant to this subsection shall be competent evidence to establish the chain of custody. Any party objecting to or contesting the procedures or results of the blood or genetic marker tests shall file with the court written objections setting forth the basis for the objections and shall serve copies thereof upon all other parties not less than 10 days prior to any hearing at which the results may be introduced into evidence. The person contesting the results of the blood or genetic marker tests has the right to subpoena the testing expert pursuant to the Rules of Civil Procedure. If no objections are filed within the time and manner prescribed, the test results are admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy. The results of the blood or genetic marker tests shall have the following effect:

(1) If the court finds that the conclusion of all the experts, as disclosed by the evidence based upon the test, is that the probability of the alleged parent's parentage is less than eighty-five percent (85%), the alleged parent is presumed not to be the parent and the evidence shall be admitted. This presumption may be rebutted only by clear, cogent, and convincing evidence;

(2) If the experts disagree in their findings or conclusions, the question of paternity shall be submitted upon all the evidence;

(3) If the tests show that the alleged parent is not excluded and that the probability of the alleged parent's parentage is between eighty-five percent (85%) and ninety-seven percent (97%), this evidence shall be admitted by the court and shall be weighed with other competent evidence;

(4) If the experts conclude that the genetic tests show that the alleged parent is not excluded and that the probability of the alleged parent's parentage is ninety-seven percent (97%) or higher, the alleged parent is presumed to be the parent and this evidence shall be admitted. This presumption may be rebutted only by clear, cogent, and convincing evidence. (1949, c. 51; 1965, c. 618; 1975, c. 449, ss. 1, 2; 1979, c. 576, s. 1; 1993, c. 333, s. 2; 1993 (Reg. Sess., 1994), c. 733, s. 1.)

Legal Periodicals. — For a brief discussion of this section, see 27 N.C.L. Rev. 456 (1949).

For note discussing the admissibility of blood-grouping tests to rebut the presumption that a child born during a valid marriage is legitimate, see 50 N.C.L. Rev. 163 (1971).

For survey of 1974 case law on the use of blood-grouping tests, see 53 N.C.L. Rev. 1057 (1975).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For comment, "The Use of Blood Tests in Actions to Determine Paternity," see 16 Wake Forest L. Rev. 591 (1980).

For note discussing an indigent's right to a blood test in a paternity suit, see 4 Campbell L. Rev. 169 (1981).

CASE NOTES

Editor's Note. *— Many of the cases in the following annotations were decided under this section as it stood before the 1975 amendment, which made the results of a blood test, not in conflict with other blood tests, conclusive rather than merely competent evidence that defendant could not be the father of the child, and prior to the 1993 amendment, which provided for the admissibility of a certified report of the results of a paternity blood test or genetic marker test without additional expert testimony, and assigned weight to such evidence according to the probability of parentage.*

Scope of Section. — This section authorizes blood tests only upon motion made by either the State or the defendant, and the court involved in the matter must order the test. The statute does not authorize the indiscriminate taking of blood, nor does it allow the performance of a blood test by anyone than a trained technician or anywhere other than a medical facility. State v. Mauney, 106 N.C. App. 26, 415 S.E.2d 208 (1992).

This section does not confer standing upon an alleged natural parent to compel a presumed father to submit to a blood test to determine the paternity of a child born during the marriage of the presumed father to the natural mother. Johnson v. Johnson, 343 N.C. 114, 468 S.E.2d 59 (1996).

Former subdivision (b)(1) of this section (see now subsection (b1)) was applicable to civil actions only; the statute which applies to criminal actions is subdivision (a)(1). State v. McInnis, 102 N.C. App. 338, 401 S.E.2d 774, cert. denied, 329 N.C. 274, 407 S.E.2d 848 (1991).

The provisions of this section were intended to apply alike in civil and criminal actions except in those particulars involving procedural differences. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

But Only in Actions in Which Question of Paternity Arises. — This section requires blood-grouping tests only in actions in which the question of paternity arises. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Before a court is required to order a blood-grouping test in a civil action, the question of paternity must arise. Williams v. Holland, 39 N.C. App. 141, 249 S.E.2d 821 (1978).

Section Not Applicable in Rape Case. — This section applies only where "the question of parentage arises." A question of parentage is not central to a charge of rape. Thus, the commands of this section are inapplicable in a rape case. State v. Jackson, 320 N.C. 452, 358 S.E.2d 679 (1987).

For discussion of calculation of a "probability of paternity" from blood test results, see Cole v. Cole, 74 N.C. App. 247, 328 S.E.2d 446, aff'd, 314 N.C. 660, 335 S.E.2d 897 (1985).

Weight Given Tests Is Legislative Question. — It is for the General Assembly to decide the question of the weight to be given blood-grouping tests. State v. Camp, 286 N.C. 148, 209 S.E.2d 754 (1974).

Weight Given Blood Tests Which Do Not Exclude Putative Father. — The legislature has not mandated the weight to be given to blood tests which do not exclude the putative father. The jury is entitled to consider this evidence and accord it the weight deemed appropriate. Smith v. Price, 315 N.C. 523, 340 S.E.2d 408 (1986).

Results of Tests Are Competent to Rebut Any Presumption of Paternity. — In both criminal and civil actions in which the question of paternity arises, the results of blood-grouping tests must be admitted in evidence when offered by a duly licensed practicing physician or other qualified person, regardless of any presumptions with respect to paternity, and such evidence shall be competent to rebut any presumptions of paternity. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

To permit the marital presumption to be rebutted absent a determination that another man is the father of the child would illegitimate the child in violation of the public policy of this state. Jones v. Patience, 121 N.C. App. 434, 466 S.E.2d 720 (1996).

Including Common-Law Presumption of Legitimacy. — Assuming blood-grouping tests are made and offered in evidence by qualified persons, the results thereof, if they tend to exclude defendant as the father of the child, may be offered in evidence to rebut the common-law presumption of legitimacy. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Tests Cannot Prove Paternity. — The value of serological blood tests, when made and interpreted by specifically qualified technicians, using approved testing procedures and reagents of standard strength, is now generally recognized. Such tests, however, can never prove the paternity of any individual, and they cannot always exclude the possibility. Nevertheless, in a significant number of cases, they can disprove it. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Tests Conclusive Only in Excluding Putative Father. — The blood-grouping test results are conclusive only in excluding the putative father. The results might show him to have a blood type which the father of the child must have had; but this only indicates that of all the people of that blood type or group, he, as well as anyone else with that blood type or group, could have been the father of the child. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

The marital presumption ordinarily may be rebutted by evidence of blood grouping tests excluding a putative father as the biological father. Jones v. Patience, 121 N.C. App. 434, 466 S.E.2d 720 (1996).

Inconsistent Results Allowed. — This statute simply provides that when test results are consistent and show the defendant not to be the father of the child, the jury is required to return a special verdict of not guilty. Nothing in this statute prohibits the admission into evidence of inconsistent results. State v. McInnis, 102 N.C. App. 338, 401 S.E.2d 774, cert. denied, 329 N.C. 274, 407 S.E.2d 848 (1991).

Varying Results of Blood Tests. — Court did not err by admitting the result of blood tests showing the probability of defendant's fathering the child to be 99.54%, even though it varied greatly from the result of blood tests performed by another laboratory showing the probability of paternity to be only 93.75%. State v. McInnis, 102 N.C. App. 338, 401 S.E.2d 774, cert. denied, 329 N.C. 274, 407 S.E.2d 848 (1991).

Effect Where Principle of Res Judicata Bars Issue of Paternity. — Where the defendant in an action to recover arrearages for child support was barred by principles of res judicata from putting paternity in issue as the result of a prior adjudication of paternity in a Nevada divorce action in which the Nevada court had in personam jurisdiction over the defendant, the trial court erred in allowing the defendant's motion for blood-grouping tests. Williams v. Holland, 39 N.C. App. 141, 249 S.E.2d 821 (1978).

Before a court is required to order a blood-grouping test in a civil action, the question of paternity must arise. If a defendant is barred by res judicata or estoppel from raising the issue of paternity, the statutorily imposed obligation of the court to order that the parties submit to blood-grouping tests never arises, and it is error for the court to enter such order. Withrow v. Webb, 53 N.C. App. 67, 280 S.E.2d 22 (1981).

Default Judgment Barred Right to a Blood Test. — Because a default judgment conclusively established defendant's paternity, defendant having failed to appeal the default judgment or make a timely motion under Rule 59(a)(8) of the Rules of Civil Procedure, res judicata barred the granting of defendant's motion for blood testing. Garrison ex rel. Chavis v. Barnes, 117 N.C. App. 206, 450 S.E.2d 554 (1994).

The defendant was not barred from contesting paternity pursuant to this section where the issue had not been litigated and where the defendant never formally acknowledged paternity in the manner prescribed by G.S. 110-132; furthermore, the defendant was not required to present evidence that another man had acknowledged paternity in order for the court to authorize the test. Ambrose v. Ambrose, 140 N.C. App. 545, 536 S.E.2d 855, 2000 N.C. App. LEXIS 1213 (2000).

Defendant Has Right to Blood Test. — There can be no doubt that a defendant's right to a blood test to determine parentage is a substantial right and that, upon defendant's motion, the court must order the test when it is possible to do so. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

A defendant is entitled in a proceeding under the Uniform Reciprocal Enforcement of Support Act to a blood-grouping test pursuant to this section where the issue of paternity is raised and, upon timely motion, is entitled to have the jury pass on the issue of paternity. Brondum v. Cox, 30 N.C. App. 35, 226 S.E.2d 193, aff'd, 292 N.C. 192, 232 S.E.2d 687 (1976).

The 1975 amendment to this section amplified the importance of the right to a blood-grouping test under G.S. 49-7. State v. Morgan, 31 N.C. App. 128, 228 S.E.2d 523 (1976).

Indigent defendant's right to a free blood-grouping test may be rendered meaningless without counsel to advise him of his right to demand such a test, to explain the test's significance, to ensure that the test is properly administered and to ensure that the results are properly admitted into evidence. Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981), modified, 306 N.C. 333, 293 S.E.2d 95 (1982), cert. denied, 459 U.S. 1113, 103 S. Ct. 745, 74 L. Ed. 2d 965 (1983).

The only areas in which the results of blood grouping tests should be open to attack are in the method of testing or in the qualifications of the persons performing the tests. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Personal Performance of Test by Witness Not Required. — This section allows testimony of paternity test results without requiring personal performance of the test. State v. Green, 55 N.C. App. 255, 284 S.E.2d 688 (1981), appeal dismissed, 305 N.C. 304, 291 S.E.2d 152 (1982).

Tests May Not Be Accurate Until Infant Six Months Old. — In a few cases it has been found that an infant's blood group cannot be established immediately after birth. However, by the age of six months, an accurate determination can always be had. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

When the death of the child makes a blood test impossible the situation is analogous to that which occurs when an eyewitness to events constituting the basis for an indictment dies before the accused has interviewed him or taken his deposition. It would hardly be suggested that to try the defendant after the death of that witness would deprive him of due process and that therefore the prosecution must be dismissed. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Tests May Be Ordered in Action for Alimony and Child Support Where Husband Denies Paternity. — In plaintiff-wife's action for alimony, alimony pendente lite and child support, defendant-husband was entitled under the section to an order for a blood grouping test where plaintiff alleged and defendant denied that he was the father of a child born to plaintiff during the subsistence of the marriage. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

And Results of Test May Also Be Evidence of Adultery. — While there is no authority for blood-grouping tests unless an issue of paternity is raised, in a case in which the issue of paternity is raised, the results of the blood-grouping tests, if they exclude defendant as the father of a child admittedly born during the subsistence of the marriage, also would be evidence of adultery. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Finding of Paternity Held Erroneous. — In suit in which wife sought alimony, temporary alimony, custody of children, child support and attorney's fees, and husband filed an answer denying that he was the father of the youngest child, in light of the district judge's findings that scientific evidence demonstrated that husband was sterile at the time the child was conceived, and that if husband was sterile, the blood grouping probability of paternity (set at 95.98%) was reduced to 0%, judge's conclusion that husband fathered the child was erroneous. Cole v. Cole, 74 N.C. App. 247, 328 S.E.2d 446, aff'd, 314 N.C. 660, 335 S.E.2d 897 (1985).

Evidentiary Requirements Not Met. — Blood test at issue did not qualify for admissibility under the relaxed evidentiary requirements of subdivision (b1) and the trial court did not err by refusing to allow it into evidence. Catawba County ex rel. Child Support Enforcement Agency ex rel. Kenworthy v. Khatod, 125 N.C. App. 131, 479 S.E.2d 270 (1996).

The trial court properly admitted the presumption of paternity relevant to genetic marker testing set forth in this section although the record contained no ruling as to defendant's written objection to the admission nor any stipulation to admit the evidence, contrary to the court's assertion that the parties did so stipulate; where expert testimony indicated that paternity by defendant was a factual possibility, it would have been error to assign 0 as the prior probability of paternity. Brown v. Smith, 137 N.C. App. 160, 526 S.E.2d 686, 2000 N.C. App. LEXIS 253 (2000).

Chain of Custody. — It was prejudicial error for the trial court to admit other man's blood test results where the chain of custody was not properly established. Rockingham County Dep't of Social Serv. ex rel. Shaffer v. Shaffer, 126 N.C. App. 197, 484 S.E.2d 415 (1997).

If a paternity blood test is not ordered by the trial court upon motion by a party, the standard in G.S. 8-50.1(b1) will not apply and the party seeking to admit the test must present independent evidence of the chain of custody. Where no sworn affidavits or witness testimony established that specimen's were drawn from a putative father and the minor child, where no testimony was submitted from the person who collected the samples, and where no testimony or an affidavit was presented from the individual who performed the DNA test to confirm that the specimen was transferred within the laboratory without being disturbed, it was error to admit the results of the test and a determination of parentage was reversed. Columbus County v. Davis, 163 N.C. App. 64, 592 S.E.2d 225, 2004 N.C. App. LEXIS 244 (2004).

Verification of Chain of Custody. — Where there was no evidence that the chain of custody of blood tests relied on were verified as required by subsection (b1) even though the chain of custody was certified there was not sufficient compliance with this section; thus, blood tests were erroneously admitted. Rockingham County Dep't of Social Servs. ex rel. Shaffer v. Shaffer, 126 N.C. App. 197, 484 S.E.2d 415 (1997).

Trial court erred in precluding the alleged father from participating in the termination of parental rights hearing after a paternity test indicated that there was a zero possibility that he was the child's father because the presumption created by the paternity test was nevertheless rebuttable. In re L.D.B., 168 N.C. App. 206, 617 S.E.2d 288, 2005 N.C. App. LEXIS 165 (2005).

Presumption Rebutted. — Putative father's testimony that he did not know child's mother and did not have sexual relations was clear, cogent, and convincing evidence sufficient to rebut the presumption created by the 99.96% probability of paternity test. Nash County Dep't of Social Servs. ex rel. Child Support Enforcement Agency ex rel. Williams v. Beamon, 126 N.C. App. 536, 485 S.E.2d 851 (1997).

Applied in Johnson v. Johnson, 7 N.C. App. 310, 172 S.E.2d 264 (1970); State v. White, 42 N.C. App. 320, 256 S.E.2d 505 (1979); Bunting v. Beacham, 45 N.C. App. 304, 262 S.E.2d 672 (1980); Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983); Dorton v. Dorton, 69 N.C. App. 764, 318 S.E.2d 344 (1984); Wake County ex rel. Denning v. Ferrell, 71 N.C. App. 185, 321 S.E.2d 913 (1984);

Heavener v. Heavener, 73 N.C. App. 331, 326 S.E.2d 78 (1985).

Cited in State v. Davis, 272 N.C. 102, 157 S.E.2d 671 (1967); State v. White, 300 N.C. 494, 268 S.E.2d 481 (1980); State v. Camp, 299 N.C. 524, 263 S.E.2d 592 (1980); Wake County ex rel. Carrington v. Townes, 306 N.C. 333, 293 S.E.2d 95 (1982); Davie County Dep't of Social Servs. v. Jones, 62 N.C. App. 142, 301 S.E.2d 926 (1983); Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985); Nash County Dep't of Social Servs. ex rel. Its Child Support Enforcement Agency ex rel. Williams v. Beamon, 126 N.C. App. 536, 485 S.E.2d 851 (1997); Rice v. Rice, 147 N.C. App. 505, 555 S.E.2d 924, 2001 N.C. App. LEXIS 1190 (2001).

§ 8-50.2. Results of speed-measuring instruments; admissibility.

(a) The results of the use of radio microwave, laser, or other speed-measuring instruments shall be admissible as evidence of the speed of an object in any criminal or civil proceeding for the purpose of corroborating the opinion of a person as to the speed of an object based upon the visual observation of the object by such person.

(b) Notwithstanding the provisions of subsection (a) of this section, the results of a radio microwave, laser, or other electronic speed-measuring instrument are not admissible in any proceeding unless it is found that:

(1) The operator of the instrument held, at the time the results of the speed-measuring instrument were obtained, a certificate from the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter referred to as the Commission) authorizing him to operate the speed-measuring instrument from which the results were obtained.

(2) The operator of the instrument operated the speed-measuring instrument in accordance with the procedures established by the Commission for the operation of such instrument.

(3) The instrument employed was approved for use by the Commission and the Secretary of Crime Control and Public Safety pursuant to G.S. 17C-6.

(4) The speed-measuring instrument had been calibrated and tested for accuracy in accordance with the standards established by the Commission for that particular instrument.

(c) All radio microwave, laser, and other electronic speed-measuring instruments shall be tested for accuracy within a 12-month period prior to the alleged violation by a technician possessing at least a General Radiotelephone Operator License from the Federal Communications Commissions or possessing a Certified Electronics Technician certificate issued by a Federal Communications Commission Commercial Operators License Examination Manager or by a laboratory established by the International Association of Chiefs of Police. A written certificate by the technician or laboratory showing that the test was made within the required period and that the instrument was accurate shall be competent and prima facie evidence of those facts in any proceeding referred to in subsection (a) of this section.

All radio microwave, laser, and other speed enforcement instruments shall be tested in accordance with standards established by the North Carolina Criminal Justice Education and Training Standards Commission. The Commission shall provide for certification of all radio microwave, laser, and other speed enforcement instruments.

(d) In every proceeding where the results of a radio microwave, laser, or other speed-measuring instrument is sought to be admitted, judicial notice shall be taken of the rules approving the use of the models and types of radio microwave, laser, and other speed-measuring instruments and the procedures for operation and calibration or measuring accuracy of such instruments. (1979, 2nd Sess., c. 1184, s. 3; 1983, c. 34; 1987, c. 318; c. 827, s. 60; 1994, Ex. Sess., c. 18, s. 1; 2005-137, s. 1.)

CASE NOTES

Use of Radar as Corroboration Only. — The General Assembly has provided that the speed of a vehicle may not be proved by the results of radar measurement alone, and that such evidence may be used only to corroborate the opinion of a witness as to speed, which opinion is based upon actual observation. State v. Jenkins, 80 N.C. App. 491, 342 S.E.2d 550 (1986).

§ 8-50.3: Expired effective September 30, 2007.

Editor's Note. — Session Laws 2003-280, s. 5, as amended by Session Laws 2005-27, made this section effective July 1, 2003, and expiring September 30, 2007.

§ 8-51: Repealed by Session Laws 1983 (Regular Session, 1984), c. 1037, s. 5.

Cross References. — As to present provisions pertaining to the disqualification of interested persons, see now G.S. 8C-1, Rule 601(c).

§ 8-51.1. Dying declarations.

Dying declarations admissible in administrative proceedings shall be as provided in G.S. 8C-1, Rule 804. (1973, c. 464, s. 1; 1983 (Reg. Sess., 1984), c. 1037, s. 11.)

Legal Periodicals. — For survey of 1976 case law on evidence, see 55 N.C.L. Rev. 1033 (1977).

For survey of 1978 law on evidence, see 57 N.C.L. Rev. 1061 (1979).

For article, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

CASE NOTES

Editor's Note. — *The cases below were decided under this section as it read prior to amendment by Session Laws 1983 (Reg. Sess., 1984), c. 1037, s. 11.*

U.S. Const., Amend. VI Not Violated by Admission of Declaration. — Albeit a dying declaration is indubitably hearsay and the declarant is, of course, not available for cross-examination, the admission of such evidence is not a violation of U.S. Const., Amend. VI. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

General Assembly Codified Essentials of Former Law. — "Dying declarations" by the person whose death is an issue in the case have long been admissible in North Carolina provided (1) at the time they were made the declarant was in actual danger of death; (2) he had full apprehension of the danger; (3) death did in fact ensue; and (4) declarant, if living, would be a competent witness to testify to the matter. In 1973, the General Assembly codified the essentials of those requirements in this section. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

And Case Law Requirements Are Unchanged. — In State v. Bowden, 290 N.C. 702, 228 S.E.2d 414 (1976), and in State v. Cousin, 291 N.C. 413, 230 S.E.2d 518 (1976), it was noted, without deciding, that the words "no hope of recovery" in the statute might make the statutory exception to the hearsay rule more restrictive than existing case law. The Supreme Court concluded that the statutory prerequisites that the deceased must have been "conscious of approaching death and believed that there was no hope of recovery" did not change the case-law requirements that in order to be admissible the declarations of a decedent must have been "in present anticipation of death." State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

The statutory prerequisites that the deceased must have been "conscious of approaching death and believed that there was no hope of recovery" did not change case-law requirements that in order to be admissible the declaration of a decedent must have been "in present anticipation of death." It was enough if he "believed he was going to die." State v. Penn, 36 N.C. App. 482, 244 S.E.2d 702 (1978).

Rationale Based on Trustworthiness of Declaration. — The rationale of this section clearly rests upon a belief in the general trustworthiness of dying declarations, rather than upon the necessity for bringing to justice the perpetrators of secret homicides. State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978).

The common law and statutory requirement of "no hope of recovery" rests upon the tenet that when an individual believes death to be imminent, the ordinary motives for falsehood are absent and most powerful considerations impel him to speak the truth. The solemnity of approaching death is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

The public necessity of preventing secret homicides from going unpunished requires the preservation of dying declarations as evidence, notwithstanding the inability of the defendant to cross-examine his accuser. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

Section Expands the Admissibility of Statements. — The overall effect of this section was to liberalize the dying declaration exception to the hearsay rule by expanding the admissibility of such statements to all civil and criminal trials. State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978).

Declarant's Death Need Not Be in Issue. — Admissibility seems no longer to be confined to situations in which the declarant's death is in issue, but rather extends to any situation in which the cause or circumstances of the declarant's death may be relevant to any issue in litigation. State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978).

It is not necessary that the declarant should be in the very act of dying; it is enough if he is under the apprehension of impending dissolution. Stated in simpler terms, it is enough if he believed he was going to die. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

And Test Is Not Actual Swiftness with Which Death Ensues. — The fact that the declarant survived one week longer than the doctor had told him he might live did not affect the admissibility of his dying declarations. The test is the declarant's belief in the nearness of death when he made the statement, not the actual swiftness with which death ensued. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

It is not necessary for the declarant to state that he perceives he is going to die. If all the circumstances, including the nature of the wound, indicate that the declarant realized death was near, this requirement of the law is satisfied. State v. Bowden, 290 N.C. 702, 228 S.E.2d 414 (1976); State v. Cousin, 291 N.C. 413, 230 S.E.2d 518 (1976); State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978); State v. Richardson, 308 N.C. 470, 302 S.E.2d 799 (1983).

The consciousness of approaching death may be made to appear from what the injured person said; or from the nature and extent of the wounds inflicted, being obviously such that he must have felt or known that he could not survive; as well as from his conduct at the time and the communications, if any, made to him by his medical advisers, if assented to or understandingly acquiesced in by him. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

The party seeking admission of the out-of-court statement need not show that the declarant stated he had given up all hope of living or considered himself to be in the throes of death. All that must be shown is that the declarant believes he is going to die. This belief is best shown by his express communication to this effect. However, it is not necessary that declarant personally express his belief that he has no chance of recovery. This may be shown by the circumstances. State v. Hamlette, 302 N.C. 490, 276 S.E.2d 338 (1981).

The declaration must have been voluntary and made when the declarant was conscious of approaching death and without hope for recovery. State v. Bowden, 290 N.C. 702, 228 S.E.2d 414 (1976); State v. Cousin, 291 N.C. 413, 230 S.E.2d 518 (1976).

The admissibility of a declaration as a dying declaration is a question to be determined by the trial judge, and when the judge admits the declaration, his ruling is reviewable only to determine whether there is evidence tending to show facts essential to support it. State v. Bowden, 290 N.C. 702, 228 S.E.2d 414 (1976); State v. Cousin, 291 N.C. 413, 230 S.E.2d 518 (1976); State v. Penn, 36 N.C. App. 482, 244 S.E.2d 702 (1978).

The admissibility of dying declarations is a decision for the trial judge, and review by the Supreme Court is limited to the narrow question of whether there is any evidence tending to show the factual prerequisites to admissibility. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978); State v. Richardson, 308 N.C. 470, 302 S.E.2d 799 (1983).

A dying declaration is not conclusive, its weight and credibility being for the jury to determine. It may be impeached in the same manner as any other sworn statement. State v. Harding, 291 N.C. 223, 230 S.E.2d 397 (1976).

Once admitted into evidence, a dying declaration is no different from other testimony. The extent of its credibility is a matter for the jury and it is subject to impeachment or corroboration upon the same grounds and in the same manner as the testimony of a sworn witness. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

Declarations Made in Response to Lead-

ing Questions. — The fact that the dying declarations were made in response to leading questions did not require their exclusion from evidence. The qualifying questions were not perfunctory to be used in the event the dying man took a turn for the worse, but were clearly appropriate in light of the declarant's severe injuries and inability to speak, and the declarations were as nearly spontaneous as declarations by one under the circumstances could be. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

Impeachment of Dying Declaration. — The impeachment of a dying declaration must proceed under the ordinary rules of evidence. Under these rules, for the purpose of impeachment, a party is entitled to introduce evidence only of the general reputation or character of the witness. Therefore, the courts do not permit the witness to be impeached by independent evidence of particular misconduct. Specifically, this means that a witness may not be impeached by record evidence of his conviction of crime. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

Evidence of the general character or reputation of a decedent is relevant on the issue of his dying declaration and is admissible to impeach or to sustain the declaration. This is an exception to the usual rule that evidence as to the general moral character of the deceased is not admissible in a prosecution for homicide. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

Applied in State v. Richardson, 59 N.C. App. 558, 297 S.E.2d 921 (1982).

§ 8-52: Repealed by Session Laws 1973, c. 41.

§ 8-53. Communications between physician and patient.

No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon, and no such information shall be considered public records under G.S. 132-1. Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin. Any resident or presiding judge in the district, either at the trial or prior thereto, or the Industrial Commission pursuant to law may, subject to G.S. 8-53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge. (1885, c. 159; Rev., s. 1621; C.S., s. 1798; 1969, c. 914; 1977, c. 1118; 1983, c. 410, ss. 1, 2; c. 471.)

Cross References. — For section authorizing the Secretary of the Department of Human Resources to obtain, notwithstanding this section, a copy or summary of pertinent portions of patient medical records deemed necessary by joint agreement of the attending physician and the Department physician for investigating a disease or health hazard, and providing immunity to a physician providing such copies or summaries, see G.S. 130A-5(2). For section authorizing disclosure of medical information by health care provider under certain circumstances, see G.S. 90-21.20B.

Legal Periodicals. — For note on the discretion of the trial judge in compelling disclosure of privileged information in the area of physician-patient privilege, see 41 N.C.L. Rev. 627 (1963).

For case law survey on evidence, see 43 N.C.L. Rev. 900 (1965).

For note on authority of the judge in a child custody hearing to compel disclosure by a treating physician on the issue of the mental stability of one of the parties, see 46 N.C.L. Rev. 956 (1968); 47 N.C.L. Rev. 265 (1968).

For note on reporting patients for review of driver's license, see 48 N.C.L. Rev. 1003 (1970).

For comment surveying North Carolina Law of relational privilege, see 50 N.C.L. Rev. 630 (1972).

For comment on release of medical records by North Carolina hospitals, see 7 N.C. Cent. L.J. 299 (1976).

For comment on the evidentiary implications at trial of the physician-patient privilege, see 12 Wake Forest L. Rev. 849 (1976).

For survey of 1979 law on evidence, see 58 N.C.L. Rev. 1456 (1980).

For article discussing the psychotherapist-patient privilege, see 60 N.C.L. Rev. 893 (1982).

For survey of 1983 law of evidence, see 62 N.C.L. Rev. 1290 (1984).

For note on the admissibility of a criminal defendant's hypnotically refreshed testimony, see 10 Campbell L. Rev. 311 (1988).

For article, "What's the Harm in Asking?: A Discussion of Waiver of the Physician-Patient Privilege and Ex Parte Interviews with Treating Physicians," see 19 N.C. Cent. L.J. 1 (1990).

For comment on the prohibition of ex parte contacts with a plaintiff's treating physician, see 13 Campbell L. Rev. 233 (1991).

For note, "Restricting Ex Parte Interviews with Nonparty Treating Physicians: Crist v. Moffatt," see 69 N.C.L. Rev. 1381 (1991).

CASE NOTES

I. General Consideration.
II. Nature and Scope of Privilege.
III. Waiver.
IV. Compelled Disclosure.

I. GENERAL CONSIDERATION.

Privilege Is Statutory. — At common law, communications from patients to physicians are not privileged. Such privilege is purely statutory. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

Section Amends Common-Law Rule. — Under the common law, communications which passed between a patient and a physician in the confidence of the professional relation and information acquired by the physician while attending or treating the patient were not privileged or protected from disclosure by the physician. This section as interpreted by the Supreme Court has the effect of amending this common-law rule. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

Legislative Intent. — The legislature intended this section to be a shield and not a sword. It was careful to make provision to avoid injustice and suppression of truth by putting it in the power of the trial judge to compel disclosure. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

Purpose of Section. — One of the objects of this statute is to encourage full and frank disclosure to the doctor. Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954).

It is the purpose of statutes such as this section to induce the patient to make full disclosure that proper treatment may be given, to prevent public disclosure of socially stigmatized diseases, and in some instances to protect patients from self-incrimination. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962); In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979); Cates v. Wilson, 83 N.C. App. 448, 350 S.E.2d 898 (1986), modified, State v. Artis, 91 N.C. App. 604, 372 S.E.2d 905 (1988).

The purpose of this section is to create a privileged relationship between physician and patient. Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964); Johnson v. United Ins. Co. of Am., 262 N.C. 253, 136 S.E.2d 587 (1964).

The underlying purpose of the privilege under this section is to encourage free communication and disclosure between patient and physician to facilitate the proper diagnosis and treatment of the patient's ailment; the denial of this privilege would result in the patient withholding information vital to the proper treatment of her ailment for fear of publicity exposing facts of an embarrassing or confidential nature. Jones v. Asheville Radiological Group, 129 N.C. App. 449, 500 S.E.2d 740 (1998).

Purposes of North Carolina's statutory physician-patient privilege is to encourage the patient to fully disclose pertinent information to a physician so that proper treatment may be prescribed, to protect the patient against public disclosure of socially stigmatized diseases, and to shield the patient from self-incrimination; accordingly, the proviso allowing for compelled disclosure of privileged information is intended to refer to exceptional rather than ordinary factual situations. Mims v. Wright, 157 N.C. App. 339, 578 S.E.2d 606, 2003 N.C. App. LEXIS 646 (2003).

Purpose of Section Must Be Carried Out at Superior Court Level. — If the spirit and purpose of this section is to be carried out, it must be at the superior court level. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

The principle by which a physician may not be compelled to divulge communications and other matters which have come to his knowledge by observation of his patient is regulated by statute, and under the provisions of this section, the privilege is qualified, and it rests within the discretion of the trial judge, in the administration of justice, to compel the physician, called as a witness, to testify to such matters when relevant to the inquiry. State v. Martin, 182 N.C. 846, 109 S.E. 74 (1921).

Compelled Disclosure in Exceptional Situations. — In view of the primary purpose of this section to create a privileged relationship between physician and patient, it is clear that the provision regarding compelled disclosure is intended to refer to exceptional, rather than ordinary, factual situations. Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964).

Proper Administration of Justice. — This section sets forth the procedure to compel disclosure of information which ordinarily is protected by the doctor-patient privilege. Such information may be disclosed by order of the court if in the opinion of the trial judge disclosure is necessary to the proper administration of justice. This decision is one made in the discretion of the trial judge, and the defendant must show an abuse of discretion in order to successfully challenge the ruling. State v. Drdak, 330 N.C. 587, 411 S.E.2d 604 (1992).

This section and § 8-53.3 are to be read in pari materia. When so read, they extend the physician-patient privilege to the psychologist-client situation and withdraw the privilege in all situations where "necessary to a proper administration of justice." The reasons for the exceptions to the privileges granted by the two statutes are the same and it would be discordant to fail to extend to G.S. 8-53.3 the amendment of this section which made it clear that the legislature intended that disclosure could be compelled prior to trial. In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818, cert. denied, 298 N.C. 297, 259 S.E.2d 298 (1979).

Discretion of Trial Judge. — The statute affords the trial judges wide discretion in determining what is necessary for a proper administration of justice. State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983).

The court examined sealed medical records of the victim which the victim's hospital asserted as privileged under G.S. 8-53 and concluded that they contained no information exculpatory of defendant's guilt or material to her defense or punishment. State v. Jarrett, 137 N.C. App. 256, 527 S.E.2d 693, 2000 N.C. App. LEXIS 318 (2000).

Order Issued by Incorrect Judge. — While the order compelling the disclosure of a second-degree murder defendant's medical records, which showed how much alcohol he drank on the night of the traffic accident, should have been issued by a superior court judge, rather than a district court judge, the error was harmless in light of the other overwhelming evidence of the defendant's intoxication. State v. Rich, 132 N.C. App. 440, 512 S.E.2d 441 (1999), aff'd, 351 N.C. 386, 527 S.E.2d 299 (2000).

This section is not applicable in an involuntary commitment proceeding. In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

For discussion of distinction between statutory physician-patient privilege and rule prohibiting unauthorized ex parte contacts with patient's nonparty treating physicians, see Crist v. Moffatt, 326 N.C. 326, 389 S.E.2d 41 (1990).

Defense counsel may not interview medical malpractice plaintiff's nonparty treating physicians privately without plaintiff's express consent. Defendant instead must utilize the statutorily recognized methods of discovery enumerated in G.S. 1A-1, Rule 26. Crist v. Moffatt, 326 N.C. 326, 389 S.E.2d 41 (1990).

Exclusion of Statement From Treating Physician. — Exclusion of a written response from a treating physician, which was in response to a facsimile sent by defense counsel that detailed three questions regarding causation of an employee's alleged work-related injury and subsequent disability, was proper since the communication was ex parte and consisted of interrogatories to a non-party, which were not authorized by any caselaw precedent nor any rule of evidence. Mayfield v. Parker Hannifin, 174 N.C. App. 386, 621 S.E.2d 243, 2005 N.C. App. LEXIS 2472 (2005).

Applied in Wilder v. Edwards, 7 N.C. App. 513, 173 S.E.2d 72 (1970); Gibson v. Montford, 9 N.C. App. 251, 175 S.E.2d 776 (1970); State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975); State v. Hodgen, 47 N.C. App. 329, 267 S.E.2d 32 (1980); Prince v. Duke Univ., 326 N.C. 787, 392 S.E.2d 388 (1990).

Cited in State v. Wade, 197 N.C. 571, 150 S.E. 32 (1929); State v. Litteral, 227 N.C. 527, 43 S.E.2d 84 (1947); Flora v. Hamilton, 81 F.R.D. 576 (M.D.N.C. 1978); Spell v. McDaniel, 591 F. Supp. 1090 (E.D.N.C. 1984); Shelton v. Morehead Mem. Hosp., 318 N.C. 76, 347 S.E.2d 824 (1986); State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986); Crist v. Moffatt, 92 N.C. App. 520, 374 S.E.2d 487 (1988); Salaam v. North Carolina DOT, 122 N.C. App. 83, 468 S.E.2d 536 (1996), review denied, 345 N.C. 494, 480 S.E.2d 51 (1997); Virmani v. Presbyterian Health Servs. Corp., 127 N.C. App. 629, 493 S.E.2d 310 (1997), aff'd in part and rev'd in part on other grounds, 350 N.C. 449, 515 S.E.2d 675 (1999); Norris v. Sattler, 139 N.C. App. 409, 533 S.E.2d 483, 2000 N.C. App. LEXIS 894 (2000); In re Will of Smith, 159 N.C. App. 651, 583 S.E.2d 615, 2003 N.C. App. LEXIS 1506 (2003); In re Investigation of the Death of Miller, 357 N.C. 316, 584 S.E.2d 772, 2003 N.C. LEXIS 831 (2003).

II. NATURE AND SCOPE OF PRIVILEGE.

Qualified Privilege. — The privilege established by this section is not absolute, but qualified. Cates v. Wilson, 83 N.C. App. 448, 350 S.E.2d 898 (1986), modified, 321 N.C. 1, 361 S.E.2d 734 (1987).

This privilege extends only to those cases in which the physician and patient relationship existed at the time of the communication and where the information given was necessary for diagnosis or treatment. State

v. Mayhand, 298 N.C. 418, 259 S.E.2d 231 (1979).

Examination as to Criminal Defendant's Competence. — No physician-patient privilege is created between a physician and a criminal defendant examined by the physician for the purpose of passing on defendant's ability to proceed to trial. State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3552, 77 L. Ed. 2d 1398, rehearing denied, 463 U.S. 1249, 104 S. Ct. 37, 77 L. Ed. 2d 1456 (1983).

A psychiatrist appointed by the court for a sanity examination of the defendant is a witness for the court, not the prosecution, and the statements made by the defendant to the psychiatrist are not privileged under the doctor-patient relationship. State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3552, 77 L. Ed. 2d 1398, rehearing denied, 463 U.S. 1249, 104 S. Ct. 37, 77 L. Ed. 2d 1456 (1983).

The admissions of one accused of crime are not rendered confidential within the meaning of the law when made to a psychiatrist examining him by order of the court in order to form an opinion as to whether the defendant had sufficient capacity to be in law guilty of crime, since, under the circumstances of this case, the relationship of physician and patient did not exist, and this section is not applicable. State v. Newsome, 195 N.C. 552, 143 S.E. 187 (1928).

Where doctor went to the jail to examine defendant at the request of his brother to determine if he was under the influence of intoxicating liquor, not at the request of defendant, and not to perform any professional services for defendant, the relationship of patient and physician, under such circumstances, did not exist between defendant and the doctor within the purview of this section. State v. Hollingsworth, 263 N.C. 158, 139 S.E.2d 235 (1964), overruled on other grounds, State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989).

Effect of Marriage Between Physician and Patient. — If the relation of doctor and patient existed between plaintiff and her former husband, any information which he acquired while attending her in his professional character was protected by this section in the same manner as if they had not been married to each other. Furr v. Simpson, 271 N.C. 221, 155 S.E.2d 746 (1967).

Application to Nurses, Technicians and Others. — The effect of this section is not extended to include nurses, technicians, and others, unless they were assisting, or acting under the direction of, a physician or surgeon. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

The provisions of this section also apply to nurses, technicians, and others when they are assisting or acting under the direction of a physician or surgeon, if the physician or surgeon is at the time acting so as to be within the rule set out therein. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969); State v. Wooten, 18 N.C. App. 269, 196 S.E.2d 603, appeal dismissed, 283 N.C. 670, 197 S.E.2d 879 (1973).

This privilege includes entries in hospital records made by or under the direction of physicians and surgeons. However, this statute does not include nurses, technicians and others, unless they were assisting, or acting under the direction of a physician or surgeon. State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983).

Optometrists Not Covered by Privilege. — The physician-patient privilege against disclosure of confidential communications and information does not extend to optometrists. State v. Shaw, 305 N.C. 327, 289 S.E.2d 325 (1982).

What Information Included. — It is the accepted construction of this section that it extends, not only to information orally communicated by the patient, but to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe. Smith v. John L. Roper Lumber Co., 147 N.C. 62, 60 S.E. 717 (1908). See Creech v. Sovereign Camp, W.O.W., 211 N.C. 658, 191 S.E. 840 (1937); Capps v. Lynch, 253 N.C. 18, 116 S.E.2d 137 (1960); Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962); Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964); In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

This section applied to hospital records offered in evidence in an action to recover death benefits under a policy of insurance, where insurer denied liability on the ground that the application contained false statements with respect to insured's health, insofar as the records contained entries made by physicians and surgeons, or under their direction, pertaining to communications and information obtained by them in attending the insured professionally, which information was necessary to enable them to prescribe for her. However, any other information contained in the records, if relevant and otherwise competent, was not privileged. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

Information Is No Less Privileged Because It Was Obtained in Hospital. — There is no difference in the application of the statute between examination and treatment of the patient by a physician or surgeon in a hospital and in the home. The information is no less privileged that it was obtained in a hospital. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

Tape Relating to Facts in Death Certificates. — In an action by plaintiff to recover damages for wrongful discharge from his position as superintendent of a State hospital for the mentally disordered, a tape of a meeting of the credentials committee of that hospital would not come within the privilege provided by this section where the information on the tape did not relate to treatment of patients but related basically the facts included in the death certificates of patients which were a matter of public records. Smith v. State, 298 N.C. 115, 257 S.E.2d 399 (1979).

Cross-examination of defendant's psychiatrist concerning incriminating statements made by defendant did not violate defendant's statutory right to privileged communication with his doctor on the basis that no bona fide doctor-patient relationship existed between defendant and his expert witness, or on the basis that, even assuming a valid relationship, defendant waived his right to the privilege by putting the doctor on the stand. State v. Clark, 301 N.C. 176, 270 S.E.2d 425 (1980).

Child Abuse Cases. — The physician-patient privilege, created by this section, is not available in cases involving child abuse. State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983). See § 8-53.1.

III. WAIVER.

Privilege Is That of Patient. — A physician or surgeon may not refuse to testify; the privilege is that of the patient. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962); Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968); State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

The records of patients at a hospital are privileged but the privilege is that of the patient — not the hospital. Reserve Life Ins. Co. v. Davis Hosp., 36 F.R.D. 434 (W.D.N.C. 1965).

The privilege created by this statute is for the benefit of the patient alone. In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

The privilege is not absolute, but qualified. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962); State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

The privilege created by this statute may be waived by the patient, and in any event is a qualified, rather than an absolute, privilege in that the judge has discretion, either at the trial or prior thereto, to "compel such disclosure, if in his opinion the same is necessary to a proper administration of justice." In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

Only Patient or Court May Authorize Disclosure. — The law protects the patient's secrets, and makes it the duty of the doctor to keep them, a duty he cannot waive. The veil of secrecy can be drawn aside only by the patient or by court, and only when the ends of justice require it. Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954).

Privilege May Be Waived. — The privilege given by this section is for the benefit of the patient alone, and it may be insisted on or waived at his discretion, subject to the exceptions included in the section. Fuller v. Knights of Pythias, 129 N.C. 318, 40 S.E. 65 (1901); Smith v. John L. Roper Lumber Co., 147 N.C. 62, 60 S.E. 717 (1908). See Creech v. Sovereign Camp, W.O.W., 211 N.C. 658, 191 S.E. 840 (1937); Capps v. Lynch, 253 N.C. 18, 116 S.E.2d 137 (1960).

Since the privilege is that of the patient alone, it may be waived by him expressly or impliedly, and cannot be taken advantage of by any other person. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

The physician-patient privilege may be waived and the waiver may be express or implied. Green ex rel. Green v. Maness, 69 N.C. App. 292, 316 S.E.2d 917, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984); Spencer v. Spencer, 70 N.C. App. 159, 319 S.E.2d 636 (1984).

A patient may waive the privilege under this Section; the waiver may be express or implied. Cates v. Wilson, 83 N.C. App. 448, 350 S.E.2d 898 (1986), modified on other grounds, 321 N.C. 1, 361 S.E.2d 734 (1987).

A patient may expressly or impliedly waive his physician-patient privilege during discovery and at trial. Adams v. Lovette, 105 N.C. App. 23, 411 S.E.2d 620, aff'd, 332 N.C. 659, 422 S.E.2d 575 (1992).

A patient may waive the physician-patient privilege by breaking the fiduciary relationship with the physician by revealing, or permitting revelation of, the substance of the information transmitted to the physician. Jones v. Asheville Radiological Group, 129 N.C. App. 449, 500 S.E.2d 740 (1998).

Medical records are protected by this section, which sets forth the physician-patient privilege, and because this statutory privilege is to be strictly construed, the patient bears the burden of establishing the existence of the privilege and objecting to the discovery of such privileged information; moreover, the privilege is not absolute and may be waived, either by express waiver or by waiver implied from the patient's conduct. Mims v. Wright, 157 N.C. App. 339, 578 S.E.2d 606, 2003 N.C. App. LEXIS 646 (2003).

Implied waivers of the physician-patient privilege occur where: (1) the patient fails to object to testimony on the privileged matter; (2) the patient calls the physician as a witness and examines him or her as to the patient's physical condition; (3) the patient testifies to the communication between himself or herself and the physician; or (4) a patient, by bringing an action, counterclaim, or defense directly places his or her medical condition at issue. Mims v.

Wright, 157 N.C. App. 339, 578 S.E.2d 606, 2003 N.C. App. LEXIS 646 (2003).

The privilege is waived by implication where the patient calls the physician as a witness and examines him as to patient's physical condition, where patient fails to object when the opposing party causes the physician to testify, or where the patient testifies to the communication between himself and physician. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968); Cates v. Wilson, 83 N.C. App. 448, 350 S.E.2d 898 (1986), modified on other grounds, 321 N.C. 1, 361 S.E.2d 734 (1987).

Effect of Implied Waiver. — The defendants were not entitled to summary judgment on the patient's claim for unauthorized disclosure of confidential information, where neither the waiver of the privilege implied by the patient's filing of a medical malpractice action against her former physician and others for misdiagnosis of breast cancer nor her conduct during the course of the action allowed defendants who were not parties to the action to disclose her mammography films to the expert who was testifying as an expert for the defendant physician absent her authorization or the use of appropriate discovery procedures. Jones v. Asheville Radiological Group, 129 N.C. App. 449, 500 S.E.2d 740 (1998).

Where plaintiff used an affidavit of his physician for the purpose of obtaining a temporary restraining order pending the hearing of his case on the merits, such use did not waive the physician-patient privilege. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

Waiver by Patient's Testimony Describing Nature of Injuries in Detail. — While a patient does not waive his right to assert that a communication between himself and his physician is privileged by merely testifying as to his own physical condition, where the patient voluntarily goes into detail regarding the nature of his injuries, he waives the privilege, and the physician is competent and compellable to testify in regard thereto, since the patient will not be allowed to close the mouth of the only witness in a position to contradict him and fully explain the facts. Capps v. Lynch, 253 N.C. 18, 116 S.E.2d 137 (1960).

A patient may surrender his privilege in a personal injury case by testifying to the nature and extent of his injuries and the examination and treatment by the physician or surgeon. Whether the testimony of the patient amounts to a waiver of privilege depends upon the provisions of the applicable statute and the extent and ultimate materiality of the testimony given with respect to the nature, treatment, and effect of the injury or ailment. The question of waiver is to be determined largely by the facts and circumstances of the particular case on trial. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

When a patient voluntarily testifies in detail about his injuries and his medical treatment, he waives the privilege, and the adverse party may examine the physician. Green ex rel. Green v. Maness, 69 N.C. App. 292, 316 S.E.2d 917, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Plaintiff May Not Waive Privilege as to Information But Not as to Other Matters. — When the patient breaks the fiduciary relationship with the physician by revealing, or permitting revelation of, the substance of the information transmitted to the physician, the patient has, in effect, determined that it is no longer important that the confidences which the privilege protects continue to be protected. Having taken this position, the plaintiff may not silence the physician as to matters otherwise protected by the privilege. Cates v. Wilson, 321 N.C. 1, 361 S.E.2d 734 (1987).

Such as Opinions. — There is no statutory basis for allowing a patient to waive his privilege as to information gained by his physician while maintaining it as to his physician's opinions. Cates v. Wilson, 321 N.C. 1, 361 S.E.2d 734 (1987).

When a patient dissolves the fiduciary relationship with his physician by disclosing or permitting disclosure of details of their consultations, he should not, in fairness, be allowed to prevent the physician from stating an opinion which might aid the trier of fact in assessing the merits of the patient's case. To hold otherwise would enable patients to use the privilege not defensively to protect their confidences but offensively to suppress the truth in litigation. Cates v. Wilson, 321 N.C. 1, 361 S.E.2d 734 (1987).

Following Waiver, Plaintiff May Not Prohibit Physicians from Testifying for Defendant. — A plaintiff who has waived his physician-patient privilege as to nonparty treating physicians may not preclude these physicians from testifying as experts for the defendant. Cates v. Wilson, 321 N.C. 1, 361 S.E.2d 734 (1987).

Once a plaintiff waives his right to prohibit disclosures of confidences by his physicians, he may not assert the physician-patient privilege to prevent them from testifying as experts for his opponent. Cates v. Wilson, 321 N.C. 1, 361 S.E.2d 734 (1987).

IV. COMPELLED DISCLOSURE.

Legislative Intent. — The legislature intended to employ the phrase "may compel such disclosure" in this section in such manner as to authorize the court to require disclosure in all situations governed by this section without exception, when disclosure "is necessary to a proper administration of justice." In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818, cert. denied, 298 N.C. 297, 259 S.E.2d 298 (1979).

Disclosure May Be Compelled Prior to Trial or Filing of Charges. — Construing this section and G.S. 8-53.3 so as to give effect to the obvious intention of the legislature as manifested in the entire act and other acts in pari materia, the language of both of these sections is sufficient to allow the trial court to compel disclosure prior to trial and prior to the filing of criminal charges when such action is necessary to the exercise of its implied or inherent powers to provide for the proper administration of justice. In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818, cert. denied, 298 N.C. 297, 259 S.E.2d 298 (1979).

Trial Judge May Compel Disclosure. — The legislature was careful to make provision to avoid injustice and suppression of truth by putting it in the power of the trial judge to compel disclosure. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

The judge, in the exercise of discretion and by the authority of the proviso in this section, may follow the procedure for the admission of testimony and admit hospital records in evidence. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

The statutory privilege is a qualified one, and the judge may compel disclosure by the physician if he finds, in his discretion, that it is necessary for the proper administration of justice. State v. Mayhand, 298 N.C. 418, 259 S.E.2d 231 (1979); State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at State v. Agee, 326 N.C. 542, 391 S.E.2d 171 (1990) in light of.

The procedural aspects of the statutory physician-patient privilege, established in this section, are qualified. It is within the discretion of the trial judge alone to compel a physician called as a witness to testify for the proper administration of justice as to matters within the physician-patient relationship. Carter v. Colonial Life & Accident Ins. Co., 52 N.C. App. 520, 278 S.E.2d 893, cert. denied, 304 N.C. 193, 285 S.E.2d 96 (1981).

This section creates only a limited physician-patient privilege, because a trial judge may compel disclosure and deny defendant the benefit of the privilege if this is necessary for the proper administration of justice. State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3552, 77 L. Ed. 2d 1398, rehearing denied, 463 U.S. 1249, 104 S. Ct. 37, 77 L. Ed. 2d 1456 (1983).

The trial court may compel the physician or surgeon to disclose communications and information obtained by him if in the judge's opinion the same is necessary to a proper administration of justice. Cates v. Wilson, 83 N.C. App. 448, 350 S.E.2d 898 (1986), modified, 321 N.C. 1, 361 S.E.2d 734 (1987).

This section affords the trial judge wide discretion in determining what is necessary for a proper administration of justice. Cates v. Wilson, 83 N.C. App. 448, 350 S.E.2d 898 (1986), modified, 321 N.C. 1, 361 S.E.2d 734 (1987).

But Only as to Matters Necessary to Proper Administration of Justice. — The trial judge may ascertain from the physician the nature of the evidence involved and may determine what part, if any, should be disclosed as necessary to the proper administration of justice. Obviously, the proper administration of justice might require disclosure as to certain but not as to all matters under the privilege. Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964).

This section requires, and the decisions of the Supreme Court are to the effect, that the trial judge may admit communication between physician and patient if in his opinion such is necessary to a proper administration of justice. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

This section affords the trial judge wide discretion in determining what is necessary for a proper administration of justice. Cates v. Wilson, 83 N.C. App. 448, 350 S.E.2d 898 (1986), modified, 321 N.C. 1, 361 S.E.2d 734 (1987).

Privileged medical information may still be discoverable if disclosure is necessary to a proper administration of justice; the decision that disclosure is necessary to a proper administration of justice is one made in the discretion of the trial judge, and the defendant must show an abuse of discretion in order to successfully challenge the ruling. Mims v. Wright, 157 N.C. App. 339, 578 S.E.2d 606, 2003 N.C. App. LEXIS 646 (2003).

Explicit Finding Not Required. — This section does not require an explicit finding that disclosure is necessary to a proper administration of justice; the finding is implicit in the admission of the evidence. State v. Smith, 347 N.C. App. 453, 496 S.E.2d 357 (1998).

Unclear Whether Specific Findings Required. — Whether the trial court has to make a specific finding that disclosure of privileged material is necessary for the proper administration of justice is unclear as this section does not require such an explicit finding, and the finding is implicit in the admission of the evidence; however, caselaw has held that a trial court may permit opinion evidence by non-party treating physicians only after finding, pursuant to the statute, that the proper administration of justice necessitates such testimony, and that the trial court is required to make a finding, appearing in the record, that disclosure is necessary to a proper administration of justice. Mims v. Wright, 157 N.C. App. 339, 578 S.E.2d 606, 2003 N.C. App. LEXIS 646 (2003).

And He Should Not Hesitate to Do So. — Judges should not hesitate to require disclosure where it appears to them to be necessary in order that the truth be known and justice be done. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962); State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

Judge's Finding of Record That Testimony Is Necessary. — Before a physician may testify to matters arising in his confidential relationship with his patient, this section requires that the trial judge find that in his opinion such testimony is "necessary to a proper administration of justice," and in the absence of such finding appearing of record on appeal, it is reversible error for the trial judge upon defendant's exception to admit testimony of the insured's physician tending to show that the insured in his application for life insurance had made misstatements of material facts that would avoid the insurer's liability in his suit to cancel the policy issued thereon. Metropolitan Life Ins. Co. v. Boddie, 194 N.C. 199, 139 S.E. 228 (1927). See Creech v. Sovereign Camp, W.O.W., 211 N.C. 658, 191 S.E. 840 (1937); Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954).

If the statements were privileged under this section, then in the absence of a finding by the presiding judge, duly entered upon the record, that the testimony was necessary to a proper administration of justice, it was incompetent, and upon defendant's objection should have been excluded. Sawyer v. Weskett, 201 N.C. 500, 160 S.E. 575 (1931).

Where the presiding judge compels disclosure, as provided by this section, he shall enter upon the record his finding that the testimony is necessary to a proper administration of justice. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

In the absence of a finding by the trial court that, in its opinion, the admission of hospital records was necessary to a proper administration of justice, the appellate court is compelled to hold that their exclusion was not error. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

The superior court's finding, inserted in the record, that the evidence of a physician was necessary to a proper administration of justice, takes the physician's evidence out of the privileged communication rule provided in this section. State v. Howard, 272 N.C. 519, 158 S.E.2d 350 (1968).

A judge of superior court at term may, in his discretion, compel disclosure of physician-patient communications if, in his opinion, it is necessary to a proper administration of justice and he so finds and enters such finding on the record. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

In construing this section it is incumbent on the presiding judge to find the fact, and this should appear in the record in substance, that, in his opinion, the disclosure is necessary to a proper administration of justice. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

Express Recital of Findings Held Unnecessary. — Although the trial judge made no express recital of findings that the testimony of a psychiatrist in a sterilization proceeding was necessary to the proper administration of justice, his opinion that such was the case was implicit when he overruled respondent's objection to the testimony asserting the privilege under this section. It must be assumed that the judge was aware of the statute when he made the ruling, and that under these circumstances the very act of ruling was in itself a finding that its admission was necessary to a proper administration of justice. In re Johnson, 36 N.C. App. 133, 243 S.E.2d 386 (1978).

Substantial Compliance with Section. — Where the district attorney filed a motion requesting the court to compel disclosure of defendant's medical records and the court found that "the results of the analysis of the defendant's blood is needed for evidence" and ordered the hospital to furnish the reports of all tests and treatment of defendant for the dates in question, this constituted substantial compliance with the statute. State v. Miller, 80 N.C. App. 425, 342 S.E.2d 553 (1986), appeal dismissed and cert. denied, 317 N.C. 711, 347 S.E.2d 448 (1986).

Failure to give defendant notice of the hearing on the motion to compel disclosure and defendant's absence when the motion was heard was not reversible error, since defendant could have appealed the disclosure order and any prejudice to defendant was cured when defendant had the opportunity to be heard on this matter at the pretrial voir dire hearing of defendant's motion to suppress the results of defendant's blood test. State v. Miller, 80 N.C. App. 425, 342 S.E.2d 553 (1986).

Child Abuse Cases. — By virtue of G.S. 8-53.2 and 7A-551 [see now G.S. 7B-310], the physician-patient privilege, created by G.S. 8-53 is not available in cases involving child abuse. State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

Any privilege which the defendant, who sought treatment of a sexually transmittable disease after he had been charged with sexual crimes against his children and taken into custody, might have been entitled to this section was nullified by G.S. 8-53.1 and 7A-551 [see now G.S. 7B-310]. State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

Disclosure Properly Compelled. — In a prosecution for possession of heroin, the trial court did not err in ruling that a physician should be required in the interests of justice to give testimony concerning a matchbox containing heroin found on defendant's person when she was undressed in a hospital emergency room in order that the physician could determine the cause of her unconsciousness. State v. Wooten, 18 N.C. App. 269, 196 S.E.2d 603, appeal dismissed, 283 N.C. 670, 197 S.E.2d 879 (1973).

Where the trial court received evidence and heard arguments before ruling that the privilege should be waived and the testimony allowed into evidence, the record failed to establish that this ruling could not have been the result of a reasoned decision. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

When defendant was charged with second-degree murder for causing another's death by his drunk driving, his medical records, showing the concentration of alcohol in his blood immediately after the incident, were properly admitted, under G.S. 8-53, because the trial court did not abuse its discretion in finding that the admission of such records was necessary for the proper administration of justice. State v. Westbrook, 175 N.C. App. 128, 623 S.E.2d 73, 2005 N.C. App. LEXIS 2704 (2005).

Trial court did not abuse its discretion in ordering a driver to produce privileged medical records, which mentioned or reflected the results of any tests performed to determine the driver's blood alcohol content and the presence of controlled substances in his body at the time of the accident, in the interest of justice. Roadway Express, Inc. v. Hayes, 178 N.C. App. 165, 631 S.E.2d 41, 2006 N.C. App. LEXIS 1297 (2006).

Disclosure Improperly Compelled. — Driver did not waive physician-patient privilege simply by driving, and the trial court abused its discretion in compelling the production of her medical records where the injured party did not contend that the driver's medical condition contributed to the accident, and the driver did not contend that she was injured, but merely denied the allegation of negligence and asserted contributory negligence of the injured party, in the alternative. Mims v. Wright, 157 N.C. App. 339, 578 S.E.2d 606, 2003 N.C. App. LEXIS 646 (2003).

§ 8-53.1. Physician-patient and nurse privilege; limitations.

(a) Notwithstanding the provisions of G.S. 8-53 and G.S. 8-53.13, the physician-patient or nurse privilege shall not be a ground for excluding evidence regarding the abuse or neglect of a child under the age of 16 years or regarding an illness of or injuries to such child or the cause thereof in any judicial proceeding related to a report pursuant to the North Carolina Juvenile Code, Chapter 7B of the General Statutes of North Carolina.

(b) Nothing in this Article shall preclude a health care provider, as defined in G.S. 90-21.11, from disclosing information pursuant to G.S. 90-21.20B. (1965, c. 472, s. 2; 1971, c. 710, s. 2; 1981, c. 469, s. 24; 1998-202, s. 13(b); 2004-186, s. 16.2; 2006-253, s. 18; 2007-115, s. 4.)

Editor's Note. — Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

Effect of Amendments. — Session Laws 2006-253, s. 18, effective December 1, 2006, and applicable to offenses committed on or after that date, added "disclosure of information in impaired driving accident cases" at the end of the section heading; designated the existing provisions as subsection (a), and added subsection (b).

Session Laws 2007-115, s. 4, effective June 27, 2007, substituted "limitations" for "waived in child abuse; disclosure of information in impaired driving accident cases" in the section heading, and substituted "pursuant to" for "to a law enforcement agency investigating a vehicle crash under the provisions of" near the end of subsection (b).

Legal Periodicals. — For survey of 1983 law of evidence, see 62 N.C.L. Rev. 1290 (1984).

For article, "What's the Harm in Asking?: A Discussion of Waiver of the Physician-Patient Privilege and Ex Parte Interviews with Treating Physicians," see 19 N.C. Cent. L.J. 1 (1990).

CASE NOTES

This section is read in pari materia with the Juvenile Code (§ 7A-516, et seq.), in particular, § 7A-551. State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983); State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

Section applies irrespective of when the medical information was obtained. — Section 7A-551 [see now G.S. 7B-310] and this section plainly facilitate the prosecution of child abusers, without regard to whether the medical information was obtained before or after the accused was officially charged with a crime. State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

Evidence That Defendant Sought Treatment of Sexually Transmitted Disease. — Any privilege which defendant, who sought treatment of a sexually transmittable disease after he had been charged with sexual crimes against his children and taken into custody, might have been entitled to by G.S. 8-53 was nullified by this section and G.S. 7A-551 [see now G.S. 7B-310]. State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

Evidence That Defendant in Sexual Abuse Case Had Gonorrhea. — Unequivocal evidence that a seven-year old girl had been sexually abused would invoke this section and G.S. 7A-551 [see now G.S. 7B-310]. Therefore, medical records maintained by a county health department, revealing that the defendant had been treated for gonorrhea, were admissible as evidence with regard to the cause or source of the child's disease. State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983).

Cited in Spell v. McDaniel, 591 F. Supp. 1090 (E.D.N.C. 1984).

§ 8-53.2. Communications between clergymen and communicants.

No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be competent to testify in any action, suit or proceeding concerning any information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted, provided, however, that this section shall not apply where communicant in open court waives the privilege conferred. (1959, c. 646; 1963, c. 200; 1967, c. 794.)

Legal Periodicals. — For note, "Privileged Communications — The New North Carolina Priest-Penitent Statute," see 46 N.C.L. Rev. 427 (1968).

For comment surveying North Carolina law of relational privilege, see 50 N.C.L. Rev. 630 (1972).

For survey of 1983 law of evidence, see 62 N.C.L. Rev. 1290 (1984).

For note on the clergy-communicant privilege, see 65 N.C.L. Rev. 1390 (1987).

CASE NOTES

Privilege Is Statutory. — Apart from this statute, there is no privilege with reference to communications between a clergyman or other spiritual advisor and his communicants or others who seek his advice and comfort. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967), commented on in 45 N.C.L. Rev. 863, 884, 924 (1967).

Two Statutory Requirements. — For the clergyman's privilege to apply the defendant must be seeking the counsel and advice of his minister, and the information must be entrusted to the minister as a confidential communication. State v. Andrews, 131 N.C. App. 370, 507 S.E.2d 305 (1998).

Expectation of Trust and Confidentiality in Covered Communications. — The legislature's excision of the term "confidential" from the current version of this statute was clearly not intended to broaden application of the privilege to all genre of general conversation with one's spiritual mentor, but merely to broaden the range of advisory and counseling practices to which it applies. The expectation of trust and confidentiality inherent in communications covered under the prior statute was not affected by the legislature's modification in

1967 of that statute's wording. State v. West, 317 N.C. 219, 345 S.E.2d 186 (1986).

No Discretion in Court to Compel Disclosure When Privilege Exists. — The 1967 amendment to this section revealed the General Assembly's intent to remove from the trial courts any discretion to compel disclosure when the clergy-communicant's privilege exists. State v. Barber, 317 N.C. 502, 346 S.E.2d 441 (1986).

Minister Related to Defendant. — In a criminal trial, the trial court erred in allowing the mother of the victim, who was also the defendant's aunt and a minister, to testify with respect to statements made by defendant when she visited defendant while he was in jail, as this witness was acting at least in part in her professional capacity as a minister. State v. Jackson, 77 N.C. App. 832, 336 S.E.2d 437 (1985), cert. denied, 316 N.C. 199, 341 S.E.2d 572 (1986).

Limited Waiver Was Proper. — Trial court did not err by allowing a husband a limited waiver of the clergy-communicant privilege to allow examination of a minister regarding the husband's marriage counseling sessions with his wife during one month, but refusing to allow him to elicit testimony from the minister regarding other counseling sessions because the clergy-communicant privilege was absolute; further, the trial court reviewed the minister's notes and properly found that the notes contained no references during the time frames specified by defendant that established an earlier "discovery date" by the husband of the affair that was the basis of the underlying criminal conversation lawsuit. Misenheimer v. Burris, — N.C. App. —, 644 S.E.2d 611, 2007 N.C. App. LEXIS 1170 (2007).

Privilege Held Inapplicable. — This section was not applicable where the person to whom defendant confided was not an ordained or licensed minister of any church and did not hold any office in any church, although he had preached from the pulpit several times and had taught Sunday school, and where the court found that the defendant did not make statements while seeking spiritual comfort and guidance, but that they were conversational statements in which he confided to a friend. State v. Barber, 317 N.C. 502, 346 S.E.2d 441 (1986).

Where preacher, who had told defendant's wife the day before that defendant needed help and that he was going to try to help him, sought out defendant for that purpose, and meeting attended by defendant, preacher and the preacher's wife was not one in which defendant had any reason to expect confidentiality, as the conversation appeared to be one in which the preacher was offering his advice and counsel, but not one in which defendant's admissions were entrusted to him in pursuit of such counsel and advice, this section did not apply. State v. West, 317 N.C. 219, 345 S.E.2d 186 (1986).

Clergy-communicant privilege was not applicable to statements defendant made in the presence of a church elder who was not an ordained minister or clergyman. State v. Pulley, — N.C. App. —, 636 S.E.2d 231, 2006 N.C. App. LEXIS 2242 (2006).

Cited in Spencer v. Spencer, 61 N.C. App. 535, 301 S.E.2d 411 (1983); Spell v. McDaniel, 591 F. Supp. 1090 (E.D.N.C. 1984); In re Investigation of the Death of Miller, 357 N.C. 316, 584 S.E.2d 772, 2003 N.C. LEXIS 831 (2003).

§ 8-53.3. Communications between psychologist and client or patient.

No person, duly authorized as a licensed psychologist or licensed psychological associate, nor any of his or her employees or associates, shall be required to disclose any information which he or she may have acquired in the practice of psychology and which information was necessary to enable him or her to practice psychology. Any resident or presiding judge in the district in which the action is pending may, subject to G.S. 8-53.6, compel disclosure, either at the trial or prior thereto, if in his or her opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.

Notwithstanding the provisions of this section, the psychologist-client or patient privilege shall not be grounds for failure to report suspected child abuse or neglect to the appropriate county department of social services, or for failure to report a disabled adult suspected to be in need of protective services to the appropriate county department of social services. Notwithstanding the provisions of this section, the psychologist-client or patient privilege shall not be grounds for excluding evidence regarding the abuse or neglect of a child, or an illness of or injuries to a child, or the cause thereof, or for excluding evidence regarding the abuse, neglect, or exploitation of a disabled adult, or an illness of or injuries to a disabled adult, or the cause thereof, in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 3 of Chapter 7B of the General Statutes, or to the Protection of the Abused, Neglected, or Exploited Disabled Adult Act, Article 6 of Chapter 108A of the General Statutes. (1967, c. 910, s. 18; 1983, c. 410, ss. 3, 7; 1987, c. 323, s. 2; 1993, c. 375, s. 2; c. 553, s. 78; 1998-202, s. 13(c).)

Legal Periodicals. — For comment surveying North Carolina law of relational privilege, see 50 N.C.L. Rev. 630 (1972).

For comment on the evidentiary implications at trial of the physician-patient privilege, see 12 Wake Forest L. Rev. 849 (1976).

For survey of 1979 law on evidence, see 58 N.C.L. Rev. 1456 (1980).

For article discussing the psychotherapist-patient privilege, see 60 N.C.L. Rev. 893 (1982).

For note on the admissibility of a criminal defendant's hypnotically refreshed testimony, see 10 Campbell L. Rev. 311 (1988).

CASE NOTES

This section does not require an explicit finding of the necessity to compel discovery of privileged information, but rather, such a finding is implicit in the admission of such evidence. State v. Williams, 350 N.C. 1, 510 S.E.2d 626, 1999 N.C. LEXIS 5 (1999), cert. denied 528 U.S. 880, 120 S. Ct. 193, 145 L. Ed. 2d 162 (1999).

Section 8-53 and this section are to be read in pari materia. In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818, cert. denied, 298 N.C. 297, 259 S.E.2d 298 (1979).

Thus, Disclosure May Be Compelled Prior to Trial or Filing of Charges. — Construing G.S. 8-53 and this section so as to give effect to the obvious intention of the legislature as manifested in the entire act and other acts in pari materia, the language of both of these sections is sufficient to allow the trial court to compel disclosure prior to trial and prior to the filing of criminal charges when such action is necessary to the exercise of its implied or inherent powers to provide for the proper administration of justice. In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818, cert. denied, 298 N.C. 297, 259 S.E.2d 298 (1979).

This section as written favors a policy of nondisclosure. Flora v. Hamilton, 81 F.R.D. 576 (M.D.N.C. 1978).

But judges should not hesitate where it appears to them that disclosure is necessary in order that the truth be known and justice done. Flora v. Hamilton, 81 F.R.D. 576 (M.D.N.C. 1978).

Testimony Proper Where No Privilege Existed. — Where defendant to a charge of first-degree sexual offense telephoned a clinical psychologist and made an appointment, but doctor recognized a conflict of interest because she was also treating defendant's wife and stepdaughters, doctor telephoned defendant to refer him to another psychologist, and defendant then stated to her that he had been seduced by his stepdaughter, the trial court, by allowing this testimony and compelling disclosure over defendant's objection on the basis that it was "necessary to the proper administration of justice" as allowed by this section, acted properly, since under the second paragraph of this section the psychologist-patient privilege did not exist. State v. Knight, 93 N.C. App. 460, 378 S.E.2d 424, cert. denied, 325 N.C. 230, 381 S.E.2d 789 (1989).

Applicability of Privilege to Competency Examination. — No psychologist-client privilege is created when a defendant is examined at his request by a court-appointed psychologist for purposes of evaluating defendant's mental status, and even if they were the court could compel disclosure if the records were "necessary to the proper administration of justice." State v. Williams, 350 N.C. 1, 510 S.E.2d 626, 1999 N.C. LEXIS 5 (1999), cert. denied 528 U.S. 880, 120 S. Ct. 193, 145 L. Ed. 2d 162 (1999).

Authority to Compel Evidence. — It was not error for a trial court to admit certain evidence in a child neglect and dependency case that violated the mother's psychologist-patient privilege; under G.S. 8-53.3, the court had the authority to compel disclosure of otherwise privileged information if, in his or her opinion, it was necessary to a proper administration of justice, and the mother's psychological condition was a major issue in the determination that her son was neglected. In re K.D., 178 N.C. App. 322, 631 S.E.2d 150, 2006 N.C. App. LEXIS 1393 (2006).

Order Compelling Disclosure Upheld. — Trial court's order that the marriage counselor disclose counseling session records was not erroneous in light of the state's theory of the case, that defendant conspired with and aided and abetted her lover in the murder of her husband, as the testimony of the marriage counselor was surely relevant. State v. Theer, — N.C. App. —, 639 S.E.2d 655, 2007 N.C. App. LEXIS 151 (2007).

Applied in State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979); State v. Davis, 353 N.C. 1, 539 S.E.2d 243, 2000 N.C. LEXIS 897 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 95, 151 L. Ed. 2d 55 (2001), cert. denied, — N.C. —, 604 S.E.2d 919 (2004).

Cited in State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983); Spell v. McDaniel, 591 F. Supp. 1090 (E.D.N.C. 1984); State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986); State v. East, 345 N.C. 535, 481 S.E.2d 652 (1997), cert. denied, 522 U.S. 918, 118 S. Ct. 306, 139 L. Ed. 2d 236 (1997); In re Brooks, 143 N.C. App. 601, 548 S.E.2d 748, 2001 N.C. App. LEXIS 344 (2001); In re Investigation of the Death of Miller, 357 N.C. 316, 584 S.E.2d 772, 2003 N.C. LEXIS 831 (2003).

§ 8-53.4. School counselor privilege.

No person certified by the State Department of Public Instruction as a school counselor and duly appointed or designated as such by the governing body of a public school system within this State or by the head of any private school within this State shall be competent to testify in any action, suit, or proceeding concerning any information acquired in rendering counseling services to any student enrolled in such public school system or private school, and which information was necessary to enable him to render counseling services; provided, however, that this section shall not apply where the student in open court waives the privilege conferred. Any resident or presiding judge in the district in which the action is pending may compel disclosure, either at the trial or prior thereto, if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be the district court judge, and if the case is in superior court the judge shall be a superior court judge. (1971, c. 943; 1983, c. 410, ss. 4, 5.)

Legal Periodicals. — For comment surveying North Carolina law of relational privilege, see 50 N.C.L. Rev. 630 (1972).

For survey of 1983 law of evidence, see 62 N.C.L. Rev. 1290 (1984).

CASE NOTES

Cited in Spell v. McDaniel, 591 F. Supp. 1090 (E.D.N.C. 1984); In re Investigation of the Death of Miller, 357 N.C. 316, 584 S.E.2d 772, 2003 N.C. LEXIS 831 (2003).

§ 8-53.5. Communications between licensed marital and family therapist and client(s).

No person, duly licensed as a licensed marriage and family therapist, nor any of the person's employees or associates, shall be required to disclose any information which the person may have acquired in rendering professional marriage and family therapy services, and which information was necessary to enable the person to render professional marriage and family therapy services. Any resident or presiding judge in the district in which the action is pending may, subject to G.S. 8-53.6, compel disclosure, either at the trial or prior thereto, if in the court's opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge. (1979, c. 697, s. 2; 1983, c. 410, ss. 6, 7; 1985, c. 223. s. 1; 2001-487, s. 40(a); 2004-203, s. 18.)

Legal Periodicals. — For survey of 1983 law of evidence, see 62 N.C.L. Rev. 1290 (1984).

CASE NOTES

Cited in Spell v. McDaniel, 591 F. Supp. 1090 (E.D.N.C. 1984); In re Investigation of the Death of Miller, 357 N.C. 316, 584 S.E.2d 772, 2003 N.C. LEXIS 831 (2003).

§ 8-53.6. No disclosure in alimony and divorce actions.

In an action pursuant to G.S. 50-5.1, 50-6, 50-7, 50-16.2A, and 50-16.3A if either or both of the parties have sought and obtained marital counseling by a licensed physician, licensed psychologist, licensed psychological associate, licensed clinical social worker, or licensed marriage and family therapist, the person or persons rendering such counseling shall not be competent to testify in the action concerning information acquired while rendering such counseling. (1983, c. 410, s. 8; 2001-152, s. 1.)

Legal Periodicals. — For survey of 1983 law of evidence, see 62 N.C.L. Rev. 1290 (1984).

CASE NOTES

Cited in In re Investigation of the Death of Miller, 357 N.C. 316, 584 S.E.2d 772, 2003 N.C. LEXIS 831 (2003).

§ 8-53.7. Social worker privilege.

No person engaged in delivery of private social work services, duly licensed or certified pursuant to Chapter 90B of the General Statutes shall be required to disclose any information that he or she may have acquired in rendering professional social services, and which information was necessary to enable him or her to render professional social services: provided, that the presiding judge of a superior or district court may compel such disclosure, if in the court's opinion the same is necessary to a proper administration of justice and such disclosure is not prohibited by G.S. 8-53.6 or any other statute or regulation. (1983, c. 495, s. 2; 2001-152, s. 2; 2001-487, s. 40(b).)

CASE NOTES

Cited in In re Investigation of the Death of Miller, 357 N.C. 316, 584 S.E.2d 772, 2003 N.C. LEXIS 831 (2003).

§ 8-53.8. Counselor privilege.

No person, duly licensed pursuant to Chapter 90, Article 24, of the General Statutes, shall be required to disclose any information which he or she may have acquired in rendering professional counseling services, and which information was necessary to enable him or her to render professional counseling services: Provided, that the presiding judge of a superior or district court may compel such disclosure, if in the court's opinion the same is necessary to a proper administration of justice and such disclosure is not prohibited by other statute or regulation. (1983, c. 755, s. 2; 1993, c. 514, s. 2.)

CASE NOTES

Cited in State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986); In re Investigation of the Death of Miller, 357 N.C. 316, 584 S.E.2d 772, 2003 N.C. LEXIS 831 (2003).

§ 8-53.9. Optometrist/patient privilege.

No person licensed pursuant to Article 6 of Chapter 90 of the General Statutes shall be required to disclose any information that may have been acquired in rendering professional optometric services and which information was necessary to enable that person to render professional optometric services, except that the presiding judge of a superior or district court may compel this disclosure, if, in the court's opinion, disclosure is necessary to a proper administration of justice and disclosure is not prohibited by other statute or rule. (1997-75, s. 4; 1997-304, 3.)

CASE NOTES

Cited in In re Investigation of the Death of Miller, 357 N.C. 316, 584 S.E.2d 772, 2003 N.C. LEXIS 831 (2003).

§ 8-53.10. Peer support group counselors.

(a) Definitions. — The following definitions apply in this section:

- (1) Client law enforcement employee. — Any law enforcement employee or a member of his or her immediate family who is in need of and receives peer counseling services offered by the officer's employing law enforcement agency.
- (2) Immediate family. — A spouse, child, stepchild, parent, or stepparent.
- (3) Peer counselor. — Any law enforcement officer or civilian employee of a law enforcement agency who:
  - a. Has received training to provide emotional and moral support and counseling to client law enforcement employees and their immediate families; and
  - b. Was designated by the sheriff, police chief, or other head of a law enforcement agency to counsel a client law enforcement employee.
- (4) Privileged communication. — Any communication made by a client law enforcement employee or a member of the client law enforcement employee's immediate family to a peer counselor while receiving counseling.

(b) A peer counselor shall not disclose any privileged communication that was necessary to enable the counselor to render counseling services unless one of the following apply:

- (1) The disclosure is authorized by the client or, if the client is deceased, the disclosure is authorized by the client's executor, administrator, or in the case of unadministrated estates, the client's next of kin.
- (2) The disclosure is necessary to the proper administration of justice and, subject to G.S. 8-53.6, is compelled by a resident or presiding judge. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.

(c) The privilege established by this section shall not apply:

- (1) If the peer counselor was an initial responding officer, a witness, or a party to the incident that prompted the delivery of peer counseling services.

(2) To communications made while the peer counselor was not acting in his or her official capacity as a peer counselor.

(3) To communications related to a violation of criminal law. This subdivision does not require the disclosure of otherwise privileged communications related to an officer's use of force.

(d) Notwithstanding the provisions of this section, the peer counselor privilege shall not be grounds for failure to report suspected child abuse or neglect to the appropriate county department of social services, or for failure to report a disabled adult suspected to be in need of protective services to the appropriate county department of social services. Notwithstanding the provisions of this section, the peer counselor privilege shall not be grounds for excluding evidence regarding the abuse or neglect of a child, or an illness of or injuries to a child, or the cause thereof, or for excluding evidence regarding the abuse, neglect, or exploitation of a disabled adult, or an illness of or injuries to a disabled adult, or the cause thereof, in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 3 of Chapter 7B, or to the Protection of the Abused, Neglected, or Exploited Disabled Adult Act, Article 6 of Chapter 108A of the General Statutes. (1999-374, s. 1.)

§ 8-53.11. Persons, companies, or other entities engaged in gathering or dissemination of news.

(a) Definitions. — The following definitions apply in this section:

(1) Journalist. — Any person, company, or entity, or the employees, independent contractors, or agents of that person, company, or entity, engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination via any news medium.

(2) Legal proceeding. — Any grand jury proceeding or grand jury investigation; any criminal prosecution, civil suit, or related proceeding in any court; and any judicial or quasi-judicial proceeding before any administrative, legislative, or regulatory board, agency, or tribunal.

(3) News medium. — Any entity regularly engaged in the business of publication or distribution of news via print, broadcast, or other electronic means accessible to the general public.

(b) A journalist has a qualified privilege against disclosure in any legal proceeding of any confidential or nonconfidential information, document, or item obtained or prepared while acting as a journalist.

(c) In order to overcome the qualified privilege provided by subsection (b) of this section, any person seeking to compel a journalist to testify or produce information must establish by the greater weight of the evidence that the testimony or production sought:

(1) Is relevant and material to the proper administration of the legal proceeding for which the testimony or production is sought;

(2) Cannot be obtained from alternate sources; and

(3) Is essential to the maintenance of a claim or defense of the person on whose behalf the testimony or production is sought.

Any order to compel any testimony or production as to which the qualified privilege has been asserted shall be issued only after notice to the journalist and a hearing and shall include clear and specific findings as to the showing made by the person seeking the testimony or production.

(d) Notwithstanding subsections (b) and (c) of this section, a journalist has no privilege against disclosure of any information, document, or item obtained as the result of the journalist's eyewitness observations of criminal or tortious conduct, including any physical evidence or visual or audio recording of the observed conduct. (1999-267, s. 1.)

Editor's Note. — This section was enacted as G.S. 8-53.9 and was redesignated as G.S. 8-53.11 pursuant to directions from the Revisor of Statutes.

§ 8-53.12. Communications with agents of rape crisis centers and domestic violence programs privileged.

(a) Definitions. — The following definitions apply in this section:

(1) Agent. — An employee or agent of a center who has completed a minimum of 20 hours of training as required by the center, or a volunteer, under the direct supervision of a center supervisor, who has completed a minimum of 20 hours of training as required by the center.

(2) Center. — A domestic violence program or rape crisis center.

(3) Domestic violence program. — A nonprofit organization or program whose primary purpose is to provide services to domestic violence victims.

(4) Domestic violence victim. — Any person alleging domestic violence as defined by G.S. 50B-1, who consults an agent of a domestic violence program for the purpose of obtaining, for himself or herself, advice, counseling, or other services concerning mental, emotional, or physical injuries suffered as a result of the domestic violence. The term shall also include those persons who have a significant relationship with a victim of domestic violence and who have sought, for themselves, advice, counseling, or other services concerning a mental, physical, or emotional condition caused or reasonably believed to be caused by the domestic violence against the victim.

(5) Rape crisis center. — Any publicly or privately funded agency, institution, organization, or facility that offers counseling and other services to victims of sexual assault and their families.

(6) Services. — Includes, but is not limited to, crisis hotlines; safe homes and shelters; assessment and intake; children of violence services; individual counseling; support in medical, administrative, and judicial systems; transportation, relocation, and crisis intervention. The term does not include investigation of physical or sexual assault of children under the age of 16.

(7) Sexual assault. — Any alleged violation of G.S. 14-27.2, 14-27.3, 14-27.4, 14-27.5, 14-27.7, 14-27.7A, or 14-202.1, whether or not a civil or criminal action arises as a result of the alleged violation.

(8) Sexual assault victim. — Any person alleging sexual assault, who consults an agent of a rape crisis center for the purpose of obtaining, for themselves, advice, counseling, or other services concerning mental, physical, or emotional injuries suffered as a result of sexual assault. The term shall also include those persons who have a significant relationship with a victim of sexual assault and who have sought, for themselves, advice, counseling, or other services concerning a mental, physical, or emotional condition caused or reasonably believed to be caused by sexual assault of a victim.

(9) Victim. — A sexual assault victim or a domestic violence victim.

(b) Privileged Communications. — No agent of a center shall be required to disclose any information which the agent acquired during the provision of services to a victim and which information was necessary to enable the agent to render the services; provided, however, that this subsection shall not apply where the victim waives the privilege conferred. Any resident or presiding judge in the district in which the action is pending shall compel disclosure, either at the trial or prior thereto, if the court finds, by a preponderance of the evidence, a good faith, specific and reasonable basis for believing that (i) the records or testimony sought contain information that is relevant and material to factual issues to be determined in a civil proceeding, or is relevant, material, and exculpatory upon the issue of guilt, degree of guilt, or sentencing in a criminal proceeding for the offense charged or any lesser included offense, (ii) the evidence is not sought merely for character impeachment purposes, and (iii) the evidence sought is not merely cumulative of other evidence or information available or already obtained by the party seeking the disclosure or the party's counsel. If the case is in district court, the judge shall be a district court judge, and if the case is in superior court, the judge shall be a superior court judge.

Before requiring production of records, the court must find that the party seeking disclosure has made a sufficient showing that the records are likely to contain information subject to disclosure under this subsection. If the court finds a sufficient showing has been made, the court shall order that the records be produced for the court under seal, shall examine the records in camera, and may allow disclosure of those portions of the records which the court finds contain information subject to disclosure under this subsection. After all appeals in the action have been exhausted, any records received by the court under seal shall be returned to the center, unless otherwise ordered by the court. The privilege afforded under this subsection terminates upon the death of the victim.

(c) Duty in Case of Abuse or Neglect. — Nothing in this section shall be construed to relieve any person of any duty pertaining to abuse or neglect of a child or disabled adult as required by law. (2001-277, s. 1.)

§ 8-53.13. Nurse privilege.

No person licensed pursuant to Article 9A of Chapter 90 of the General Statutes shall be required to disclose any information that may have been acquired in rendering professional nursing services, and which information was necessary to enable that person to render professional nursing services, except that the presiding judge of a superior or district court may compel disclosure if, in the court's opinion, disclosure is necessary to a proper administration of justice and disclosure is not prohibited by other statute or rule. Nothing in this section shall preclude the admission of otherwise admissible written or printed medical records in any judicial proceeding, in accordance with the procedure set forth in G.S. 8-44.1, after a determination by the court that disclosure should be compelled as set forth herein. (2003-342, s. 1; 2004-186, s. 16.1.)

§ 8-54. Defendant in criminal action competent but not compellable to testify.

In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to cross-examination as other witnesses. Except as above provided, nothing in this section shall render any person, who in any criminal proceeding is charged with the commission of a criminal offense, competent or compellable to give evidence against himself, nor render any person compellable to answer any question tending to criminate himself. (1856-7, c. 23; 1866, c. 43, s. 3; 1868-9, c. 209, s. 4; 1881, c. 89, s. 3; c. 110, ss. 2, 3; Code ss. 1353, 1354; Rev., ss. 1634, 1635; C.S., s. 1799.)

Cross References. — As to rights of accused, see N.C. Const., Art. I, § 23. As to exceptions, i.e., where witness is not excused from testifying on ground that testimony will tend to incriminate him, see G.S. 1-357, 14-38, 14-354.

Legal Periodicals. — For article discussing self-incrimination, see 15 N.C.L. Rev. 229 (1937).

For note concerning confessions, see 23 N.C.L. Rev. 364 (1945).

As to compelling accused to speak so that witness may identify his voice, see note in 27 N.C.L. Rev. 262 (1949).

For note, "Constitutional Law — Is the Restricted Cross-Examination Rule Embodied in the Fifth Amendment?", see 45 N.C.L. Rev. 1030 (1967).

For note discussing sua sponte instructions on a defendant's failure to testify, see 54 N.C.L. Rev. 1001 (1976).

For comment on impeaching a criminal defendant by prior acquittals, see 17 Wake Forest L. Rev. 561 (1981).

For article, "An Analysis of the New North Carolina Evidence Code," see 20 Wake Forest L. Rev. 1 (1984).

CASE NOTES

I. General Consideration.
II. Evidence of Defendant's Character.
III. Cross-Examination of Defendant.
  A. Scope of Questioning.
  B. Particular Areas of Inquiry.
IV. Defendant Not Testifying.
  A. Effect.
  B. Fact Commented On.
  C. Instructions to Jury.

I. GENERAL CONSIDERATION.

Change from Common Law. — To correctly interpret and apply this section, it should be remembered that at common law, both in England and in this country, parties were not competent witnesses and were not permitted to testify. Nonetheless, an admission of guilt by defendant was competent evidence just as it is competent today. Then, as now, the law applied and gave effect to the assumption that one charged with crime and wrongful conduct would not remain silent when he had an opportunity to speak. Such silence was evidence of guilt. Thus, when the barrier was removed preventing the accused from testifying and according him a privilege, it was proper to provide that his failure to utilize the privilege so given should not be regarded as an implied admission. State v. Walker, 251 N.C. 465, 112 S.E.2d 61 (1960), cert. denied, 364 U.S. 832, 81 S. Ct. 45, 5 L. Ed. 2d 58 (1960), overruled on other grounds, State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989).

Prior to the adoption of this section defendants in criminal actions were not competent to testify in their own behalf. The prevailing theory prior to the adoption of this section was that the frailty of human nature and the overpowering desire for freedom would ordinarily induce a person charged with crime, if permitted to testify, to swear falsely. State v. Williams, 6 N.C. App. 611, 170 S.E.2d 640 (1969).

When the common-law rules of evidence, which declared that parties were incompetent to testify, were changed by this section, an important privilege was extended to defendants, guarded by the provision that a failure to exercise it should raise no presumption of guilt against them. State v. Smith, 290 N.C. 148, 226 S.E.2d 10, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976).

The common-law disqualification against interested parties testifying was removed by this section. State v. Howard, 222 N.C. 291, 22 S.E.2d 917 (1942).

Privilege and Not a Duty. — A defendant in a criminal matter can only be examined as a witness by his own request. State v. Ellis, 97 N.C. 447, 2 S.E. 525 (1887).

This section gives a criminal defendant the privilege of testifying in his own behalf. It is not his duty to do so, and he cannot be compelled to testify. If he does, however, he occupies the position of any other witness. He is entitled to the same privileges and is equally liable to be impeached or discredited. State v. Austin, 20 N.C. App. 539, 202 S.E.2d 293, rev'd on other grounds, 285 N.C. 364, 204 S.E.2d 675 (1974).

The word "presumption" as used in this section is equivalent to what is at present generally understood by the word "inference." State v. Bailey, 4 N.C. App. 407, 167 S.E.2d 24 (1969).

The law is that the jury is not to infer guilt from the fact that the defendant neither testifies nor presents evidence. State v. Willis, 22 N.C. App. 465, 206 S.E.2d 729 (1974).

Defendant Treated as Other Witnesses. — When the defendant exercises this privilege he is treated just as any other witness and thereby subjects himself to all the disadvantages of that position. State v. Efler, 85 N.C. 585 (1881); State v. Hawkins, 115 N.C. 712, 20 S.E. 623 (1894); State v. Auston, 223 N.C. 203, 25 S.E.2d 613 (1943).

Where a defendant in a criminal prosecution testifies in his own behalf he waives his constitutional privilege not to answer questions tending to incriminate him and is subject to cross-examination for the purpose of impeaching his credibility as other witnesses. State v. Griffin, 201 N.C. 541, 160 S.E. 826 (1931).

If a defendant in a criminal action testifies, he occupies the position of any other witness, and he is entitled to the same privileges and is equally liable to be impeached or discredited. State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

No Instruction Required When Defendant Testifies. — When the defendant testifies, the trial court is not required to instruct the jury, upon request or otherwise, that the defendant cannot be compelled to testify. State v. Walden, 311 N.C. 667, 319 S.E.2d 577 (1984).

Contradiction of Testimony. — Defendant's privilege against self-incrimination was not violated where State was permitted to show for purposes of impeachment that defendant had not voluntarily turned himself in to the police, and defendant had already testified to the contrary. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Comment on Failure to Produce Exculpatory Evidence. — A prosecutor may not make any reference to or comment on a defendant's failure to testify. However, a defendant's failure to produce exculpatory evidence or to contradict evidence presented by the state may properly be brought to the jury's attention by the state in its closing argument. State v. Mason, 315 N.C. 724, 340 S.E.2d 430 (1986).

Where the prosecutor did no more than comment on defendant's failure to produce witnesses and evidence to refute the state's case, her statements did not constitute an impermissible comment on defendant's failure to take the stand. State v. Mason, 315 N.C. 724, 340 S.E.2d 430 (1986).

Evidence of Other Offenses Where Defendant Does Not Testify. — When the defendant in a criminal trial does not testify, evidence of other offenses is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; such evidence will be admissible, however, if that evidence is used to show intent, design, guilty knowledge, or scienter or to make out the res gestae or to exhibit a chain of circumstances in respect of the matter on trial, when the other offenses are so connected with the offense charged as to throw light on one or more of these questions. State v. Allen, 50 N.C. App. 173, 272 S.E.2d 785 (1980), appeal dismissed, 302 N.C. 399, 279 S.E.2d 353 (1981).

Where There Are Two or More Defendants. — Even prior to the enactment of this section on a trial for an affray, one defendant could not oppose the testifying of his codefendant for himself, the State's counsel not objecting. State v. Hamlett, 85 N.C. 520 (1881).

Failure of Codefendant to Take Stand. — A codefendant on trial cannot be required over his own objection to testify as a witness for defendant. State v. Hanford, 16 N.C. App. 353, 191 S.E.2d 910, cert. denied, 282 N.C. 428, 192 S.E.2d 841 (1972).

Defendant may properly raise a violation of this section for the first time on appeal. State v. Fleming, 33 N.C. App. 216, 234 S.E.2d 431, cert. denied and appeal dismissed, 293 N.C. 161, 236 S.E.2d 705 (1977).

In the absence of an indication to the trial court that defendant wished to take the stand, it could not be said that the court denied defendant his right to testify. State v. Hayes, 314 N.C. 460, 334 S.E.2d 741 (1985).

Testimony May Be Used in Subsequent Trial. — Where a defendant, in a prosecution for another crime, testified in his own behalf, after having been informed of his privilege not to testify, admissions made by him are competent evidence against him in a subsequent trial. State v. Simpson, 133 N.C. 676, 45 S.E. 567 (1903).

Error in Sustaining Objections Held Waived. — In a prosecution for first-degree murder, where defendant contended that the trial court erred in sustaining the State's objections to several of his attempts to explain his answers, thereby violating his right to testify in his own behalf pursuant to this section, any error by the trial court in sustaining the State's objections was cured when the evidence sought to be admitted was subsequently admitted without objection. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

Applied in State v. Turner, 253 N.C. 37, 116 S.E.2d 194 (1960); State v. Stephens, 262 N.C. 45, 136 S.E.2d 209 (1964); State v. Boone, 39 N.C. App. 218, 249 S.E.2d 817 (1978); State v. Joseph, 59 N.C. App. 436, 297 S.E.2d 173 (1982); State v. Farrow, 66 N.C. App. 147, 310 S.E.2d 418 (1984); State v. Billings, 104 N.C. App. 362, 409 S.E.2d 707 (1991); State v. Smith, 357 N.C. 604, 588 S.E.2d 453, 2003 N.C. LEXIS 1415 (2003), cert. denied, — U.S. —, 124 S. Ct. 2915, 159 L. Ed. 2d 819 (2004); State v. Chapman, 359 N.C. 328, 611 S.E.2d 794, 2005 N.C. LEXIS 361 (2005).

Cited in State v. Colson, 194 N.C. 206, 139 S.E. 230 (1927); State v. McLeod, 198 N.C. 649, 152 S.E. 895 (1930); State v. Spivey, 198 N.C. 655, 153 S.E. 255 (1930); State v. Vernon, 208 N.C. 340, 180 S.E. 590 (1935); York v. York, 212

N.C. 695, 194 S.E. 486 (1938); State v. Davis, 272 N.C. 102, 157 S.E.2d 671 (1967); State v. Paige, 272 N.C. 417, 158 S.E.2d 522 (1968); State v. Castor, 285 N.C. 286, 204 S.E.2d 848 (1974); State v. Thompson, 293 N.C. 713, 239 S.E.2d 465 (1977); State v. Alston, 35 N.C. App. 691, 242 S.E.2d 523 (1978); State v. Holder, 331 N.C. 462, 418 S.E.2d 197 (1992); State v. Griffin, 109 N.C. App. 131, 425 S.E.2d 722 (1993); State v. McIntosh, 336 N.C. 517, 444 S.E.2d 438 (1994); State v. Thompson, 118 N.C. App. 33, 454 S.E.2d 271 (1995); State v. Porter, 340 N.C. 320, 457 S.E.2d 716 (1995); State v. James, 342 N.C. 589, 466 S.E.2d 710 (1996); State v. Ward, 354 N.C. 231, 555 S.E.2d 251, 2001 N.C. LEXIS 1097 (2001).

II. EVIDENCE OF DEFENDANT'S CHARACTER.

Defendant's General Character Can Be Shown. — When a prosecutor or defendant in a criminal action goes upon the stand as a witness he becomes just as any other witness, and his general character can be proven, not only as it was before a charge affecting it was made, but as it is at the date he goes upon the stand. State v. Spurling, 118 N.C. 1250, 24 S.E. 533 (1896).

But His Character Is Not in Issue Unless So Placed. — Where a defendant goes on the witness stand and testifies, he does not thereby put his character in issue, but only puts his testimony in issue, and the State may introduce evidence tending to show the bad character of the witness solely for the purpose of contradicting him. State v. Foster, 130 N.C. 666, 41 S.E. 284 (1902); State v. Cloninger, 149 N.C. 567, 63 S.E. 154 (1908).

And When He Does Not Testify, His Character Is Not in Issue. — When defendant does not go upon the stand, and does not offer evidence of good character, his character is not in issue and it may not be impeached by the State. State v. Proctor, 213 N.C. 221, 195 S.E. 816 (1938).

Unless a defendant in a criminal prosecution testifies as a witness, thereby subjecting himself to impeachment, or produces evidence of his good character to repel the charge of crime, the State may not show his bad character for any purpose. State v. McLamb, 235 N.C. 251, 69 S.E.2d 537 (1952).

Introduction of Evidence of Good Character by Defendant. — The right of the defendant to offer testimony of his good character does not depend upon his having been examined as a witness in his own behalf. State v. Hice, 117 N.C. 782, 23 S.E. 357 (1895); State v. McKinnon, 223 N.C. 160, 25 S.E.2d 606 (1943).

When the defendant introduces evidence himself to prove his good character, then that evidence is substantive evidence, and may be considered by the jury as such. State v. Cloninger, 149 N.C. 567, 63 S.E. 154 (1908).

Use of Character Evidence Introduced by State. — Where, in the trial of a criminal action, the defendant testified in his own behalf and introduced no evidence as to his general character, but the State introduced evidence to show that such character was bad, it was held that such evidence by the State could be considered only as affecting the credibility of the defendant as a witness and not as a circumstance in determining the question of his guilt or innocence. State v. Traylor, 121 N.C. 674, 28 S.E. 493 (1897).

III. CROSS-EXAMINATION OF DEFENDANT.

A. Scope of Questioning.

Extent of Cross-Examination Permitted. — Cross-examination of a defendant under this section is not confined to matters brought out on direct examination, but questions are admissible to impeach, diminish or impair the credit of the witness. State v. Dickerson, 189 N.C. 327, 127 S.E. 256 (1925).

When a defendant voluntarily becomes a witness in his own behalf, he is subject to cross-examination and impeachment as any other witness, and it is proper for the solicitor (now district attorney) to ask him questions concerning his prior criminal record for the purpose of impeaching him, provided the questions are based on information and are asked in good faith. State v. Weaver, 3 N.C. App. 439, 165 S.E.2d 15 (1969).

It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971); State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975); State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death penalty vacated, Carter v. North Carolina, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

In order to impeach a defendant's credibility as a witness, the solicitor (now district attorney) is permitted to cross-examine the defendant as to collateral matters, including other criminal offenses, if the questions are based upon information and are asked in good faith. State v. Lea, 17 N.C. App. 71, 193 S.E.2d 383 (1972), cert. denied, 282 N.C. 674, 194 S.E.2d 154 (1973).

While defendant in a criminal action may not be required to become a witness unless he voluntarily does so, once he does so, he becomes subject to cross-examination and may be required to answer questions designed to impeach or discredit him as a witness. State v.

Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976); State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Cross-examination by the State is permitted for the purpose of impeaching the credibility of a witness, including a defendant in a criminal case, and not for the purpose of proving prior offenses. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

In cross-examination, the witness, including a defendant in a criminal case, may be asked all sorts of disparaging questions and he may be particularly asked whether he has committed specified criminal acts or has been guilty of specified reprehensible or degrading conduct. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

A testifying defendant is subject to impeachment by cross-examination, generally to the same extent as any other witness. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Once a defendant testifies, he assumes the status of any other witness and is subject to impeachment by the questions and arguments of opposing counsel. These arguments may include comments on the witness's failure to explain or deny incriminating evidence since, if an innocent explanation exists or a denial can properly be made, the witness may reasonably be expected to provide it. State v. Smith, 294 N.C. 365, 241 S.E.2d 674 (1978).

For purposes of impeachment, a defendant as witness may be cross-examined by the district attorney concerning prior inconsistent statements, prior convictions, and any specific acts of misconduct which tend to impeach his character. State v. Herbin, 298 N.C. 441, 259 S.E.2d 263 (1979).

Same — Discretion of Trial Judge. — The limits of legitimate cross-examination of a defendant are largely within the discretion of the trial judge and, absent a showing that the verdict was improperly influenced by his rulings on the scope of that cross-examination, those rulings will not be held for error. State v. Lea, 17 N.C. App. 71, 193 S.E.2d 383 (1972), cert. denied, 282 N.C. 674, 194 S.E.2d 154 (1973).

The scope of cross-examination of a criminal defendant is subject to the discretion of the trial judge and the questions must be asked in good faith. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death penalty vacated, Carter v. North Carolina, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

The scope of the cross-examination of a defendant with regard to specific acts of criminal and degrading conduct for which there has been no conviction is normally subject to the discretion of the trial judge, and the questions must be asked in good faith. The purpose of this rule permitting such a wide scope for impeachment is that such evidence is a proper and relevant means of aiding the jury in assessing and weighing the credibility of the defendant. State v. Ross, 295 N.C. 488, 246 S.E.2d 780 (1978).

B. Particular Areas of Inquiry.

Cross Examination as to Unproved Accusations or Arrests for Unrelated Offenses. — For purposes of impeachment, a witness, including the defendant in a criminal case, may not be cross-examined as to whether he has been accused, either informally or by affidavit on which a warrant is issued, of a criminal offense unrelated to the case on trial, nor cross-examined as to whether he has been arrested for such unrelated criminal offense. State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Witness, including a defendant in a criminal case, cannot be impeached by cross-examination as to whether he has been arrested for, indicted for, or accused of an unrelated criminal offense. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

A defendant may not be asked on cross-examination for impeachment purposes if he has been accused, arrested or indicted for a particular crime, but he may be asked if he in fact committed the crime. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975); State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death penalty vacated, Carter v. North Carolina, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

It is improper to cross-examine a witness, including a defendant in a criminal trial, as to indictments, warrants or arrests which may have been made against him. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Cross-Examination as to Other Offenses for Which Defendant Has Been Indicted. — For purposes of impeachment, a witness, including the defendant in a criminal case, may not be cross-examined as to whether he has been indicted or is under indictment for a criminal offense other than that for which he is then on trial. In respect of this point, State v. Maslin, 195 N.C. 537, 143 S.E. 3 (1928), and decisions in accord with Maslin, are overruled, on the basic ground that an indictment cannot rightly be considered as more than an unproved accusation. State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

The rule that a witness, including the defendant in a criminal case, may no longer be cross-examined for impeachment purposes as to whether he has been indicted or is under indictment for a criminal offense other than that for which he is then on trial applies only to trials begun after December 15, 1971, the date of the decision in State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971). State v. Harris, 281 N.C. 542, 189 S.E.2d 249 (1972).

Cross-Examination with Respect to Prior Convictions. — A witness, including the defendant in a criminal case, may be cross-examined for purposes of impeachment with respect to prior convictions of crime. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. Ross, 295 N.C. 488, 246 S.E.2d 780 (1978).

Cross-examination for impeachment purposes is not limited to conviction of crimes. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

Trial judge did not err in admitting defendant's testimony under cross-examination of prior criminal convictions where the district attorney repeatedly asked defendant what he had been convicted of, not what he had been charged with, it was defendant who unresponsively volunteered information as to charges, and defendant's motion to strike all testimony as to charges was allowed and the judge instructed the jury to disregard all of it. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Inquiry of a witness, including a defendant, into prior convictions for certain crimes is relevant to impeach the witness. State v. Collins, 29 N.C. App. 120, 223 S.E.2d 575 (1976).

Where the defendant on cross-examination testified about an additional conviction for assault with a firearm which he had failed to mention during his direct examination, this was relevant impeachment evidence, thus, it was not only proper, it was also prudent for the prosecutor to attempt to elicit further details about defendant's prior convictions. State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980).

And Specific Acts of Misconduct. — Where a defendant in a criminal case testifies in his own behalf, specific acts of misconduct may be brought out on cross-examination to impeach his testimony. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

An accused person who testifies as a witness may be cross-examined regarding prior acts of misconduct. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Trial judge did not err in allowing cross-examination of defendant concerning the circumstances of his undesirable discharge from military service. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Cross-examination for purposes of impeachment of a defendant who testifies in his own behalf is not limited to questions concerning prior convictions, but also extends to questions relating to specific acts of criminal and degrading conduct for which there has been no conviction. State v. Ross, 295 N.C. 488, 246 S.E.2d 780 (1978).

When a defendant becomes a witness and testifies in his own behalf, he is subject to cross-examination like any other witness, and, for purposes of impeachment, he may be cross-examined by the district attorney concerning any specific acts of misconduct which tend to impeach his character. State v. Galloway, 304 N.C. 485, 284 S.E.2d 509 (1981).

By choosing to testify, a defendant is subject to cross-examination as other witnesses; defendant waived his privilege against self-incrimination regarding bad acts when he elected to testify. State v. Artis, 91 N.C. App. 604, 372 S.E.2d 905 (1988).

Where defendant testified on direct examination that he had no intent of selling cocaine until he was approached by the informant, he raised the issue of entrapment, and G.S. 8C-1, Rule 404(b) allowed the State on cross-examination to question defendant concerning the prior sale to undercover police to prove absence of entrapment; therefore defendant's privilege against self-incrimination was not violated by the questions. State v. Artis, 91 N.C. App. 604, 372 S.E.2d 905 (1988).

Where defendant first testified that he had never possessed any cocaine, it was then proper impeachment for the district attorney to ask the defendant about bags containing cocaine residue found in the defendant's possession when he was arrested. State v. Wooten, 104 N.C. App. 125, 408 S.E.2d 202 (1991).

Cross-Examination as to Conviction Subsequently Set Aside. — While it was improper for the solicitor (now district attorney) to cross-examine defendant concerning a conviction for felonious assault when this conviction had been subsequently set aside and on retrial defendant had been convicted only of simple assault — if the solicitor (now district attorney) knew such was the case — defendant was hardly prejudiced when he had admitted convictions for a large number of different criminal offenses committed over a long period of years. State v. Weaver, 3 N.C. App. 439, 165 S.E.2d 15 (1969).

Denial of Impeaching Questions. — When defendant denies impeaching questions as to his prior criminal record, his answers are conclusive in the sense that they cannot be rebutted by other evidence, but the solicitor is not precluded from rephrasing his questions to include such details as the docket number of the case, the name of the court, the date of trial, the offense charged, and the sentence imposed. State v. Weaver, 3 N.C. App. 439, 165 S.E.2d 15 (1969).

Contradicting Witness's Denial of Prior Offenses. — Denial of prior offenses by a witness, including a defendant in a criminal case, may not be contradicted by introducing the record of his conviction or otherwise proving by other witnesses that he was, in fact, convicted. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Defendant May Be Recalled for Further Cross-Examination. — A defendant who avails himself of the privilege of testifying in his own behalf is subject to being recalled for further cross-examination, since the court has full discretion to allow a witness to be examined at any stage of the trial out of the usual order or to be recalled for reexamination. State v. Austin, 20 N.C. App. 539, 202 S.E.2d 293, rev'd on other grounds, 285 N.C. 364, 204 S.E.2d 675 (1974).

IV. DEFENDANT NOT TESTIFYING.

A. Effect.

No Presumption from Failure to Take Stand. — The failure of a defendant charged with homicide to take the witness stand voluntarily will not create a presumption against him. State v. Bynum, 175 N.C. 777, 95 S.E. 101 (1918).

A defendant's failure to testify may not be considered an admission of the truth of testimony which tends to incriminate him. State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975).

North Carolina cases do not prescribe any mandatory formula with regard to defendant's failure to testify not creating any presumption against him, but instead look to see if the spirit of this section has been complied with. State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975), cert. denied, 423 U.S. 1091, 96 S. Ct. 886, 47 L. Ed. 2d 102 (1976).

B. Fact Commented On.

This section unquestionably prohibits any comment before the jury concerning defendant's failure to testify. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976); State v. Hughes, 54 N.C. App. 117, 282 S.E.2d 504 (1981).

It is the privilege, but not the duty, of a party to an action to offer himself as a witness in his own behalf, and he is not the proper subject for unfriendly criticism because he declines to exercise a privilege conferred upon him for his own benefit merely. The fact is not the subject of comment at all, certainly not unless under very peculiar circumstances, which must be necessarily passed upon by the judge presiding at the trial, as a matter of sound discretion. Gragg v. Wagner, 77 N.C. 246 (1877).

Comment by Court. — The failure of defendant to testify in his own behalf should not be made the subject of comment by the court except to inform the jury that a defendant may or may not testify in his own behalf as he may see fit, and that his failure to testify does not create any presumption against him. State v. McNeill, 229 N.C. 377, 49 S.E.2d 733 (1948); State v. Bovender, 233 N.C. 683, 65 S.E.2d 323 (1951); State v. Bailey, 4 N.C. App. 407, 167 S.E.2d 24 (1969); State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973); State v. Caron, 288 N.C. 467, 219 S.E.2d 68 (1975), cert. denied, 425 U.S. 971, 96 S. Ct. 2168, 48 L. Ed. 794 (1976).

Trial court in a prosecution for armed robbery did not improperly comment on defendant's failure to testify when defense counsel stated he was going to introduce defendant into evidence and the court replied, "He'll have to take the witness stand," since the court's remark merely explained evidentiary procedure. State v. Hughes, 54 N.C. App. 117, 282 S.E.2d 504 (1981).

Any comment or explanation by the parties or the court on a defendant's election not to testify is improper. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

Counsel may not comment upon the failure of a defendant in a criminal prosecution to testify. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

This section is interpreted as denying the right of counsel to comment on the failure of a defendant to testify. The reason for the rule is that extended comment from the court or from counsel for the State or defendant would tend to nullify the declared policy of the law that the failure of one charged with crime to testify in his own behalf should not create a presumption against him or be regarded as a circumstance indicative of guilt or unduly accentuate the significance of his silence. To permit counsel for a defendant to comment upon or offer explanation of the defendant's failure to testify would open the door for the prosecution and create a situation that this section was intended to prevent. State v. Bovender, 233 N.C. 683, 65 S.E.2d 323 (1951), overruled on other grounds, State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989); State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982); State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

The decisions of the Supreme Court referring to this statute have interpreted its meaning as denying the right of counsel to comment on the failure of a defendant to testify. The reason for the rule is that extended comment from the court or from counsel for the State or defendant would tend to nullify the declared policy of the law that the failure of one charged with crime to testify in his own behalf should not create a presumption against him or be regarded as a circumstance indicative of guilt or unduly accentuate the significance of his silence. To permit counsel for a defendant to comment upon or offer explanation of the defendant's failure to testify would open the door for the prosecution and create a situation the statute was intended to prevent. State v. Walden, 311 N.C. 667, 319 S.E.2d 577 (1984).

This section prohibits the district attorney from making any reference to or comment on defendant's failure to testify. State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975); State v. Peplinski, 290 N.C. 236, 225 S.E.2d 568, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976).

This section prohibits the district attorney from making direct, or even indirect, references to a defendant's failure to testify. State v. Ferrell, 75 N.C. App. 156, 330 S.E.2d 225, cert. denied and appeal dismissed, 314 N.C. 333, 333 S.E.2d 492 (1985).

And any reference by the State regarding defendant's failure to testify violates his constitutional right to remain silent. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

New Trial Ordered. — Defendant was entitled to a new trial because the trial court erroneously overruled his objection to the prosecution's closing comments about defendant's decision not to testify in trial for felonious breaking or entering; the error was prejudicial and required a new trial. State v. Reid, 334 N.C. 551, 434 S.E.2d 193 (1993).

Statement That Defendant Was Hiding Behind Wife's Coat Tail. — Where defendant's wife and several other witnesses testified in his behalf, but he did not testify, to say that the defendant was "hiding behind his wife's coat tail" was tantamount to commenting on his failure to testify, which is not permitted by this section. State v. McLamb, 235 N.C. 251, 69 S.E.2d 537 (1952).

Statement by prosecutor that he had not said a word about defendant not going to the witness stand violated this section. State v. Roberts, 243 N.C. 619, 91 S.E.2d 589 (1956).

Inquiry in Superior Court as to Failure to Testify Below. — In a superior court trial for driving under the influence, the State, by inquiring into defendant's failure to testify in district court, did more than attempt to impeach the defendant with his prior silence, considering his allegedly belated attempt to establish a defense, but also adversely implicated defendant's right not to testify in district court. State v. Ferrell, 75 N.C. App. 156, 330 S.E.2d 225, cert. denied, 314 N.C. 333, 333 S.E.2d 492 (1985).

This section does not restrict the prosecuting attorney from making comments upon the evidence and drawing such deductions therefrom as would have been legitimate before the passage of the act, for, while enlarging the rights of the defendants, this section did not abridge the privileges of the prosecution. State v. Smith, 290 N.C. 148, 226 S.E.2d 10, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976); State v. Peplinski, 290 N.C. 236, 225 S.E.2d 568, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976).

The purpose of this section is not to restrict the prosecutor from making such comments upon the evidence and drawing such deductions therefrom so long as the prosecutor does not call attention to defendant's failure to testify. State v. Richardson, 342 N.C. 772, 467 S.E.2d 685 (1996), cert. denied, 519 U.S. 890, 117 S. Ct. 229, 136 L. Ed. 2d 160 (1996).

Statements made by prosecutor regarding the demeanor of the defendant were not comparable to statements previously held to be improper comments on a defendant's failure to testify. State v. Bates, 343 N.C. 564, 473 S.E.2d 269 (1996), cert. denied, 519 U.S. 1131, 117 S. Ct. 992, 136 L. Ed. 2d 873 (1997).

A bare statement by the prosecution to the effect that the State's evidence was uncontradicted was not an improper reference to the defendant's failure to testify. State v. Smith, 290 N.C. 148, 226 S.E.2d 10, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976).

Although the prosecution is forbidden from commenting on the failure of a defendant to testify at trial, a prosecutor's statement that the state's evidence was uncontradicted does not constitute an improper reference to defendant's failure to testify. State v. Richardson, 342 N.C. 772, 467 S.E.2d 685 (1996), cert. denied, 519 U.S. 890, 117 S. Ct. 229, 136 L. Ed. 2d 160 (1996).

Veiled Reference to Defendant's Failure to Testify. — Trial judge did not err in failing to intervene ex mero motu where any reference by the district attorney to defendant's failure to testify was at the most "a veiled reference," so brief and indirect as to make improbable any contention that the jury inferred guilt from the failure of the defendant to testify. State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989).

The State may fairly draw the jury's attention to the failure of the defendant to produce exculpatory evidence or to contradict the State's case. State v. Tilley, 292 N.C. 132, 232 S.E.2d 433 (1977).

The district attorney had a right to comment on defendant's failure to account for the hours between 4:30 and 6:45 p.m., especially after the defendant had offered evidence tending to establish an alibi. The prosecutor's remarks were directed solely at defendant's failure to offer evidence rebutting the State's case, rather than at his failure to take the stand. State v. Stanfield, 292 N.C. 357, 233 S.E.2d 574 (1977).

Prosecutor's calling the jury's attention to defendant's demeanor made no reference to or inference about his decision not to testify, and did not violate his constitutional and statutory privilege not to testify. State v. Brown, 320 N.C. 179, 358 S.E.2d 1, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

Comment by Defense Counsel on Defendant's Failure to Testify. — Defense counsel was entitled to read to the jury that clause of U.S. Const., Amend. V, material to his election not to testify, i.e., "No person ... shall be compelled in any criminal case to be a witness against himself" and to say simply that because of this provision, the jury must not consider defendant's election not to testify adversely to him, or words to this effect. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

Comments Elicited by Defense Counsel. — Trial court did not err in allowing police officer's comments on murder defendant's decision to exercise her constitutional right to remain silent upon her arrest; the comments were elicited by the defense counsel and defense counsel repeatedly asked officer to explain his answers and did not object to, or move to strike the comments. State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993), cert. denied, 510 U.S. 1028, 114 S. Ct. 644, 126 L. Ed. 2d 602 (1994).

Prohibiting Defense from Reading U.S. Const., Amend. V to the Jury Held Not Reversible Error. — The trial court did not commit reversible error in prohibiting the reading to the jury of that portion of U.S. Const., Amend. V, pertinent to the defendant's election not to testify, where in his general instructions to the jury, the judge gave an accurate and complete statement of the law applicable to defendant's election not to testify. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

Exception to improper remarks of counsel during the argument must be taken before verdict. The rationale for this rule is that a party cannot be allowed to speculate upon his chances for a verdict, and then complain because counsel were not arrested in their comments upon the case. Such exceptions, like those to the admission of incompetent evidence, must be made in apt time, or else be lost. State v. Hopper, 292 N.C. 580, 234 S.E.2d 580 (1977).

Exception in Death Cases. — The general rule that exception to improper remarks of counsel during the argument must be taken before verdict has been modified in recent years so that it does not apply to death cases, when the argument of counsel is so prejudicial to the defendant that in this court's opinion, it is doubted that the prejudicial effect of such argument could have been removed from the jurors' minds by any instruction the trial judge might have given. State v. Hopper, 292 N.C. 580, 234 S.E.2d 580 (1977).

A slip of the tongue in an instruction on defendants' failure to testify will not be held to be prejudicial error if not called to the attention of the court and if it does not appear that the jury could have been prejudiced thereby. State v. Willis, 22 N.C. App. 465, 206 S.E.2d 729 (1974).

Prosecution's statements directed at defendant's failure to produce rebuttal or alibi evidence at trial for robbery with dangerous weapon, were not directed at defendant's failure to testify on his own behalf; therefore, these comments were not in error. State v. Thompson, 110 N.C. App. 217, 429 S.E.2d 590 (1993).

Failure to Object. — Trial court did not err by allowing a detective to testify that defendant refused to make a statement to police because defendant did not object to that testimony during trial; also, the trial court did not have an obligation to give the jury a curative instruction, sua sponte, after a witness who testified stated during cross-examination that, if defendant didn't agree with what the witness said, defendant should defend himself. State v. Batchelor, 157 N.C. App. 421, 579 S.E.2d 422, 2003 N.C. App. LEXIS 739 (2003).

C. Instructions to Jury.

Improper comment on defendant's failure to testify may be cured by an instruction from the court that the argument is improper, followed by prompt and explicit instructions to the jury to disregard it. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

If the defendant elects not to testify as a witness in his own defense, any comment by the solicitor (now district attorney) calling attention to this failure is improper; but where the presiding judge carefully instructs the jury that defendant's failure to testify in his own defense should not be construed in anywise to his prejudice, the presiding judge properly and effectively removes any prejudicial effect that might result from the solicitor's (now district attorney) argument. State v. Lewis, 256 N.C. 430, 124 S.E.2d 115 (1962).

If the district attorney improperly comments on defendant's failure to testify, the error may be cured by a withdrawal of the remark or by a statement from the court that it was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness. State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975); State v. Peplinski, 290 N.C. 236, 225 S.E.2d 568, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976); State v. Soloman, 40 N.C. App. 600, 253 S.E.2d 270 (1979).

When a prosecutor improperly comments upon the accused's failure to testify, the error may be cured if the trial judge (1) sustains an objection to the comment; (2) tells the jury that the comment was improper; and (3) instructs the jury to disregard the comment and not to consider the failure of the accused to offer himself as a witness. State v. Oates, 65 N.C. App. 112, 308 S.E.2d 507 (1983), cert. denied, 310 N.C. 747, 315 S.E.2d 708 (1984).

An instruction by the trial court immediately after sustaining an objection to a prosecutor's comment on the defendant's failure to testify, that the defendant's exercise of his right not to testify shall not be used against him, is insufficient absent an instruction that the argument was improper and that it should be disregarded. State v. Oates, 65 N.C. App. 112, 308 S.E.2d 507 (1983), cert. denied, 310 N.C. 747, 315 S.E.2d 708 (1984).

Trial court's curative instruction to the jury following the prosecutor's comment at trial was sufficient, even though not made immediately after the prosecutor's comments, as the the trial court stated that the comment was improper, and the statement was followed by an instruction to the jury not to consider the failure of the accused to offer the accused as a witness. State v. Kemmerlin, 356 N.C. 446, 573 S.E.2d 870, 2002 N.C. LEXIS 1260 (2002).

To be effective, the trial court's instruction should immediately follow the offensive remark and should explain why the remark was improper. The fact that the remark was made by a private prosecutor makes no difference. State v. Oates, 65 N.C. App. 112, 308 S.E.2d 507 (1983), cert. denied, 310 N.C. 747, 315 S.E.2d 708 (1984).

New Trial If No Curative Instruction on Improper Argument Is Given. — When there is an objection to prohibited statements on the failure of the defendant to testify, it is the duty of the court not only to sustain objection to the prosecuting attorney's improper and erroneous argument but also to instruct the jury that the argument was improper with prompt and explicit instructions to disregard it. If no proper curative instruction is given, the prejudicial effect of the argument requires a new trial. State v. Soloman, 40 N.C. App. 600, 253 S.E.2d 270 (1979).

Failure to Request Curative Instruction. — Where defendants failed to promptly object to the prosecutor's statement and decided against requesting a curative instruction when this was suggested by the trial court, they were not entitled to a new trial for the failure of the trial court to grant relief, since the statement was not so grossly improper as to require the trial court to act ex mero motu. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

It is better practice not to instruct on the defendant's failure to testify. State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976).

Unless Defendant Requests Such an Instruction. — Ordinarily, it would seem better to give not instruction concerning a defendant's failure to testify unless such an instruction is requested by the defendant. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754, cert. denied, 279 N.C. 396, 183 S.E.2d 243 (1971); State v. Rankin, 282 N.C. 572, 193 S.E.2d 740 (1973); State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973); State v. Caron, 288 N.C. 467, 219 S.E.2d 68 (1975), cert. denied, 425 U.S. 971, 96 S. Ct. 2168, 48 L. Ed. 2d 794 (1976).

Right to Instruction Upon Request. — A nontestifying defendant has the right, upon proper request, to have the court tell the jury in substance that his failure to take the witness stand and testify in his own behalf does not create any presumption against him. State v. Leffingwell, 34 N.C. App. 205, 237 S.E.2d 550 (1977).

This statute prohibits the prosecution, the defense, or the trial judge from commenting upon the defendant's failure to testify. A nontestifying defendant, however, has the right upon request to have the trial court instruct the jury that his failure to testify may not be held against him. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

Such Instruction Is Discretionary Absent Request. — Court need not charge that failure of defendant to testify should not be considered against him in absence of request. State v. Jordan, 216 N.C. 356, 5 S.E.2d 156 (1939); State v. Warren, 292 N.C. 235, 232 S.E.2d 419 (1977).

The failure of the trial court to instruct the jury upon the effect of defendant's failure to testify is not error, because such an instruction is not required unless specifically requested by defendant. State v. Smith, 24 N.C. App. 498, 211 S.E.2d 539 (1975), overruled on other grounds, State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989).

Under this section the trial judge is not required to instruct the jury that a defendant's failure to testify creates no presumption against him unless defendant requests the instruction. In fact, it is better not to give such an instruction unless defendant requests it. State v. Chambers, 52 N.C. App. 713, 280 S.E.2d 175 (1981).

But Giving Unrequested Proper Instructions Is Not Reversible Error. — Giving unrequested proper instructions relating to the failure of the defendant to exercise his right to testify or refrain from testifying under the provisions of this section is not reversible error. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754, cert. denied, 279 N.C. 396, 183 S.E.2d 243 (1971).

While it is the better practice to give no instructions on the defendant's failure to testify, there is no error in giving an unrequested instruction on defendants' failure to testify if it correctly states the law. State v. Willis, 22 N.C.

App. 465, 206 S.E.2d 729 (1974).

The trial court did not err in instructing the jury regarding defendant's failure to testify, even though defendant did not request the instruction. State v. Hill, 34 N.C. App. 347, 238 S.E.2d 201 (1977).

It is not always prejudicial error to give an unrequested instruction regarding defendant's failure to testify or present evidence. There is no prejudicial error if the instruction makes clear to the jury that the defendant has the right to offer or to refrain from offering evidence as he sees fit and that his failure to testify should not be considered by the jury as basis for any inference adverse to him. State v. Chambers, 52 N.C. App. 713, 280 S.E.2d 175 (1981).

What Instruction Must State. — Any instruction is incomplete and prejudicially erroneous unless it makes clear to the jury that the defendant has the right to offer or to refrain from offering evidence as he sees fit and that his failure to testify should not be considered by the jury as basis for any inference adverse to him. State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975), cert. denied, 423 U.S. 1091, 96 S. Ct. 886, 47 L. Ed. 2d 102 (1976); State v. Caron, 288 N.C. 467, 219 S.E.2d 68 (1975), cert. denied, 425 U.S. 971, 96 S. Ct. 2168, 48 L. Ed. 2d 794 (1976).

Language of Statute Should be Used. — The better practice is for the trial judge to use the language employed in this section without additions if there is a request for such instructions. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754, cert. denied, 279 N.C. 396, 183 S.E.2d 243 (1971).

An instruction which incorporates the precise language of this section is not only acceptable, but it has often been suggested as being the preferred instruction. State v. Penland, 20 N.C. App. 73, 200 S.E.2d 672 (1973), appeal dismissed, 284 N.C. 621, 201 S.E.2d 692 (1974).

Instructions Upheld. — The court's remarks to the jury in instructing them that defendant was within his rights in not testifying, and that his failure to testify should not be considered against him, were held without error upon defendant's exception. State v. Horne, 209 N.C. 725, 184 S.E. 470 (1936).

A charge to the effect that a defendant has a right not to testify and that his failure to testify should not be considered as a circumstance against him will not be held for error on the ground that it called to the jury's attention the fact of defendant's absence from the stand. State v. Wood, 230 N.C. 740, 55 S.E.2d 491 (1949).

No hard and fast form of expression or consecrated formula is required, but the jury may be instructed that, as to the defendant, the jury should scrutinize his testimony in the light of his interest in the outcome of the prosecution, but that if after such scrutiny the jury believes that the witness has told the truth, it should give his testimony the same weight it would give the testimony of any other credible witness. It was not mandatory that the judge charge the jury in this respect, but the charge was permissible and appeared to be the uniform practice. State v. Williams, 6 N.C. App. 611, 170 S.E.2d 640 (1969).

The trial judge's statement in his charge to the jury did not constitute prejudicial error where the charge, taken as a whole, did not give the jury the impression that defendant's failure to present evidence was to be taken against him. State v. Harlow, 16 N.C. App. 312, 191 S.E.2d 900 (1972).

Trial court's instruction that the jury must be very careful not to allow defendant's silence to influence their decision in any way did not constitute prejudicial error, though an instruction more nearly in the language of this section would have been preferable. State v. House, 17 N.C. App. 97, 193 S.E.2d 327 (1972); State v. Phifer, 17 N.C. App. 101, 193 S.E.2d 413 (1972), cert. denied, 283 N.C. 108, 194 S.E.2d 636 (1973).

Although it is the better practice to give no instruction concerning the failure of defendant to testify unless he requests it, the trial court's instruction in a first degree murder case to the effect that defendant's failure to testify should not be considered by the jury was not prejudicial to defendant. State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

Where an instruction was unduly repetitious, but stripped of unnecessary verbiage the instruction was that a defendant may or may not testify in his own behalf as he sees fit, and that his failure to testify shall not be held against him to any extent, this instruction met the requirements of this section. State v. Caron, 288 N.C. 467, 219 S.E.2d 68 (1975), cert. denied, 425 U.S. 971, 96 S. Ct. 2168, 48 L. Ed. 2d 794 (1976).

Trial judge's instruction to the jury that they "should" not consider defendant's failure to take the stand against him, rather than that they "shall" not consider his failure to take the stand against him, was not error. State v. Sellers, 289 N.C. 268, 221 S.E.2d 264 (1976).

While it is better practice to use the words of the statute, i.e., "shall not create any presumption against him," the use of the words "should not" in an instruction concerning defendant's failure to testify was not such error as to require a new trial. State v. Boone, 293 N.C. 702, 239 S.E.2d 459 (1977).

Instructions Held Improper. — While the interpretations of this section require defendant's testimony to be scrutinized, it was the province of the jury to determine from his demeanor and the attending circumstances the weight which they would accord his testimony, and a charge of the court that "the law presumes" that he is naturally laboring under the temptation to testify to whatever he thinks may be necessary to clear himself and that the jury should take into consideration what a conviction would mean to defendant, etc., was held to impose a burden and cast a shadow upon his testimony greater than the law required and constituted reversible error. State v. Wilcox, 206 N.C. 691, 175 S.E. 122 (1934).

While it is proper for the court to instruct the jury to scrutinize testimony of a defendant in a criminal prosecution because of his interest in the verdict, it was error for the court to fail to follow such instructions with a charge that if after such scrutiny the jury found him worthy of belief they should give his testimony as full credit as they would that of any other witness. State v. Dee, 214 N.C. 509, 199 S.E. 730 (1938).

A charge to the jury to "very carefully and very cautiously scrutinize" defendant's testimony is not to be commended. State v. Auston, 223 N.C. 203, 25 S.E.2d 613 (1943).

Instruction that the defendants "did not offer any evidence as they have the right to do" was incomplete and prejudicially erroneous. State v. Baxter, 285 N.C. 735, 208 S.E.2d 696 (1974).

Court's instruction to disregard the remark, "Why in the world did the defendant sit here for these one-and-a-half days remaining mute and not come to the stand?" was insufficient where the court did not instruct that the remark was improper nor why it was improper. State v. Oates, 65 N.C. App. 112, 308 S.E.2d 507 (1983), cert. denied, 310 N.C. 747, 315 S.E.2d 708 (1984).

§ 8-55. Testimony enforced in certain criminal investigations; immunity.

If any justice, judge or magistrate of the General Court of Justice shall have good reason to believe that any person within his jurisdiction has knowledge of the existence and establishment of any faro bank, faro table or other gaming table prohibited by law, or of any place where alcoholic beverages are sold contrary to law, in any town or county within his jurisdiction, such person not being minded to make voluntary information thereof on oath, then it shall be lawful for such justice, magistrate, or judge to issue to the sheriff of the county in which such faro bank, faro table, gaming table, or place where alcoholic beverages are sold contrary to law is supposed to be a subpoena, capias ad testificandum, or other summons in writing, commanding such person to appear immediately before such justice, magistrate, or judge and give evidence on oath as to what he may know touching the existence, establishment and whereabouts of such faro bank, faro table or other gaming table, or place where alcoholic beverages are sold contrary to law, and the name and personal description of the keeper thereof. Such evidence, when obtained, shall be considered and held in law as an information on oath, and the justice, magistrate or judge may thereupon proceed to seize and arrest such keeper and destroy such table, or issue process therefor as provided by law. No person shall be excused, on any prosecution, from testifying touching any unlawful gaming done by himself or others; but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offenses so done or participated in by him. (R.C., c. 35, s. 50; 1858-9, c. 34, s. 1; Code, ss. 1050, 1215; 1889, c. 355; Rev., ss. 1637, 3721; 1913, c. 141; C.S., s. 1800; 1969, c. 44, s. 22; 1971, c. 381, s. 4; 1981, c. 412, s. 4(4); c. 747, s. 66.)

CASE NOTES

For case upholding the constitutionality of this section, see In re Briggs, 135 N.C. 118, 47 S.E. 403 (1904).

Witness Compellable to Testify. — In a prosecution for gaming a witness may be compelled to testify, although his answer tends to criminate him, since he is pardoned for the offense. State v. Morgan, 133 N.C. 743, 45 S.E. 1033 (1903).

Cited in State v. Foster, 228 N.C. 72, 44 S.E.2d 447 (1947).

§ 8-56. Husband and wife as witnesses in civil action.

In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. (1866, c. 43, ss. 3, 4; C.C.P., s. 341; Code, s. 588; Rev., s. 1636; 1919, c. 18; C.S., s. 1801; 1945, c. 635; 1977, c. 547; 1983 (Reg. Sess., 1984), c. 1037, s. 3.)

Legal Periodicals. — For note on privileged communications between husband and wife, see 15 N.C.L. Rev. 282 (1937).

As to competency of husband and wife to testify in action for criminal conversation, see 26 N.C.L. Rev. 206 (1948).

For note on privileged communications between husband and wife, see 46 N.C.L. Rev. 643 (1968).

For note on testimony by one spouse against the other concerning adultery, see 48 N.C.L. Rev. 131 (1969).

For comment surveying North Carolina law of relational privilege, see 50 N.C.L. Rev. 630 (1972).

For survey of 1976 case law on evidence, see 55 N.C.L. Rev. 1033 (1977).

For note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

For comment on adverse marital testimony in criminal actions after the modification of the common-law rule by State v. Freeman, 302 N.C. 591, 276 S.E.2d 450 (1981), see 60 N.C.L. Rev. 874 (1982).

For article, "An Analysis of the New North Carolina Evidence Code," see 20 Wake Forest L. Rev. 1 (1984).

CASE NOTES

I. General Consideration.
II. Confidential Communications.

I. GENERAL CONSIDERATION.

Editor's Note. — *Many of the cases annotated below were decided prior to the 1983 (Reg. Sess., 1984) amendment to this section, which deleted language providing that in actions for adultery, divorce on account of adultery, or criminal conversation, husbands and wives would not be competent or compellable to give evidence for or against the other, with certain exceptions.*

Husbands and wives are competent and compellable to give evidence for or against each other, save only in the particular cases mentioned in the section. Barringer v. Barringer, 69 N.C. 179 (1873).

Common Law. — At common law, husband and wife could not testify in an action to which either was a party. Hicks v. Hicks, 275 N.C. 370, 167 S.E.2d 761 (1969); Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Federal law and North Carolina law on spousal privilege are in sharp conflict. Walker v. Lewis, 127 F.R.D. 466 (W.D.N.C. 1989).

Applicability of Federal Privilege Law in Federal Case with Pendent State Claims. — In a federal question case with pendent state law claims, where the issue is discoverability of evidence which is relevant to federal and state law claims, any conflict between federal and state privilege law must be resolved in favor of the body of federal law favoring admission of the evidence. Walker v. Lewis, 127 F.R.D. 466 (W.D.N.C. 1989).

Severance of State Law Claims from Federal Case so as to Preserve State Privilege. — In a federal question case with pendent state law claims, where the issue is admissibility of evidence at trial which is relevant to a federal question and to a pendent state law claim, the court must apply federal privilege law. However, because of liberal discovery, the court and the parties can intelligently choose whether to give effect to state privilege law by severing the trial of the state law claims in federal court or dismissing the state law claims so that they can be tried in state court. Walker v. Lewis, 127 F.R.D. 466 (W.D.N.C. 1989).

Adultery and Criminal Conversation. — For cases dealing with former provision of this section as to incompetence of one spouse to testify for and against the other in certain proceedings involving adultery and criminal conversation, see Horne v. Horne, 75 N.C. 101 (1876); Perkins v. Perkins, 88 N.C. 41 (1883); Chestnut v. Sutton, 204 N.C. 476, 168 S.E. 680 (1933); Knighten v. McClain, 227 N.C. 682, 44 S.E.2d 79 (1947); Becker v. Becker, 262 N.C. 685, 138 S.E.2d 507 (1964); Hicks v. Hicks, 275 N.C. 370, 167 S.E.2d 761 (1969); Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972); Greene v. Greene, 15 N.C. App. 314, 190 S.E.2d 258, appeal withdrawn, 282 N.C. 151, 191 S.E.2d 365 (1972); VanDooren v. VanDooren, 37 N.C. App. 333, 246 S.E.2d 20, cert. denied, 295 N.C. 653, 248 S.E.2d 258 (1978); Haddon v. Haddon, 42 N.C. App. 632, 257 S.E.2d 483 (1979); Scott v. Kiker, 59 N.C. App. 458, 297 S.E.2d 142 (1982); Spencer v. Spencer, 61 N.C. App. 535, 301 S.E.2d 411, cert. denied, 308 N.C. 678, 304 S.E.2d 757 (1983).

Applied in Rouse v. Creech, 203 N.C. 378, 166 S.E. 174 (1932); Watts v. Watts, 44 N.C. App. 46, 260 S.E.2d 170 (1979); Freeman v. St. Paul Fire & Marine Ins. Co., 72 N.C. App. 292, 324 S.E.2d 307 (1985); Warner Bros. Records, Inc. v. Souther, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 42249 (W.D.N.C. June 1, 2006).

Cited in Nelson v. Nelson, 197 N.C. 465, 149 S.E. 585 (1929); Earles v. Earles, 26 N.C. App. 559, 216 S.E.2d 739 (1975); Williamson v. Williamson, 66 N.C. App. 315, 311 S.E.2d 325 (1984); Misenheimer v. Burris, 360 N.C. 620, 637 S.E.2d 173, 2006 N.C. LEXIS 1196 (2006).

II. CONFIDENTIAL COMMUNICATIONS.

Confidential Communications During Marriage Are Protected. — The confidential communications made between husband and wife which neither will be compelled to disclose are those which are communicated "during their marriage." Whitford v. North State Life Ins. Co., 163 N.C. 223, 79 S.E. 501 (1913).

The confidential communications between husband and wife cannot, on the grounds of public policy, be admitted in evidence. State v. Brittain, 117 N.C. 783, 23 S.E. 433 (1895).

And Privileged. — A confidential communication between husband and wife is privileged and neither spouse may be compelled to disclose it when testifying as a witness. Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967).

Whatever is known by reason of marriage should be regarded as knowledge confidentially acquired, and neither husband nor wife should be allowed to divulge it to the danger or disgrace of the other. Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967).

But Communications in Presence of Others Are Not Protected. — A communication made in the known presence of a third person, or one relating to business matters which in their nature might be expected to be divulged, is not protected. Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967).

Nonwitness spouse holds the privilege and may prevent the witness spouse from testifying about confidential communications. Scott v. Kiker, 59 N.C. App. 458, 297 S.E.2d 142 (1982).

A tape recording, made by the husband without the wife's knowledge, of a conversation between them while alone, except for the presence of their eight-year-old child who was singing and playing at the time, was incompetent evidence over the wife's objection. Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967).

Letters from Husband to Wife. — In a suit in equity to set aside a judgment rendered in an action at law for fraud, letters from the plaintiff in the former action to his wife respecting fraud in that action were properly excluded, when the letters were obtained by a third party with the consent of the wife, the letters being privileged communications and inadmissible against either the husband or the wife. McCoy v. Justice, 199 N.C. 602, 155 S.E. 452 (1930).

Where a witness for the State had written a letter to his wife, and his wife, without his knowledge or consent, had given the letter to the defendant, the witness could not be cross-examined relative to the letter in an attempt to prove bias. State v. Banks, 204 N.C. 233, 167 S.E. 851 (1933).

Acts of Sexual Intercourse. — In the wife's action for alimony and alimony pendente lite, the wife may not be compelled to answer interrogatories which seek to elicit her answers under oath as to acts of sexual intercourse between the husband and wife, since such an act is a "confidential communication" within the meaning of this section. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Admission of a police officer's testimony that he heard defendant say to his wife, "I am in real trouble this time" did not violate the marital privilege since the communication was not confidential as it was made within the hearing of a third party, and at any rate the privilege refers only to testimony by a spouse about the confidential communication. State v. Setzer, 42 N.C. App. 98, 256 S.E.2d 485, cert. denied, 298 N.C. 571, 261 S.E.2d 127 (1979).

Transactions Between Spouse and Ward. — Where testimony did not relate to confidential communications between the witness and her husband during their marriage, but to the relationship and transactions between the witness and ward and between defendant and ward, there was no error in admitting it. Ashley v. Delp, 59 N.C. App. 608, 297 S.E.2d 905 (1982), cert. denied, 308 N.C. 190, 302 S.E.2d 242 (1983).

§ 8-57. Husband and wife as witnesses in criminal actions.

(a) The spouse of the defendant shall be a competent witness for the defendant in all criminal actions, but the failure of the defendant to call such spouse as a witness shall not be used against him. Such spouse is subject to cross-examination as are other witnesses.

(b) The spouse of the defendant shall be competent but not compellable to testify for the State against the defendant in any criminal action or grand jury proceedings, except that the spouse of the defendant shall be both competent and compellable to so testify:

(1) In a prosecution for bigamy or criminal cohabitation, to prove the fact of marriage and facts tending to show the absence of divorce or annulment;

(2) In a prosecution for assaulting or communicating a threat to the other spouse;

(3) In a prosecution for trespass in or upon the separate lands or residence of the other spouse when living separate and apart from each other by mutual consent or court order;

(4) In a prosecution for abandonment of or failure to provide support for the other spouse or their child;

(5) In a prosecution of one spouse for any other criminal offense against the minor child of either spouse, including any illegitimate or adopted or foster child of either spouse.

(c) No husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage. (1856-7, c. 23; 1866, c. 43; 1868-9, c. 209; 1881, c. 110; Code, ss. 588, 1353, 1354; Rev., ss. 1634, 1635, 1636; C.S., s. 1802; 1933, c. 13, s. 1; c. 361; 1951, c. 296; 1957, c. 1036; 1967, c. 116; 1971, c. 800; 1973, c. 1286, s. 11; 1983, c. 170, s. 1; 1985 (Reg. Sess., 1986), c. 843, s. 5; 1987 (Reg. Sess., 1988), c. 1040, s. 1; 1989 (Reg. Sess., 1990), c. 1039, s. 4; 1991, c, 686, s. 3.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 843, s. 6, initially provided that the act, which amended subsection (b), would become effective October 1, 1986, and expire October 1, 1988, but that the expiration date would not affect the term or authority of a grand jury constituted at that time. Session Laws 1987 (Reg. Sess., 1988), c. 1040, s. 1, as amended by Session Laws 1989 (Reg. Sess., 1990), c. 1039, s. 4, extended the expiration date of Session Laws 1985 (Reg. Sess., 1986), c. 843, s. 6, to October 1, 1993. Subsequently, Session Laws 1991, c. 686, s. 3, amended Session Laws 1985, c. 843, s. 6, as amended by Session Laws 1987, c. 1040, so as to delete the October 1, 1991 expiration provision. However, the 1991 amendment, which was in the coded bill drafting format set out at G.S. 120-20.1, did not mention or take account of Session Laws 1989 (Reg. Sess., 1990), c. 1039, s. 4.

Legal Periodicals. — For comment surveying North Carolina law of relational privilege, see 50 N.C.L. Rev. 630 (1972).

For survey of 1976 case law on evidence, see 55 N.C.L. Rev. 1033 (1977).

For article recommending adoption of a broader privilege for spouses who do not want to testify against their husbands or wives in criminal cases, see 13 N.C. Cent. L.J. 1 (1981).

For note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

For comment on adverse marital testimony in criminal actions after the modification of the common-law rule by State v. Freeman, 302 N.C. 591, 276 S.E.2d 450 (1981), see 60 N.C.L. Rev. 874 (1982).

For survey of 1983 law of evidence, see 62 N.C.L. Rev. 1290 (1984).

For article, "An Analysis of the New North Carolina Evidence Code," see 20 Wake Forest L. Rev. 1 (1984).

CASE NOTES

I. General Consideration.
II. To What Extent Spouse Was Competent and Compellable Witness Prior to 1983 Amendment.
  A. In General.
  B. Particular Actions.

C. Illustrative Cases.
III. Cross-Examination of Spouse.
IV. Failure to Testify.

I. GENERAL CONSIDERATION.

Evidence rendered incompetent by this section is excludable and failure to do so is reversible error. State v. Holmes, 101 N.C. App. 229, 398 S.E.2d 873 (1990), aff'd, 330 N.C. 826, 412 S.E.2d 660 (1992).

Applicability of Section to Common-Law Marriages. — Common-law marriages are invalid in North Carolina. Hence, the husband-wife testimonial privilege granted in this section may not be asserted by a criminal defendant to disqualify a witness alleged to be his spouse by virtue of a common-law marriage contracted in North Carolina. This State, however, will recognize as valid a common-law marriage if the acts alleged to have created it took place in a state in which such a marriage is valid. State v. Alford, 298 N.C. 465, 259 S.E.2d 242 (1979).

Privilege Belongs to Spouse. — Under subsection (b) of this section, the privilege belongs to the spouse, not to the defendant. Once challenged, the better practice is for the trial judge to advise the spouse that he or she cannot be compelled to testify in cases where this statute applies, and then to determine whether the spouse is in fact still willing to testify. State v. Britt, 320 N.C. 705, 360 S.E.2d 660 (1987).

The sole prohibition of subsection b is now directed to compelled testimony. State v. Rush, 340 N.C. 174, 456 S.E.2d 819 (1995).

As amended in 1986, this section embodies the common law rule that a defendant's spouse may be compelled to testify against a defendant for the State, and reflects judicial abrogation of the common law rule that a spouse is incompetent to testify against the defendant spouse. State v. Rush, 340 N.C. 174, 456 S.E.2d 819 (1995).

The spousal privilege does not bar nonconfidential, out-of-court statements made by a spouse and introduced against a defendant spouse for the State through a third party. State v. Rush, 340 N.C. 174, 456 S.E.2d 819 (1995).

Rationale of cases decided prior to State v. Freeman, 302 N.C. 591, 276 S.E.2d 450 (1981), holding that a spouse's out-of-court statements are inadmissible against the defendant spouse for the State, no longer applies. State v. Rush, 340 N.C. 174, 456 S.E.2d 819 (1995).

This section preserves the rule against disclosure of confidential communications. While this section modifies the rule against adverse spousal testimony, it preserves the rule against disclosure of confidential marital communications. State v. Holmes, 330 N.C. 826, 412 S.E.2d 660 (1992).

A confidential communication between husband and wife is privileged and that this privilege, even in criminal cases, survives both the North Carolina Rules of Evidence and the 1983 amendment to this section. The statute makes it clear that neither spouse may be compelled to disclose confidential communications between husband and wife when testifying as a witness. State v. Holmes, 330 N.C. 826, 412 S.E.2d 660 (1992).

Effect of Termination of Marriage. — When the marital relationship terminates, the asserted reasons for this section, the preservation of the sanctity of the home and the fictional oneness of husband and wife, are no longer pertinent; but evidence that defendant and his wife were experiencing less than harmonious marital relations is insufficient to terminate the privilege. State v. Reavis, 19 N.C. App. 497, 199 S.E.2d 139 (1973).

Defendant who asked third parties to leave before he spoke to his wife in their home had the right to assert privilege against his wife and prohibit her from testifying both about his statements to her and about his actions in taking a gun out of a kitchen cabinet. State v. Holmes, 101 N.C. App. 229, 398 S.E.2d 873 (1990), aff'd, 330 N.C. 826, 412 S.E.2d 660 (1992).

Prejudicial Error Not Shown. — Assuming, arguendo, that defendant's wife was compelled to testify against defendant, the error was not prejudicial, where she essentially corroborated other witnesses' testimony, and there was not a reasonable possibility that a different result would have been reached had she not testified. State v. Britt, 320 N.C. 705, 360 S.E.2d 660 (1987).

Admission Not Marital Communication. — Defendant's admission to his wife that he had sexual intercourse with his stepdaughter was not a marital communication induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship; rather, defendant's confession was driven by his own psychological motivations and was not a marital communication. State v. Smith, 113 N.C. App. 827, 440 S.E.2d 322 (1994).

Applied in State v. Spain, 3 N.C. App. 266, 164 S.E.2d 486 (1968); State v. Ward, 34 N.C. App. 598, 239 S.E.2d 291 (1977); State v. Cox, 73 N.C. App. 432, 326 S.E.2d 100 (1985); State v. Josey, 328 N.C. 697, 403 S.E.2d 479 (1991); State v. Martin, 105 N.C. App. 182, 412 S.E.2d 134 (1992).

Cited in State v. Jones, 280 N.C. 322, 185

S.E.2d 858 (1972); State v. Byrd, 21 N.C. App. 734, 205 S.E.2d 326 (1974); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976); State v. Thompson, 293 N.C. 713, 239 S.E.2d 465 (1977); State v. Holmes, 120 N.C. App. 54, 460 S.E.2d 915 (1995); State v. Brown, 350 N.C. 193, 513 S.E.2d 57 (1999); Cooper v. Shealy, 140 N.C. App. 729, 537 S.E.2d 854, 2000 N.C. App. LEXIS 1265 (2000); Misenheimer v. Burris, 360 N.C. 620, 637 S.E.2d 173, 2006 N.C. LEXIS 1196 (2006).

II. TO WHAT EXTENT SPOUSE WAS COMPETENT AND COMPELLABLE WITNESS PRIOR TO 1983 AMENDMENT.

A. In General.

Editor's Note. — *The cases below were decided under this section as it read prior to the 1983 amendment. Formerly the section made the spouse of the defendant competent to testify for him, but not competent or compellable to testify against him, with certain exceptions.*

Common Law. — At common law the husband or wife of the defendant in a criminal case was incompetent to testify either for the State or for the defense. State v. Alford, 274 N.C. 125, 161 S.E.2d 575 (1968).

At common law, a husband or a wife was incompetent to testify either for or against his or her defendant-spouse in a criminal action. This section changed this rule to the effect that a husband or a wife can testify for a defendant-spouse. The common law rule remains in effect, however, regarding testimony against a spouse in a criminal action. State v. Suits, 296 N.C. 553, 251 S.E.2d 607 (1979).

Common-Law Rule Modified. — The common-law rule prohibiting one spouse from testifying against another in a criminal action is modified so as to prohibit such testimony only if the substance of the testimony concerns a "confidential communication" between the marriage partners made during the duration of their marriage. State v. Freeman, 302 N.C. 591, 276 S.E.2d 450 (1981).

In effect, this section left intact the common-law rule that a spouse is incompetent to testify against the other spouse in a criminal case. However, the common-law rule was modified so that spouses are now incompetent to testify against one another in a criminal proceeding only if the substance of the testimony concerns a confidential communication. State v. Waters, 308 N.C. 348, 302 S.E.2d 188 (1983).

Effect of Section. — Under this section the husband or wife was a competent witness for the defendant in all criminal actions or proceedings. But neither was competent or compellable to give evidence against the other in any criminal proceeding. State v. Harbison, 94 N.C. 885 (1886). See State v. Watson, 215 N.C. 387, 1 S.E.2d 886 (1939).

Under this section a wife was neither competent nor compellable to testify against her husband in a criminal proceeding; hence, hearsay evidence of her declarations, not made in his presence or by his authority, which would be prejudicial to the husband, was inadmissible. State v. Reid, 178 N.C. 745, 101 S.E. 104 (1919). See State v. Cotton, 218 N.C. 577, 12 S.E.2d 246 (1940).

This section in effect forbade the testimony of one spouse against another in criminal proceedings unless the case fell within one of the exceptions enumerated in the statute. State v. Reavis, 19 N.C. App. 497, 199 S.E.2d 139 (1973).

This section is an evidentiary rule and applies to a spouse testifying, or to the admission of a statement by a spouse into evidence. State v. Cousin, 291 N.C. 413, 230 S.E.2d 518 (1976).

Incompetency of Spouse to Testify for State. — Although this section made a spouse competent to testify as a witness for the defense, it did not make a spouse competent to testify in a criminal case for the State. State v. Waters, 308 N.C. 348, 302 S.E.2d 188 (1983).

Declarations of One Spouse While Not in Presence of the Other. — The statutory prohibition against compelling a spouse to give evidence against the other spouse has been extended to testimony concerning declarations made by the husband or wife of the defendant, while not in the presence of the defendant, even though there was no objection interposed to such testimony. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

Testimony of a State's witness of a declaration of defendant's wife to the effect that if defendant had not been driving so slow "he wouldn't have been caught" entitled defendant to a new trial notwithstanding his failure to move to strike the answer, since testimony of the wife against the husband was forbidden by this section, and a fortiori her declarations against him not made in his presence or by his authority were precluded by this section. State v. Warren, 236 N.C. 358, 72 S.E.2d 763 (1952); State v. Dillahunt, 244 N.C. 524, 94 S.E.2d 479 (1956).

Confidential Communications Not Admissible. — This section prohibited the admission of evidence of statements made by one spouse implicating the other. State v. Overton, 60 N.C. App. 1, 298 S.E.2d 695 (1982), cert. denied and appeal dismissed, 307 N.C. 580, 299 S.E.2d 652, 307 N.C. 581, 299 S.E.2d 652, 307 N.C. 581, 299 S.E.2d 653 (1983).

The confidential communications between husband and wife cannot, on the grounds of public policy, be admitted in evidence. State v. Brittain, 117 N.C. 783, 23 S.E. 433 (1895).

When Communications Are Confidential. — In determining whether a spouse's testimony includes a "confidential communication," the question is whether the communication, whatever it contains, was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship. State v. Freeman, 302 N.C. 591, 276 S.E.2d 450 (1981).

As to exclusion of act as declaration of spouse, see State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978); State v. Suits, 296 N.C. 553, 251 S.E.2d 607 (1979).

Admissibility of Statements Made as Agent of Spouse. — This section is a codification of a common-law rule of evidence and, as such, is subject to the same exceptions which pertain to the common-law rule. One of the exceptions is that, when one spouse is made the agent of the other spouse, the statements of the agent are admissible against the principal despite the spousal relationship. State v. Overton, 60 N.C. App. 1, 298 S.E.2d 695 (1982), cert. denied and appeal dismissed, 307 N.C. 580, 299 S.E.2d 652, 307 N.C. 581, 299 S.E.2d 652, 307 N.C. 581, 299 S.E.2d 653 (1983).

This section does not prohibit a husband or wife from making voluntary statements to police officers during the investigatory stage of a criminal proceeding. State v. Aaron, 29 N.C. App. 582, 225 S.E.2d 117, cert. denied, 290 N.C. 663, 228 S.E.2d 455 (1976), 430 U.S. 908, 97 S. Ct. 1180, 51 L. Ed. 2d 585 (1977).

Failure to Exclude Incompetent Testimony. — When evidence rendered incompetent by this section was admitted, it became the duty of the trial judge to exclude the testimony, and his failure to do so was held reversible error whether exception was noted or not. State v. Porter, 272 N.C. 463, 158 S.E.2d 626 (1968); State v. Thompson, 290 N.C. 431, 226 S.E.2d 487 (1976); State v. McKenzie, 46 N.C. App. 34, 264 S.E.2d 391 (1980).

B. Particular Actions.

Abandonment of Wife. — Under this section the wife is a competent witness against her husband as to the fact of abandonment or neglect to provide adequate support. State v. Brown, 67 N.C. 470 (1872).

Proof of Marriage. — The wife is competent to prove the fact of marriage under an indictment against her husband for abandonment. State v. Chester, 172 N.C. 946, 90 S.E. 697 (1916).

Bigamy. — In an indictment for bigamy the first wife of the defendant is a competent witness to prove the marriage, public cohabitation as man and wife being public acknowledgments of the relation and not coming within the nature of the confidential relations which the policy of the law forbids either to give in evidence. State v. Melton, 120 N.C. 591, 26 S.E. 933 (1897). See also, State v. McDuffie, 107 N.C. 885, 12 S.E. 83 (1890).

By the express provisions of this section, defendant's legal wife was a competent witness before the grand jury, which was considering an indictment against him charging him with a violation of the provisions of G.S. 14-183, "to prove the fact of marriage ...." State v. Vandiver, 265 N.C. 325, 144 S.E.2d 54 (1965).

Prior to the 1957 amendment to this section, it was held that while in a prosecution for bigamous cohabitation, as in a prosecution for bigamy, the wife was competent to testify against the husband to prove the fact of marriage; her testimony was limited to proof of the fact of marriage, and any testimony by her as to other incriminating facts, such as testimony tending to show that they had not been divorced, was incompetent. State v. Setzer, 226 N.C. 216, 37 S.E.2d 513 (1946); State v. Hill, 241 N.C. 409, 85 S.E.2d 411 (1955).

Felony Committed by One Spouse Against the Other. — It appears that an exception to the general common-law rule that one spouse was not a competent witness against the other in a criminal proceeding was applicable where one spouse was tried for a felony committed against the other spouse. State v. Robinson, 15 N.C. App. 362, 190 S.E.2d 270, cert. denied, 281 N.C. 762, 191 S.E.2d 363 (1972).

Where defendant was charged with a serious felony which she and others allegedly perpetrated against the man she contended was her husband, the public's interest in having her brought to justice far outweighed any conceivable interest the public might have had in precluding her alleged husband from testifying against her. State v. Robinson, 15 N.C. App. 362, 190 S.E.2d 270, cert. denied, 281 N.C. 762, 191 S.E.2d 363 (1972).

Assault. — In case of assault and battery with intent to kill by poison, with evidence tending to show the previous threats of the wife, and that the poison was put into the food prepared by the daughter in her mother's presence at their home, and that the husband was poisoned from eating thereof, the testimony of the husband as to his wife's previous threats was not inadmissible under the provisions of this section, but was admissible for the purpose of showing knowledge and identifying the perpetrators of the crime, and was distinguishable from the rule that threats are ordinarily inadmissible on trials for assault and battery. State v. Alderman, 182 N.C. 917, 110 S.E. 59 (1921).

The rule that neither the husband nor wife is competent to testify against the other in criminal cases does not apply to proof of assault by the one upon the other. State v. French, 203 N.C. 632, 166 S.E. 747 (1932).

Effect of Marriage Subsequent to Assault. — The fact that subsequent to an assault the defendant married the prosecuting witness did not render her an incompetent witness against him at the trial. State v. Price, 265 N.C. 703, 144 S.E.2d 865 (1965).

C. Illustrative Cases.

Threats. — In a homicide case, where there was a plea and evidence of self-defense, it was competent for defendant's wife to testify to a threat made by deceased against her husband, which she communicated to defendant before the killing. State v. Rice, 222 N.C. 634, 24 S.E.2d 483 (1943).

Wife's Statements to Husband in Presence of Witness. — Testimony of witness that at the time of the arrest of defendant by the officers of the law his wife was present and said to him: "I told you that you would get into it if you did not stay with me like I wanted you to," to which he replied: "Hush," was not a confidential communication between husband and wife within the contemplation of this section, could be testified to by the witness who was present and heard it, and was some evidence of guilt in connection with the other evidence in the case. State v. Freeman, 197 N.C. 376, 148 S.E. 450 (1929).

Testimony of Wife Who Witnessed Killing by Husband. — This section does not render the testimony invalid of a wife who witnessed the killing by her husband of a passenger in the car she was driving as such testimony does not fit the definition of a "confidential communication" between marriage partners. State v. Funderburk, 56 N.C. App. 119, 286 S.E.2d 884 (1982).

Testimony as to Adultery prior to Marriage. — Where a man and woman were indicted for fornication and adultery, and a nol. pros. was entered as to the woman, her husband was a competent witness to show adultery between the defendants committed before he married the woman. State v. Wiseman, 130 N.C. 726, 41 S.E. 884 (1902).

Testimony as to Conduct prior to Divorce. — A divorced husband was incompetent to testify against his divorced wife in the trial of an indictment against her for fornication and adultery which occurred prior to the divorce. State v. Raby, 121 N.C. 682, 28 S.E. 490 (1877).

Where former husband or wife is prosecuted for a felony, the divorced spouse is a competent witness to testify for the State as to what occurred during the subsistence of their marriage in his or her presence when the alleged felony was being committed. State v. Alford, 274 N.C. 125, 161 S.E.2d 575 (1968).

Conduct as Declaration Against Spouse. — Where in response to the officer's inquiry as to whether the defendant had a knife, the jury was informed that the defendant's wife left the room and returned with a pocket knife, identified as State's Exhibit Number 3, this conduct was equivalent to the wife stating, "Yes, the defendant has a knife, and here it is." Thus, the court committed prejudicial error in allowing the police officer to testify to the wife's actions. State v. Suits, 296 N.C. 553, 251 S.E.2d 607 (1979).

A wife under this section was not competent to testify against her husband in a prosecution for felonious burning and the admission of her testimony entitled him to a new trial. State v. Kluttz, 206 N.C. 726, 175 S.E. 81 (1934).

A wife's testimony that her husband shot and killed her brother in her presence in a public place was competent in a prosecution of the husband for first-degree murder of her brother, since the actions of the husband in a public place and in the presence of a third person could not have been a communication made in the confidence of the marital relationship or one which was induced by affection and loyalty in the marriage. State v. Freeman, 302 N.C. 591, 276 S.E.2d 450 (1981).

Prosecutions Against Both Husband and Wife. — Where husband and wife were separately indicted for the same homicide and the prosecutions were consolidated and tried together over their objections, and the wife's testimony, though admitted only as to her, was to the effect that her husband killed deceased and forced her, through fear, to confess and attempt to exculpate him, her testimony was necessarily inculpatory of the husband and impinged this section, and his motion for a mistrial and severance at the conclusion of the State's evidence should have been granted. State v. Cotton, 218 N.C. 577, 12 S.E.2d 246 (1940).

Where testimony disclosed that any part of husband's extrajudicial statement implicating codefendant wife was deleted by the State, there was no violation of the rule of this section. State v. Mathis, 13 N.C. App. 359, 185 S.E.2d 448 (1971).

Wife as Witness for Husband. — Where the defendant husband was alleged to have stolen certain property, it was competent for him to introduce his wife as a witness to prove from what source he got the money to pay for such property, but unless he introduced her in proper time it rested within the discretion of the trial judge whether her testimony would be received. State v. Lemon, 92 N.C. 790 (1885).

III. CROSS-EXAMINATION OF SPOUSE.

Scope of Cross-Examination — When Spouse Testifies Against Defendant. — A wife cannot be compelled to testify against her husband in a criminal action; but when she takes the stand in his behalf, she is subject to cross-examination in the same manner and to the same extent as any other witness. State v. Tola, 222 N.C. 406, 23 S.E.2d 321 (1942).

Same — When Spouse Testifies for Defendant. — Where defendant's wife testifies in his behalf, she is subject to be cross-examined to the same extent as if unrelated to him. State v. Bell, 249 N.C. 379, 106 S.E.2d 495 (1959); State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

Prior Inconsistent Statements. — In a prosecution for murder committed in the perpetration of an armed robbery and for conspiracy to commit armed robbery, if based on information and asked in good faith, it was permissible for the district attorney to ask defendant's wife about her prior inconsistent statements as they related to her previous relationship with the trigger man for purposes of impeachment. State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

A statement by defendant's wife was admissible where the statement was not induced by the confidence of the marital relationship but, instead, was at most a casual observation. State v. Hammonds, 141 N.C. App. 152, 541 S.E.2d 166, 2000 N.C. App. LEXIS 1309 (2000).

A statement by defendant's wife was admissible where the defendant took no steps to ensure confidentiality while obtaining the weapon and the wife's presence was merely incidental. State v. Hammonds, 141 N.C. App. 152, 541 S.E.2d 166, 2000 N.C. App. LEXIS 1309 (2000).

A statement by defendant's wife was admissible where the statement merely indicated that the communication regarding the shooting took place and where the defendant was allowed to put on his brother's testimony that, immediately after the shooting, defendant telephoned and told his brother that he thought he had killed someone, thereby demonstrating that defendant did not treat his statement to his wife as a confidential matter. State v. Hammonds, 141 N.C. App. 152, 541 S.E.2d 166, 2000 N.C. App. LEXIS 1309 (2000).

IV. FAILURE TO TESTIFY.

Spousal Testimony. — In defendant's trial on charges of first degree murder, first degree burglary, second degree kidnapping, and robbery with a dangerous weapon, the trial court properly admitted the videotaped statement that defendant's wife gave to police, pursuant to G.S. 8C-1, N.C. R. Evid. 804(b)(5), after defendant's wife refused to testify for the State at defendant's trial. State v. Carter, 156 N.C. App. 446, 577 S.E.2d 640, 2003 N.C. App. LEXIS 178 (2003), cert. denied, 358 N.C. 547, — S.E.2d — (2004), cert. denied, — U.S. —, 125 S. Ct. 868, 160 L. Ed. 2d 784 (2005).

Failure of Spouse to Testify May Not Be Used Against Defendant. — The failure of the wife to be examined as a witness in behalf of a husband tried for a criminal offense was expressly excluded as evidence to the husband's prejudice by this section, though she was competent to testify. State v. Harris, 181 N.C. 600, 107 S.E. 466 (1921).

Duty of Court Where Improper Evidence Is Placed Before Jury. — When evidence forbidden by this section was argumentatively placed before the jury and used to the prejudice of the defense, it was the duty of the judge ex mero motu to intervene and promptly instruct the jury that the wife's failure to testify and the improper argument concerning that fact had to be disregarded and under no circumstances used to the prejudice of the defendant. State v. Thompson, 290 N.C. 431, 226 S.E.2d 487 (1976).

Failure to Instruct Held Error. — In a prosecution for first-degree murder, where the district attorney in his argument to the jury used the failure of defendant's wife to testify on defendant's behalf to the prejudice of the defense, the failure of the trial judge to intervene on his own motion and promptly instruct the jury that the wife's failure to testify and the improper argument regarding that fact must be disregarded and under no circumstances used to the prejudice of the defendant was reversible error. State v. McCall, 289 N.C. 570, 223 S.E.2d 334 (1976).

Error in Jury Instruction Not Prejudicial. — Although the trial court initially erred in permitting the prosecutor to comment upon the defendant's failure to call the defendant's spouse to testify at trial, the trial court later issued a peremptory instruction that the jury should disregard the argument and that the failure of the defendant to call the defendant's spouse should not be held against the defendant; therefore, despite the fact that the instruction was insufficiently detailed, the error was not prejudicial given the additional evidence concerning defendant's guilt. State v. Barden, 356 N.C. 316, 572 S.E.2d 108, 2002 N.C. LEXIS 1115 (2002).

Action of Court Held Insufficient to Remove Prejudice. — During the absence of the judge, the solicitor (now district attorney) in his argument to the jury called the jury's attention to the fact that defendant's wife had not testified in his behalf, and persisted in the argument after objection by defendant's counsel. Upon his return, the judge sustained the objection, and near the conclusion of his charge to the jury stated that the law did not permit such comment and that the jury should not let the argument influence it. The solicitor's (district attorney's) comment violated this section, and was prejudicial, and called for prompt peremptory and certain caution by the court, not only that the argument should be disregarded, but that the failure of defendant's wife to testify should not be considered to his prejudice, and the action of the court in merely sustaining the objection and the caution later given by the court near the conclusion of the charge was insufficient to free the case of prejudice. State v. Helms, 218 N.C. 592, 12 S.E.2d 243 (1940).

In a prosecution for second-degree murder, it was error for the trial judge merely to sustain an objection, without a curative instruction, to the prosecutor's comment during closing argument on the failure of the defendant's wife to testify. State v. Robinson, 74 N.C. App. 323, 328 S.E.2d 309 (1985).

Failure to Give Additional Instruction Not Error. — Where the trial judge had properly excluded from consideration by the jury testimony relating to the wife's failure to appear and testify in behalf of her husband on his trial for a homicide, the defendant could not successfully complain of error on appeal in the failure of the trial judge to again instruct the jury thereon, when there had been no exception taken to the charge of the court or the refusal of any prayer for instruction on the subject. State v. Harris, 181 N.C. 600, 107 S.E. 466 (1921).

§ 8-57.1. Husband-wife privilege waived in child abuse.

Notwithstanding the provisions of G.S. 8-56 and G.S. 8-57, the husband-wife privilege shall not be ground for excluding evidence regarding the abuse or neglect of a child under the age of 16 years or regarding an illness of or injuries to such child or the cause thereof in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 3 of Chapter 7B of the General Statutes of North Carolina. (1971, c. 710, s. 3; 1998-202, s. 13(d).)

Legal Periodicals. — For comment surveying North Carolina law of relational privilege, see 50 N.C.L. Rev. 630 (1972).

For note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

For note, "Family Law—Lovers' Triangle Turns Bermuda Triangle: The Natural Father's Right to Rebut the Marital Presumption—Michael H. v. Gerald D.," see 25 Wake Forest L. Rev. 617 (1990).

§ 8-57.2. Presumed father or mother as witnesses where paternity at issue.

Whenever an issue of paternity of a child born or conceived during a marriage arises in any civil or criminal proceeding, the presumed father or the mother of such child is competent to give evidence as to any relevant matter regarding paternity of the child, including nonaccess to the present or former spouse, regardless of any privilege which may otherwise apply. No parent offering such evidence shall thereafter be prosecuted based upon that evidence for any criminal act involved in the conception of the child whose paternity is in issue and/or for whom support is sought, except for perjury committed in this testimony. (1981, c. 634, s. 1.)

Legal Periodicals. — For note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

For survey of 1981 law on evidence, see 60 N.C.L. Rev. 1359 (1982).

CASE NOTES

Rule rendering wife incompetent to prove nonaccess has now been abrogated entirely in all civil and criminal proceedings in which paternity is at issue. Carpenter v. Hawley, 53 N.C. App. 715, 281 S.E.2d 783, cert. denied and appeal dismissed, 304 N.C. 587, 289 S.E.2d 564 (1981).

Applied in Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

Cited in Wake County ex rel. Manning v. Green, 53 N.C. App. 26, 279 S.E.2d 901 (1981).

§ 8-58: Repealed by Session Laws 1973, c. 1286, ss. 11, 26.

Editor's Note. — Session Laws 1973, c. 1286, repealed, transferred, and amended numerous sections in the General Statutes, largely relating to pretrial procedure, and enacted Chapter 15A, the Criminal Procedure Act.

§ 8-58.1. Injured party as witness when medical charges at issue.

Whenever an issue of hospital, medical, dental, pharmaceutical, or funeral charges arises in any civil proceeding, the injured party or his guardian, administrator, or executor is competent to give evidence regarding the amount of such charges, provided that records or copies of such charges accompany such testimony. The testimony of such a person establishes a rebuttable presumption of the reasonableness of the amount of the charges. (1983, c. 776, s. 1.)

CASE NOTES

Presumption of Reasonableness Created. — G.S. 8-58.1 creates a mandatory presumption of reasonableness for a plaintiff's medical expenses if the medical expenses are an issue and evidence is presented showing the total charges. Griffis v. Lazarovich, 161 N.C. App. 434, 588 S.E.2d 918, 2003 N.C. App. LEXIS 2200 (2003), cert. denied, 358 N.C. 375, 598 S.E.2d 135 (2004).

Total Charges Must Be Reasonable. — When plaintiff proffers the evidence required by this section, the fact-finder must find that the total amount of the alleged medical charges is reasonable, unless defendant carries its burden of going forward by rebutting the presumed fact of reasonableness. Jacobsen v. McMillan, 124 N.C. App. 128, 476 S.E.2d 368 (1996).

Presumption Does Not Preclude Finding of Unreasonableness. — The medical expenses presumption does not operate to preclude the jury from finding that plaintiff's medical expenses were not reasonably necessary for the proper treatment of his injuries. Jacobsen v. McMillan, 124 N.C. App. 128, 476 S.E.2d 368 (1996).

Failure to Rebut Presumption. — Where the injured party testified as to her injuries and treatment and introduced her medical bills, and the tortfeasor failed to introduce any evidence to rebut the presumption that the charges in the medical bills were reasonable, the reasonableness of the charges was conclusively established. McCurry v. Painter, 146 N.C. App. 547, 553 S.E.2d 698, 2001 N.C. App. LEXIS 969 (2001).

Failure to Instruct As to Statutory Presumption of Reasonableness Held Not Error. — Trial court did not err by failing to instruct the jury that the amount of a passenger's medical expenses was presumed reasonable under G.S. 8-58.1, even though G.S. 8C-1, N.C. R. Evid. 301, required the trial court to instruct the jury of a statutory presumption; all parties stipulated to the amount of the passenger's medical charges and to the reasonableness of the charges, and any instruction regarding the medical expenses would have been redundant and confusing to the jury. Griffis v. Lazarovich, 161 N.C. App. 434, 588 S.E.2d 918, 2003 N.C. App. LEXIS 2200 (2003), cert. denied, 358 N.C. 375, 598 S.E.2d 135 (2004).

Where evidence challenged whether an injured person's medical treatment and expenses from a collision were reasonable and necessary, and showed that the injured person had been receiving care for six years before the accident for back pain resulting from a prior collision, the trial court's refusal to charge on the G.S. 8-58.1 presumption as to medical expenses was proper. Osetek v. Jeremiah, 174 N.C. App. 438, 621 S.E.2d 202, 2005 N.C. App. LEXIS 2489 (2005), aff'd, 360 N.C. 471, 628 S.E.2d 760 (2006).

Applied in Chamberlain v. Thames, 131 N.C. App. 705, 509 S.E.2d 443 (1998); Bueltel v. Lumber Mut. Ins. Co., 134 N.C. App. 626, 518 S.E.2d 205, 1999 N.C. App. LEXIS 865 (1999), cert. denied, 351 N.C. 186, 541 S.E.2d 709 (1999).

§§ 8-58.2 through 8-58.5: Reserved for future codification purposes.

Article 7A.

Restrictions on Evidence in Rape Cases.

§§ 8-58.6 through 8-58.11: Repealed by Session Laws 1983 (Regular Session, 1984), c. 1037, s. 2.

Cross References. — As to evidence in rape or sex offense cases, see G.S. 8C-1, Rule 412. As to admissibility of evidence of reputation and prior convictions in prostitution cases, see G.S. 14-206.

Article 7B.

Expert Testimony.

§§ 8-58.12 through 8-58.14: Repealed by Session Laws 1983 (Regular Session, 1984), c. 1037, s. 9.

§§ 8-58.15 through 8-58.19: Reserved for future codification purposes.

Article 7C.

Admissibility of Forensic Evidence.

§ 8-58.20. Forensic analysis admissible as evidence.

(a) In any criminal prosecution, a laboratory report of a written forensic analysis, including an analysis of the defendant's DNA, or a forensic sample alleged to be the defendant's DNA, as that term is defined in G.S. 15A-266.2(2), that states the results of the analysis and that is signed and sworn to by the person performing the analysis may be admissible in evidence without the testimony of the analyst who prepared the report in accordance with the requirements of this section.

(b) A forensic analysis, to be admissible under this section, shall be performed in accordance with rules or procedures adopted by the State Bureau of Investigation, or by another laboratory accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) for the submission, identification, analysis, and storage of forensic analyses. The analyses of DNA samples and typing results of DNA samples shall be performed in accordance with the rules or procedures of the State Bureau of Investigation or other ASCLD/LAB-accredited laboratory.

(c) The analyst who analyzes the forensic sample and signs the report shall complete an affidavit on a form developed by the State Bureau of Investigation. In the affidavit, the analyst shall state (i) that the person is qualified by education, training, and experience to perform the analysis, (ii) the name and location of the laboratory where the analysis was performed, and (iii) that performing the analysis is part of that person's regular duties. The analyst shall also aver in the affidavit that the tests were performed pursuant to the ASCLD/LAB standards for that discipline and that the evidence was handled in accordance with established and accepted procedures while in the custody of the laboratory. The affidavit shall be sufficient to constitute prima facie evidence regarding the person's qualifications. The analyst shall attach the affidavit to the laboratory report and shall provide the affidavit to the investigating officer and the district attorney in the prosecutorial district in which the criminal charges are pending. An affidavit by a forensic analyst sworn to and properly executed before an official authorized to administer oaths is admissible in evidence without further authentication in any criminal proceeding with respect to the forensic analysis administered and the procedures followed.

(d) The district attorney shall serve a copy of the laboratory report and affidavit on the attorney of record for the defendant, or on the defendant if that person has no attorney, no later than five business days after receiving the report and affidavit, or 30 business days before any proceeding in which the report may be used against the defendant, whichever occurs first.

(e) Upon receipt of a copy of the laboratory report and affidavit, the attorney of record for the defendant or the defendant if that person has no attorney, shall have 15 business days to file a written objection to the use of the laboratory report and affidavit at any proceeding against the defendant. The written objection shall be filed with the court in which the matter is pending with a copy provided to the district attorney.

(f) If the defendant's attorney of record, or the defendant if that person has no attorney, fails to file a written objection with the court to the use of the laboratory report and affidavit within the time allowed by this section, then the laboratory report and affidavit may be admitted in evidence in any proceeding without the testimony of the analyst subject to the presiding judge ruling otherwise at the proceeding when offered. If, however, a written objection is filed, this section does not apply and the admissibility of the evidence shall be determined and governed by the appropriate rules of evidence. (2004-124, s. 15.2(c); 2007-484, s. 1.)

Editor's Note. — Session Laws 2004-124, s. 15.2(e), made this Article effective December 1, 2004, and applicable to offenses committed on or after that date.

Session Laws 2004-124, s. 15.2(a) and (b) provides: "(a) Of the funds appropriated to the Department of Justice in this act, the sum of two hundred fifty thousand dollars ($250,000) shall be used to contract with private entities to reduce the backlog of rape kits in storage in local law enforcement agencies as of July 1, 2004. The Department shall contract with private entities to analyze bodily fluids, DNA evidence, as 'DNA' is defined in G.S. 15A-266.2, or both, from rape kits that are evidence in cases in which a suspect has not been identified. In addition to the funds appropriated, the Department shall maximize the use of federal grant funds to expedite the elimination of the backlog."

"(b) The Department of Justice shall report, on or before May 1, 2005, to the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety on the number of rape kits analyzed by private entities and how many of those analyses resulted in arrests or convictions."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2005-276, s. 15.7(a), provides: "Of the funds appropriated by this act to the Department of Justice, the sum of two hundred fifty thousand dollars ($250,000) for the 2005-2006 fiscal year and the sum of two hundred fifty thousand dollars ($250,000) for the 2006-2007 fiscal year shall be used to contract with private entities to reduce the backlog of rape kits in storage in local law enforcement agencies and to expedite other forensic DNA analysis. The Department shall contract with private entities to analyze bodily fluids, DNA evidence, as 'DNA' is defined in G.S. 15A-266.2, or both, in cases in which a suspect has not been identified. The Department shall maximize the use of federal grant funds to expedite the elimination of the backlog."

Session Laws 2005-276, s. 15.7(b), provides:

"The Department of Justice shall report, on or before February 1, 2006, and annually thereafter to the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety on the number of rape kits analyzed by private entities and how many of those analyses resulted in arrests or convictions. The Department shall also report on the number of rape kits analyzed by the SBI Crime Lab, the amount of the remaining backlog, and the estimated time left to eliminate the backlog."

Session Laws 2005-276, s. 15.7(c), provides: "Except as provided otherwise by this subsection, the Department of Justice shall hire only nonsworn personnel to fill vacant positions in the State Bureau of Investigation laboratory. A position may be filled with a sworn agent in any of the following circumstances: (i) the position is a promotion for a sworn agent who was employed at the State Bureau of Investigation laboratory prior to July 1, 2005, (ii) the position is a forensic drug chemist position that has as a primary duty 'responding to clandestine methamphetamine laboratories,' or (iii) the position is a forensic impressions analyst position that has as a primary duty 'responding to clandestine methamphetamine laboratories.'"

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-484, s. 1, effective August 30, 2007, in subsection (b), substituted "accredited" for "certified," substituted "Directors/Laboratory Accreditation Board (ASCLD/LAB)" for "Directors (ASCLD)," and substituted "ASCLD/LAB-accredited" for "ASCLD-certified"; and substituted "ASCLD/LAB" for "ASCLD" in subsection (c).

ARTICLE 8.

Attendance of Witness.

§ 8-59. Issue and service of subpoena.

In obtaining the testimony of witnesses in causes pending in the trial divisions of the General Court of Justice, subpoenas shall be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure for civil actions. Provided that in criminal cases any employee of a local law-enforcement agency may effect service of a subpoena for the attendance of witnesses by telephone communication with the person named. However, in the case of a witness served by telephone communication pursuant to this section, neither an order to show cause nor an order for arrest shall be issued until such person has been served personally with the written subpoena. (1777, c. 115, s. 36, P.R.; R.C., c. 31, s. 59; Code, s. 1355; Rev., s. 1639; C.S., s. 1803; 1959, c. 522, s. 2; 1967, c. 954, s. 3; 1971, c. 381, s. 5; 1981, c. 267; 1989, c. 262, s. 2.)

Local Modification. — Cumberland: 1957, c. 1324, s. 2.

Cross References. — As to duty of clerk to issue subpoena, see G.S. 7A-103.

Editor's Note. — The Rules of Civil Procedure, referred to in this section, are found in G.S. 1A-1.

CASE NOTES

Applied in State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976).

Cited in North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451 (M.D.N.C. 1976).

§ 8-60: Repealed by Session Laws 1967, c. 954, s. 4.

§ 8-61. Subpoena for the production of documentary evidence.

Subpoenas for the production of records, books, papers, documents, or tangible things may be issued in criminal actions in the same manner as provided for civil actions in Rule 45 of the Rules of Civil Procedure. (1797, c. 476, P.R.; R.C., c. 31, s. 81; Code, s. 1372; Rev., s. 1641; C.S., s. 1805; 1967, c. 954, s. 3; c. 1168.)

Editor's Note. — The Rules of Civil Procedure, referred to in this section, are found in G.S. 1A-1.

§ 8-62: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For present provisions relating to subpoenas after removal of cause, see G.S. 1-87.

§ 8-63. Witnesses attend until discharge; effect of nonattendance.

Every witness, being summoned to appear in any of the said courts, in manner before directed, shall appear accordingly, and, subject to the provisions of G.S. 6-51, continue to attend from session to session until discharged, when summoned in a civil action or special proceeding, by the court or the party at whose instance such witness shall be summoned, or, when summoned in a criminal prosecution, until discharged by the court, the prosecuting officer, or the party at whose instance he was summoned; and in default thereof shall forfeit and pay, in civil actions or special proceedings, to the party at whose instance the subpoena issued, the sum of forty dollars ($40.00), to be recovered by motion in the cause, and shall be further liable to his action for the full damages which may be sustained for the want of such witness's testimony; or if summoned in a criminal prosecution shall forfeit and pay eighty dollars ($80.00) for the use of the State, or the party summoning him. If the civil action or special proceeding shall, in the vacation, be compromised and settled between the parties, and the party at whose instance such witness was summoned should omit to discharge him from further attendance, and for want of such discharge he shall attend the next session, in that case the witness, upon oath made of the facts, shall be entitled to a ticket from the clerk in the same manner as other witnesses, and shall recover from the party at whose instance he was summoned the allowance which is given to witnesses for their attendance, with costs.

No execution shall issue against any defaulting witness for the forfeiture aforesaid but after notice made known to him to show cause against the issuing thereof; and if sufficient cause be shown of his incapacity to attend, execution shall not issue, and the witness shall be discharged of the forfeiture without costs; but otherwise the court shall, on motion, award execution for the forfeiture against the defaulting witness. (1777, c. 115, ss. 37, 38, 43, P.R.; 1799, c. 528, P.R.; 1801, c. 591, P.R.; R.C., c. 31, ss. 60, 61, 62; Code, s. 1356; Rev., s. 1643; C.S., s. 1807; 1965, c. 284; 1971, c. 381, s. 12.)

Cross References. — As to payment of witness fees in advance, see G.S. 6-51. As to announcement of discharge of witnesses, see G.S. 6-62.

CASE NOTES

Duty to Attend. — When a subpoena has been served on a witness, he is required by this section to attend from term to term until discharged. State v. Gwynn, 61 N.C. 445 (1868).

Attorney Not Exempt. — A witness who fails to appear when the case is called in which he has been subpoenaed to testify is not justified in his default because he is a practicing attorney at law and has cases to try in another county at the date upon which the case was called wherein he was a witness, and the party who subpoenaed him can recover the penalty, with the costs of the motions. In re Pierce, 163 N.C. 247, 79 S.E. 507 (1913).

A witness who is summoned in this State while casually here, but who resides in another state, cannot be required to pay a forfeiture for nonattendance, if he has returned to his own state and is there at his domicile. Kinzey v. King, 28 N.C. 76 (1845).

Test of Inability to Attend. — Where a witness alleges that he was unable to attend court, this inability must be decided by reference to the modes of traveling which are in use in the community. Eller v. Roberts, 25 N.C. 11 (1842).

Nonattendance Need Not Be Willful. — This section does not require that the failure of the witness to attend should be "willful." In re Pierce, 163 N.C. 247, 79 S.E. 507 (1913).

When Witness May Elect. — Where two subpoenas are served upon a witness, requiring his attendance on the same day at different places distant from each other, he is not bound to obey the writ which may have been first served, but may make his election between them. Icehour v. Martin, 44 N.C. 478 (1853).

An issue in bastardy is not a "criminal prosecution" so as to subject a defaulting witness to the fine of eighty dollars ($80.00), prescribed by this section. Ward v. Bell, 52 N.C. 79 (1859).

Applied in State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976).

§ 8-64. Witnesses exempt from civil arrest.

Every witness shall be exempt from arrest in civil actions or special proceedings during his attendance at any court, or before a commissioner, arbitrator, referee, or other person authorized to command the attendance of such witness, and during the time such witness is going to and returning from the place of such attendance, allowing one day for every thirty miles such witness has to travel to and from his place of residence. (1777, c. 115, s. 44, P.R.; R.C., c. 31, s. 70; Code, s. 1367; Rev., s. 1644; C.S., s. 1808.)

CASE NOTES

Common Law Rule Not Repealed. — This section does not serve to repeal the common law rule of exemption of witnesses from civil arrest. Cooper v. Wyman, 122 N.C. 784, 29 S.E. 947 (1898).

Exemption Not Applicable to Criminal Proceeding. — The exemption of witnesses from civil arrest accorded by this section, and of nonresident parties and witnesses voluntarily attending court here, on grounds of public policy does not apply to parties arrested in criminal proceedings. White v. Underwood, 125 N.C. 25, 34 S.E. 104 (1899).

Nonresident Attorney. — This section does not prevent service of summons on a nonresident attorney in this State to represent his clients in a matter pending in the federal court. Greenleaf v. People's Bank, 133 N.C. 292, 45 S.E. 638 (1903).

Procedure for Claiming Exemption. — Where a party has not been granted the exemption from service of summons (which the courts seem to have placed on the same plane as the exemption from civil arrest), his remedy is not a motion to dismiss the action, but a motion, on special appearance, to set aside the return of service. Dell School v. Pierce, 163 N.C. 424, 79 S.E. 687 (1913). This is because the service is not void but voidable. Cooper v. Wyman, 122 N.C. 784, 29 S.E. 947 (1898).

Article 9.

Attendance of Witnesses from Without State.

§§ 8-65 through 8-70: Transferred to §§ 15A-811 through 15A-816 by Session Laws 1973, c. 1286, s. 9.

Article 10.

Depositions.

§§ 8-71 through 8-73: Repealed by Session Laws 1967, c. 954, s. 4.

§ 8-74. Depositions for defendant in criminal actions.

In all criminal actions, hearings and investigations it shall be lawful for the defendant in any such action to make affidavit before the clerk of the superior court of the county in which said action is pending, that it is important for the defense that he have the testimony of any person, whose name must be given, and that such person is so infirm, or otherwise physically incapacitated, or nonresident of this State, that he cannot procure his attendance at the trial or hearing of said cause. Upon the filing of such affidavit, it shall be the duty of the clerk to appoint some responsible person to take the deposition of such witness, which deposition may be read in the trial of such criminal action under the same rules as now apply by law to depositions in civil actions: provided, that the district attorney or prosecuting attorney of the district, county or town in which such action is pending have 10 days' notice of the taking of such deposition, who may appear in person or by representative to conduct the cross-examination of such witness. (Code, s. 1357; 1891, c. 522; 1893, c. 80; Rev., s. 1652; 1915, c. 251; C.S., s. 1812; 1971, c. 381, s. 6; 1973, c. 47, s. 2.)

Cross References. — As to attendance of witnesses in criminal proceedings, see G.S. 15A-801 et seq. As to discovery in criminal proceedings, see G.S. 15A-901 et seq.

Legal Periodicals. — For article discussing constitutional considerations with respect to criminal discovery for the defense and prosecution, see 50 N.C.L. Rev. 437 (1972).

CASE NOTES

Section Does Not Entitle Defendant to List of State's Witnesses. — This section provides for taking the deposition of an incapacitated defense witness, whose name must be given to the court. Patently this section has no application to defendant's motion for a list of the State's witnesses. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

In the absence of a statute requiring the State to furnish it, the defendant in a criminal case is not entitled to a list of the State's witnesses who are to testify against him. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

Where there are several defendants in the same bill of indictment, it is not necessary to notify each of the others of the taking of a deposition by one for use as evidence on his behalf. State v. Finley, 118 N.C. 1161, 24 S.E. 495 (1896).

A deposition taken under this section is competent to be read in favor of one prisoner, although it contains testimony charging his codefendant with committing the crime. When so read, it is the duty of the presiding judge to instruct the jury that they are not to consider it as evidence against the codefendant thus charged with the crime, but only as evidence in favor of the prisoner who offers it. State v. Finley, 118 N.C. 1161, 24 S.E. 495 (1896).

§ 8-75: Repealed by Session Laws 1971, c. 381, s. 13.

§ 8-76. Depositions before municipal authorities.

Any board of aldermen, board of town or county commissioners or any person interested in any proceeding, investigation, hearing or trial before such board, may take the depositions of all persons whose evidence may be desired for use in said proceeding, investigation, hearing or trial; and to do so, the chairman of such board or such person may apply in person or by attorney to the superior court clerk of that county in which such proceeding, investigation, hearing or trial is pending, for a commission to take the same, and said clerk, upon such application, shall issue such commission, or such deposition may be taken by a notary public of this State or of any other state or foreign country without a commission issuing from the court; and the notice and proceedings upon the taking of said depositions shall be the same as provided for in civil actions; and if the person upon whom the notice of the taking of such deposition is to be served is absent from or cannot after due diligence be found within this State, but can be found within the county in which the deposition is to be taken, then, and in that case, said notice shall be personally served on such person by the commissioner appointed to take such deposition or by the notary taking such deposition, as the case may be; and when any such deposition is returned to the clerk it shall be opened and passed upon by him and delivered to such board, and the reading and using of such deposition shall conform to the rules of the superior court. (1889, c. 151; Rev., s. 1653; C.S., s. 1814; 1943, c. 543.)

§ 8-77: Repealed by Session Laws 1995, c. 379, s. 9.

§ 8-78. Commissioner may subpoena witness and punish for contempt.

Commissioners to take depositions appointed by the courts of this State, or by the courts of the states or territories of the United States, arbitrators, referees, and all persons acting under a commission issuing from any court of record in this State, are hereby empowered, they or the clerks of the courts respectively in this State, to which such commission shall be returnable, to issue subpoenas, specifying the time and place for the attendance of witnesses before them, and to administer oaths to said witnesses, to the end that they may give their testimony. And any witness appearing before any of the said persons and refusing to give his testimony on oath touching such matters as he may be lawfully examined unto shall be committed, by warrant of the person before whom he shall so refuse, to the common jail of the county, there to remain until he may be willing to give his evidence; which warrant of commitment shall recite what authority the person has to take the testimony of such witness, and the refusal of the witness to give it. (1777, c. 115, s. 42, P.R.; 1805, c. 685, ss. 1, 2, P.R.; 1848, c. 66; 1850, c. 188; R.C., c. 31, s. 64; Code, s. 1362; Rev., s. 1649; C.S., s. 1816.)

Cross References. — As to willful refusal to be sworn or to testify amounting to criminal contempt, see G.S. 5A-11(4).

CASE NOTES

Power Not Exclusively in Commissioner. — The power to commit to jail a person refusing to testify before a commissioner, as provided for in this section, is not given exclusively, if at all, to the commissioner, but he may invoke the aid of the judge from whom he derives his appointment and whose authority is defied. Bradley Fertilizer Co. v. Taylor, 112 N.C. 141, 17 S.E. 69 (1893).

§ 8-79. Attendance before commissioner enforced.

The sheriff of the county where the witness may be shall execute all such subpoenas, and make due return thereof before the commissioner, or other person, before whom the witness is to appear, in the same manner, and under the same penalties, as in case of process of a like kind returnable to court; and when the witness shall be subpoenaed five days before the time of his required attendance, and shall fail to appear according to the subpoena and give evidence, the default shall be noted by the commissioner, arbitrator, or other person aforesaid; and in case the default be made before a commissioner acting under authority from courts without the State, the defaulting witness shall forfeit and pay to the party at whose instance he may be subpoenaed fifty dollars, and on the trial for such penalty the subpoena issued by the commissioner, or other person, as aforesaid, with the indorsement thereon of due service by the officer serving the same, together with the default noted as aforesaid and indorsed on the subpoena, shall be prima facie evidence of the forfeiture, and sufficient to entitle the plaintiff to judgment for the same, unless the witness may show his incapacity to have attended. (1848, c. 66, s. 2; 1850, c. 188, ss. 1, 2; R.C., c. 31, s. 65; Code, s. 1363; Rev., s. 1650; C.S., s. 1817.)

§ 8-80. Remedies against defaulting witness before commissioner.

But in case the default be made before a commissioner, arbitrator, referee or other person, acting under a commission or authority from any of the courts of this State, then the same shall be certified under his hand, and returned with the subpoena to the court by which he was commissioned or empowered to take the evidence of such witness; and thereupon the court shall adjudge the defaulting witness to pay to the party at whose instance he was summoned the sum of forty dollars ($40.00); but execution shall not issue therefor until the same be ordered by the court, after such proceedings had as shall give said witness an opportunity to show cause, if he can, against the issuing thereof. (1850, c. 188, s. 2; R.C., c. 31, s. 66; Code, s. 1364; Rev., s. 1651; C.S., s. 1818.)

§ 8-81. Objection to deposition before trial.

At any time before the trial, or hearing of an action or proceeding, any party may make a motion to the judge or court to reject a deposition for irregularity in the taking of it, either in whole or in part, for scandal, impertinence, the incompetency of the testimony, for insufficient notice, or for any other good cause. The objecting party shall state his exceptions in writing. (1869-70, c. 227, ss. 13, 17; Code, s. 1361; 1895, c. 312; 1903, c. 132; Rev., s. 1648; C.S., s. 1819.)

Legal Periodicals. — For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

CASE NOTES

Purpose of Section. — The purpose of this section is to settle the depositions as evidence before the trial or hearing and thus prevent surprise, misapprehension, confusion and delay on the trial. Carroll v. Hodges, 98 N.C. 418, 4 S.E. 199 (1887).

The purpose of this section is to give the party in whose behalf a deposition has been taken notice of any objection to the deposition and of the grounds for same before the trial. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962).

Time and Manner of Objection. — As stated by this section, exceptions to a deposition, especially those which relate to its regularity, should be disposed of, at the latest, before the trial is entered upon. Barnhardt v. Smith, 86 N.C. 473 (1882); Carroll v. Hodges, 98 N.C. 418, 4 S.E. 199 (1887); Ivey v. Bessemer City Cotton Mills, 143 N.C. 189, 55 S.E. 613 (1906). Such objection must be made in writing. Brittain v. Hitchcock, 127 N.C. 400, 37 S.E. 474 (1900).

Objection to the incompetency of testimony and motion to reject the evidence must be made in writing before trial unless the parties shall consent to a waiver of this provision. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962).

Same — When Allowed at Trial. — Where it appeared that no notice had been given to the adverse party of the taking of a deposition, and that it had not been passed upon by the clerk, it was held that an objection to its reception might be taken on the trial of the action. Bryan v. Jeffreys, 104 N.C. 242, 10 S.E. 167 (1889).

When Trial Begins. — Once the case is reached on the calendar and the jury called into the box, "the hurry of a trial" has begun and the time for deliberation and scrutiny of a deposition has passed. The purpose of this section would not be served by a holding that the trial did not begin until after the jury was impaneled. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962); State v. Swann, 5 N.C. App. 385, 168 S.E.2d 429, rev'd on other grounds, 275 N.C. 644, 170 S.E.2d 611 (1969).

The trial begins when the jurors are called into the box for examination as to their qualifications — when the work of impaneling the jury begins — and the calling of a jury is a part of the trial. State v. Swann, 5 N.C. App. 385, 168 S.E.2d 429, rev'd on other grounds, 275 N.C. 644, 170 S.E.2d 611 (1969).

Waiver of Formal Defects. — Where a party attends upon and takes part in taking depositions, he thereby waives all objections of a formal character, but a void process will not be vitalized unless there is an amendment without prejudice to third parties. McArter v. Rhea, 122 N.C. 614, 30 S.E. 128 (1898).

The failure to insert the name of the commissioner in the commission to take the deposition is waived by the objecting party appearing at the taking of the deposition and making no objection thereto until after the trial was begun. Womack v. Gross, 135 N.C. 378, 47 S.E. 464 (1904); Tomlinson Chair Mfg. Co. v. Townsend, 153 N.C. 244, 69 S.E. 145 (1910).

Where the provisions of this section as to making the objection before trial and in writing are not complied with, the objection to the deposition is waived. Woodley v. Hassell, 94 N.C. 157 (1886).

Cited in Hood Sys. Indus. Bank v. Dixie Oil Co., 205 N.C. 778, 172 S.E. 360 (1934); State v. Montgomery, 33 N.C. App. 693, 236 S.E.2d 390 (1977); Moore v. Reynolds, 63 N.C. App. 160, 303 S.E.2d 839 (1983).

§ 8-82. Deposition not quashed after trial begun.

No deposition shall be quashed, or rejected, on objection first made after a trial has begun, merely because of an irregularity in taking the same, provided it shall appear that the party objecting had notice that it had been taken, and it was on file long enough before the trial to enable him to present his objection. (1869-70, c. 227, s. 12; Code, s. 1360; Rev., s. 1647; C.S., s. 1820.)

Legal Periodicals. — For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

CASE NOTES

Objection Should Be Made Before Trial. — Where a deposition was open and on file before the trial, and an objection thereto was made for the first time on the trial, it was held that the objection could not be sustained. Morgan v. Royal Fraternal Ass'n, 170 N.C. 75, 86 S.E. 975 (1915). And this is true whether the motion is to quash the deposition in whole or in part. Carroll v. Hodges, 98 N.C. 418, 4 S.E. 199 (1887).

Where deposition of a witness is duly taken with full opportunity of cross-examination by the adverse party, with no objection before trial, and the witness is out of the State at the time of trial, exception to the deposition at the trial is without merit. Fleming v. Atlantic C.L.R.R., 236 N.C. 568, 73 S.E.2d 544 (1952).

Filing as Notice. — Where the deposition had been on file for two or three months before the trial, the appellant's counsel having notice and being present when it was opened by the clerk and ordered by him to be read in evidence on the trial, and they making no objections thereto, it was held that such deposition could not be quashed on oral objection made at the trial. Carroll v. Hodges, 98 N.C. 418, 4 S.E. 199 (1887).

Manner of Objection. — Since a deposition can be quashed only for irregularities in the taking or the incompetency of witnesses, objection should be taken to the questions and answers of the deponent by way of exception and not by motion to quash the depositions. Jeffords v. Albemarle Waterworks, 157 N.C. 10, 72 S.E. 624 (1911).

Preservation of Exception. — Where a commissioner to take depositions has, over the objection and exceptions of a party litigant, denied him the right of cross-examination of a witness of his opponent, and the litigant has appealed therefrom to the trial court, and preserved his right, the exception gives notice of the grounds upon which it was based, and on his motion on the trial, the deposition relating to that part of the evidence will be stricken. Sugg v. St. Mary's Oil Engine Co., 193 N.C. 814, 138 S.E. 169 (1927).

As to when objection is allowed at trial, see Bryan v. Jeffreys, 104 N.C. 242, 10 S.E. 167 (1889).

Cited in Gulf States Steel Co. v. Ford, 173 N.C. 195, 91 S.E. 844 (1917).

§ 8-83. When deposition may be read on the trial.

Every deposition taken and returned in the manner provided by law may be read on the trial of the action or proceeding, or before any referee, in the following cases, and not otherwise:

(1) If the witness is dead, or has become insane since the deposition was taken.

(2) If the witness is a resident of a foreign country, or of another state, and is not present at the trial.

(3) If the witness is confined in a prison outside the county in which the trial takes place.

(4) If the witness is so old, sick or infirm as to be unable to attend court.

(5) If the witness is the President of the United States, or the head of any department of the federal government, or a judge, district attorney, or clerk of any court of the United States, and the trial shall take place during the term of such court.

(6) If the witness is the Governor of the State, or the head of any department of the State government, or the president of the University, or the head of any other incorporated college in the State, or the superintendent or any physician in the employ of any of the hospitals for the insane for the State.

(7) If the witness is a justice of the Supreme Court, judge of the Court of Appeals, or a judge, presiding officer, clerk or district attorney of any court of record, and the trial shall take place during the term of such court.

(8) If the witness is a member of the Congress of the United States, or a member of the General Assembly, and the trial shall take place during a time that such member is in the service of that body.

(9) Except in actions or proceedings governed by the Rules of Civil Procedure, if the witness has been duly summoned, and at the time of the trial is out of the State, or is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting, without the procurement or consent of the party offering his deposition.

(10) If the action is pending in a magistrate's court the deposition may be read on the trial of the action, provided the witness is more than 75 miles by the usual public mode of travel from the place where the court is sitting.

(11) Except in actions or proceedings governed by the Rules of Civil Procedure, if the witness is a physician duly licensed to practice medicine in the State of North Carolina, and resides or maintains his office outside the county in which the action is pending.

If any provision of this section conflicts with the Rules of Civil Procedure, then those Rules shall control in actions or proceedings governed by them. (1777, c. 115, ss. 39, 40, 41, P.R.; 1803, c. 633, P.R.; 1828, ch. 24, ss. 1, 2; 1836, c. 30; R.C., c. 31, s. 63; 1869-70, c. 227, s. 11; 1881, c. 279, ss. 1, 3; Code, s. 1358; 1905, c. 366; Rev., s. 1645; 1919, c. 324; C.S., s. 1821; 1965, c. 675; 1969, c. 44, s. 23; 1971, c. 381, s. 7; 1973, c. 47, s. 2; 1991, c. 491, s. 1.)

Cross References. — As to depositions in criminal actions, see G.S. 8-74 and note thereto. As to manner, form, and time of taking exceptions, see G.S. 8-81, 8-82 and notes thereto. For the Rules of Civil Procedure, see G.S. 1A-1.

Legal Periodicals. — For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

For article, "Taking a Deposition Under North Carolina Law," see 21 N.C. Cent. L.J. 215 (1995).

CASE NOTES

To the extent they are in conflict, § 1A-1, Rule 32 takes precedence over this section. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

But insofar as it does not conflict with § 1A-1, Rule 32, this section remains in effect. Wright v. American Gen. Life Ins. Co., 59 N.C. App. 591, 297 S.E.2d 910 (1982), cert. denied, 307 N.C. 583, 299 S.E.2d 653 (1983).

This section is not a "differing procedure" from that of § 1A-1, Rule 32 within the contemplation of the language of Rule 1. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Deposition of Party. — While under subdivisions (2) and (9) of this section the presence of a witness in court is a proper basis for excluding the witness's deposition, it is no basis for excluding the deposition of a party, which G.S. 1A-1, Rule 32(a)(3) makes useable without restriction, if otherwise admissible under the rules of evidence. Stilwell v. Walden, 70 N.C. App. 543, 320 S.E.2d 329 (1984).

Selected Parts of Depositions. — It is not permissible to introduce selected portions of depositions without offering the whole. Sternberg v. Crockon & Roden Co., 172 N.C. 731, 90 S.E. 935 (1916); Enloe v. Charlotte Coca-Cola Bottling Co., 210 N.C. 262, 186 S.E. 242 (1936).

Meaning of "Duly Summoned". — By reasonable construction subdivision (9) of this section means that where the deposition has been regularly taken, and where the witness is more than 75 miles from the place of trial without the consent of the party, and the presence of the witness cannot be procured, the deposition may be read if a subpoena has been duly issued — not necessarily served. Tomlinson Chair Mfg. Co. v. Townsend, 153 N.C. 244, 69 S.E. 145 (1910). See Sparrow v. Blount, 90 N.C. 514 (1884).

Where Plaintiff Dies But Action Survives. — Where the deposition de bene esse of the plaintiff in an action had been taken in accordance with law, and the plaintiff had since died, but the cause of action survived, the deposition could properly be read in evidence in behalf of those who survived him in interest, and had properly been made parties to the original action. Barbee v. Cannady, 191 N.C. 529, 132 S.E. 572 (1926).

Witness Unable to Talk. — The deposition of a witness adjudged to be unable to talk or remain in court was admissible in evidence under this section. Willeford v. Bailey, 132 N.C. 402, 43 S.E. 928 (1903).

Deposition Taken in Prior Action. — In the trial of an action a deposition regularly taken in another action between the same parties and involving the same subject matter is admissible as substantive evidence. Hartis v. Charlotte Elec. Ry., 162 N.C. 236, 78 S.E. 164 (1913). It may be introduced whether the deponent was examined as a witness in the case being tried or not. Mabe v. Mabe, 122 N.C. 552, 29 S.E. 843 (1898).

Applied in Glenn v. Smith, 264 N.C. 706, 142 S.E.2d 596 (1965).

Cited in Barnhardt v. Smith, 86 N.C. 473 (1882); Stern v. Herren, 101 N.C. 516, 8 S.E. 221 (1888); Jeffords v. Albemarle Waterworks, 157 N.C. 10, 72 S.E. 624 (1911); Norburn v. Mackie, 264 N.C. 479, 141 S.E.2d 877 (1965).

§ 8-84: Repealed by Session Laws 1975, c. 762, s. 4.

ARTICLE 11.

Perpetuation of Testimony.

§ 8-85. Court reporter's certified transcription.

Testimony taken and transcribed by a court reporter and certified by the reporter or by the judge who presided at the trial at which the testimony was given, may be offered in evidence in any court as the deposition of the witness whose testimony is so taken and transcribed, in the manner, and under the rules governing the introduction of depositions in civil actions. (1971, c. 377, s. 1.)

Editor's Note. — The above section is the seventh paragraph of former G.S. 7-89. It was revised and transferred to its present position by Session Laws 1971, c. 377, s. 1, effective October 1, 1971. Former G.S. 8-85 was repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§§ 8-86 through 8-88: Repealed by Session Laws 1967, c. 954, s. 4.

ARTICLE 12.

Inspection and Production of Writings.

§ 8-89: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For present provisions as to discovery and production of documents for inspection, copying or photographing, see G.S. 1A-1, Rule 34.

§ 8-89.1: Repealed by Session Laws 1975, c. 762, s. 4.

§§ 8-90, 8-91: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For present provisions as to discovery and production of documents for inspection, copying or photographing, see G.S. 1A-1, Rule 34.

§§ 8-92 through 8-96: Reserved for future codification purposes.

ARTICLE 13.

Photographs.

§ 8-97. Photographs as substantive or illustrative evidence.

Any party may introduce a photograph, video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements. This section does not prohibit a party from introducing a photograph or other pictorial representation solely for the purpose of illustrating the testimony of a witness. (1981, c. 451, s. 1.)

Cross References. — As to admissibility of the contents of writings, recordings and photographs, see G.S. 8C-1, Rule 1001 et seq.

Legal Periodicals. — For survey of 1981 law on evidence, see 60 N.C.L. Rev. 1359 (1982).

For survey of 1982 law on evidence, see 61 N.C.L. Rev. 1126 (1983).

CASE NOTES

Limiting Instruction. — It would seem to be the better practice for a party wishing to limit the use of evidence offered by his opponent to request a limiting instruction at the time of its admission. State v. Kuplen, 316 N.C. 387, 343 S.E.2d 793 (1986); State v. Alston, 91 N.C. App. 707, 373 S.E.2d 306 (1988).

Where many if not all of the photographs which were received into evidence could properly have been considered by the jury as substantive evidence, for the trial judge to give a proper instruction limiting the State's exhibits to illustrative use would have required that the defendant specifically identify those exhibits which he contended were subject only to illustrative use. State v. Kuplen, 316 N.C. 387, 343 S.E.2d 793 (1986).

Defendant in robbery case argued that the judge erred in allowing the jury to view a videotape without first instructing them that it was admissible solely for the purpose of illustrating the victim's testimony; however, defendant did not request a limiting instruction, and since the State laid a proper foundation to introduce the videotape for either substantive or illustrative purposes, no limiting instruction was necessary. State v. Cannon, 92 N.C. App. 246, 374 S.E.2d 604 (1988), rev'd on other grounds, 326 N.C. 27, 387 S.E.2d 450 (1990).

Admissibility of Videotape Recordings. — The basic principles governing the admissibility of photographs apply also to motion pictures. Videotape recordings may be admitted into evidence where they are relevant and have been properly authenticated. State v. Billings, 104 N.C. App. 362, 409 S.E.2d 707 (1991).

Videotapes are admissible under North Carolina law for both illustrative and substantive purposes; the trial court properly admitted a videotape for the sole purpose of illustrating the testimony of an officer, where the trial judge properly instructed the jury that the videotape was being received into evidence for the limited purpose of illustrating the witness's testimony. State v. Gaither, 161 N.C. App. 96, 587 S.E.2d 505, 2003 N.C. App. LEXIS 1996 (2003), cert. denied, 358 N.C. 157, 593 S.E.2d 83 (2004).

Defendant's conviction of robbery with a firearm was proper; the State set a proper foundation for the admission of a videotape of the robbery under G.S. 8-97 by presenting testimony that the tape came from a store security camera, and had been in police custody and had not been altered, and the probative value of the videotape was not outweighed by any undue prejudice under G.S. 8C-1, N.C. R. Evid. 403. State v. Ayscue, 169 N.C. App. 548, 610 S.E.2d 389, 2005 N.C. App. LEXIS 677 (2005).

Pursuant to G.S. 8-97 and G.S. 8C-1-901, the trial court properly admitted the videotape evidence of defendant committing sexual acts with the victim, a minor child, and the photographs taken therefrom, because: (1) a state agent established an unbroken chain of custody from the time the tape was found in defendant's residence; (2) the state agent testified that the room depicted in the videotape shown to the jury was identical to the master bedroom in defendant's residence and that the man on the videotape was defendant; (3) the victim's mother, who had previously dated defendant, testified that defendant owned a camcorder and a tripod, which he had used to videotape them having sexual intercourse in the master bedroom of defendant's residence; (4) the victim's mother identified the room depicted in the videotape as defendant's master bedroom and the man on the videotape as defendant; (5) the victim's mother identified the young girl on the videotape as the victim, her daughter; (6) there was testimony that defendant's camcorder was in working condition; and (7) there was sufficient evidence from the testimony regarding the chain of custody to establish that the videotape had not been edited or altered, and that the same videotape seized from defendant's residence was the same videotape reviewed by the jury. State v. Prentice, 170 N.C. App. 593, 613 S.E.2d 498, 2005 N.C. App. LEXIS 1086 (2005), cert. denied, appeal dismissed, — N.C. —, 622 S.E.2d 628 (2005).

Videos were properly admitted where there was testimony that the videos accurately depicted the events surrounding the subject incident and that the tape had not been changed or altered, and the portions of the tape that defendant contended were inflammatory were not shown at trial. State v. Buff, 170 N.C. App. 374, 612 S.E.2d 366, 2005 N.C. App. LEXIS 998 (2005).

Trial court did not err in admitting an edited videotape of planes flying over the adjoining property owners' property in a case where they sued the airport operators based on the contention that operation of the airport was a private nuisance; the adjoining property owners laid a proper foundation for admission of that evidence and the airport operators did not argue that the videotaping system was not properly maintained or properly functioning. Broadbent

v. Allison, 176 N.C. App. 359, 626 S.E.2d 758, 2006 N.C. App. LEXIS 524 (2006).

Even assuming that videotapes from a food store were not properly admitted into evidence, reversal was not required because defendant was not prejudiced by their admission given the admittance of defendant's statement in which defendant confessed to using the victim's credit card to purchase beer and cigarettes at the food store. State v. Brooks, 178 N.C. App. 211, 631 S.E.2d 54, 2006 N.C. App. LEXIS 1334 (2006).

Under this section videotapes now may be introduced as substantive evidence upon laying a proper foundation. However, the particular nature of the video portrayal on the tape may place upon the State the burden to meet other applicable evidentiary requirements. State v. Peoples, 60 N.C. App. 479, 299 S.E.2d 311 (1983), rev'd on other grounds, 311 N.C. 515, 319 S.E.2d 177 (1984).

Videotapes generally are admissible into evidence under North Carolina law for both illustrative and substantive purposes. Campbell ex rel. McMillan v. Pitt County Mem. Hosp., 84 N.C. App. 314, 352 S.E.2d 902, aff'd, 321 N.C. 260, 362 S.E.2d 273 (1987), overruled on other grounds, Johnson v. Ruark Obstetrics & Assoc., 327 N.C. 283, 395 S.E.2d 85, rehearing denied, 327 N.C. 644, 399 S.E.2d 133 (1990).

Surveillance Video of Personal Injury Plaintiffs Admissible. — A surveillance videotape was relevant and admissible in a personal injury trial on damages, where the occupants of a van were shown engaging in various physical activities, and this evidence was relevant to whether and to what extent the occupants were disabled by the injuries they sustained in a rear end collision. Albrecht v. Dorsett, 131 N.C. App. 502, 508 S.E.2d 319 (1998).

Within Discretion of Court. — A "day in the life" videotape of child allegedly injured by negligence of defendant hospital at the time of her birth was properly admitted. The plaintiffs' failure to provide notice to the opposing counsel and the trial court prior to taping did not render the tape inadmissible; rather, the admissibility of the videotape under the particular facts and circumstances of the action lay solely within the sound discretion of the trial court. Campbell ex rel. McMillan v. Pitt County Mem. Hosp., 84 N.C. App. 314, 352 S.E.2d 902, aff'd, 321 N.C. 260, 362 S.E.2d 273 (1987).

Preview of Videotape. — Where a videotape depicts conduct of a defendant in a criminal case, the trial judge should grant a request from the defense to preview the tape. State v. Billings, 104 N.C. App. 362, 409 S.E.2d 707 (1991).

Insufficient Authentication of Videotape. — The state failed to sufficiently authenticate the contents of a videotape, or to establish an unbroken chain of custody, or to show that a store security system was properly functioning on the day of the robbery at issue, where (1) two state witnesses expressed the opinion that the security system was in working order but neither one knew anything about the maintenance or operation of the camera system, and (2) trial testimony was insufficient to establish that the tape accurately represented the events it purported to show or an unbroken chain of custody. State v. Mason, 144 N.C. App. 20, 550 S.E.2d 10, 2001 N.C. App. LEXIS 339 (2001).

Incriminating Statements in Videotape. — If a videotape contains incriminating statements by the defendant, upon his objection, the judge must conduct a voir dire to determine the admissibility of any in-custody statements or admissions in the tape. State v. Billings, 104 N.C. App. 362, 409 S.E.2d 707 (1991).

A tape recording of a hypnosis session was not admissible as corroboration of the testimony of a witness stating his present recall of prior incidents. State v. Peoples, 60 N.C. App. 479, 299 S.E.2d 311 (1983), rev'd on other grounds, 311 N.C. 515, 319 S.E.2d 177 (1984).

For discussion of admissibility of maps, surveys and the like, see Presley v. Griggs, 88 N.C. App. 226, 362 S.E.2d 830 (1987).

Proper Authentication of Photographs. — Where the witness clearly indicated that the photographs accurately portrayed what he had observed, the photographs were properly authenticated for illustrative purposes. State v. Alston, 91 N.C. App. 707, 373 S.E.2d 306 (1988).

Foundation Held Sufficient. — Where victim testified that the videotape was a factual representation of the events on the night of the robbery, the business had installed the camera approximately six weeks before the robbery, and that the camera was working properly before and after the night of the robbery, and on voir dire a police department detective testified that he had exclusive care and custody of the video camera film since the night of the robbery, there was sufficient evidence for the trial judge to find that the State had laid a proper foundation to introduce the videotape into evidence for either substantive or illustrative purposes. State v. Cannon, 92 N.C. App. 246, 374 S.E.2d 604 (1988), rev'd on other grounds, 326 N.C. 37, 387 S.E.2d 450 (1990).

Foundation Held Insufficient. — The State failed to lay a proper foundation for the admissibility and authenticity of certain confiscated videotapes depicting the defendant/ex-felon handling weapons where there was no testimony by anyone present at the time of the filming as to the "checking and operation" of the video equipment; the only testimony purporting to authenticate the tape was evidence that the chain of custody had not been broken; the

State did not call any witnesses to testify that the camera was operating properly or that the information depicted on the videotape was an accurate representation of the events at the time of filming. State v. Sibley, 140 N.C. App. 584, 537 S.E.2d 835, 2000 N.C. App. LEXIS 1243 (2000).

A proper foundation was laid for admission of a videotape of an armed robbery, where the robbery victim and two police officers testified that the taping equipment was operating properly on the day of the robbery, and an officer who viewed the videotape on the day of the robbery and at trial testified that the tape was in the same condition on both occasions. State v. Mewborn, 131 N.C. App. 495, 507 S.E.2d 906 (1998).

Admission of Prejudicial Videotapes Resulted in Reversal. — The defendant's conviction for possession with intent to sell and deliver a controlled substance was reversed where the court's admission of two videotapes—one depicting him handling various weapons and communicating some sort of intimidation or threat and the other showing the defendant holding money, talking on a cell phone and holding a beer—was so prejudicial that their improper admission infected the entire trial proceeding and where the only other evidence presented was that he was arrested in a home containing drugs, as well as seven other people, and that he had $433 in cash, a cell phone and a beeper on his person. State v. Sibley, 140 N.C. App. 584, 537 S.E.2d 835, 2000 N.C. App. LEXIS 1243 (2000).

Admission of Photographs Held Proper. — Trial court's admission of nine photographs of victims' bodies was not error despite defendant's argument that photographs were repetitive and their relevancy was outweighed by their potential to inflame passions of the jury, since each autopsy photograph showed a different wound, and the photographs were not gory or gruesome. State v. Rogers, 323 N.C. 658, 374 S.E.2d 852 (1989).

Photographs of a hole which caused injury to a moped rider were properly admitted into evidence even though they were taken five months after the accident; there was no evidence in the record suggesting that conditions had changed between the time of the accident and the time the photographs were taken. Sellers v. CSX Transp., Inc., 102 N.C. App. 563, 402 S.E.2d 872 (1991).

Chain of Custody. — The chain of custody of a videotape was not broken by its being viewed by a district attorney on the morning of an armed robbery trial, where a police officer who had viewed the tape showing the defendant commit the robbery both on the day of the offense and at trial testified that it was in the same condition and had not been edited. State v. Mewborn, 131 N.C. App. 495, 507 S.E.2d 906 (1998).

Applied in State v. Snyder, 66 N.C. App. 191, 310 S.E.2d 799 (1984); Harris v. Scotland Neck Rescue Squad, Inc., 75 N.C. App. 444, 331 S.E.2d 695 (1985).

Cited in State v. Woods, 56 N.C. App. 193, 287 S.E.2d 431 (1982); State v. Cabey, 307 N.C. 496, 299 S.E.2d 194 (1983); State v. Perry, 69 N.C. App. 477, 317 S.E.2d 428 (1984); City of Statesville v. Cloaninger, 106 N.C. App. 10, 415 S.E.2d 111 (1992); State v. Rourke, 143 N.C. App. 672, 548 S.E.2d 188, 2001 N.C. App. LEXIS 336 (2001).

§§ 8-98 through 8-102: Reserved for future codification purposes.

Article 14.

Chain of Custody.

§ 8-103. Courier service and contract carriers.

For purposes of maintaining a chain of custody for any item of evidence, depositing the item with the State courier service operated by the Department of Administration or a common or contract carrier shall be considered the same as depositing such item in first class United States mail. (1983, c. 375, s. 1.)

§§ 8-104 through 8-109: Reserved for future codification purposes.

ARTICLE 15.

Mediation Negotiations.

§ 8-110. Inadmissibility of negotiations.

(a) Evidence of statements made and conduct occurring during mediation at a community mediation center authorized by G.S. 7A-38.5 shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim, except in proceedings to enforce a settlement of the action. No such settlement shall be binding unless it has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed during mediation.

(b) No mediator shall be compelled to testify or produce evidence in any civil proceeding concerning statements made and conduct occurring in a mediation conducted by a community mediation center authorized by G.S. 7A-38.5. A civil proceeding includes any civil matter in any administrative agency or the General Court of Justice, including a proceeding to enforce a settlement reached at the mediation. For purposes of this subsection, a mediator is a person assigned by the center to conduct the mediation and any staff person employed by the center to provide supervision of that person. This subsection does not excuse a mediator from the reporting requirements of G.S. 7B-301 or G.S. 108A-102.

(c) Except as provided in this subsection, no mediator shall be compelled to testify or produce evidence in any criminal misdemeanor or felony proceeding concerning statements made and conduct occurring in a mediation conducted at a community mediation center authorized by G.S. 7A-38.5. A judge presiding over the trial of a felony may, however, compel disclosure of any evidence unrelated to the dispute that is the subject of the mediation if it is to be introduced in the trial or disposition of the felony and the judge determines that the introduction of the evidence is necessary to a proper administration of justice, and the evidence may not be obtained from any other source. For purposes of this subsection, a mediator is a person assigned by the center to conduct the mediation and any staff person employed by the center to provide supervision of that person. This subsection does not excuse a mediator from the reporting requirements of G.S. 7B-301 or G.S. 108A-102. (1999-354, s. 4.)

Chapter 8A.

Interpreters for Deaf Persons.

§ 8A-1: Recodified as §§ 8B-1 through 8B-9.

Editor's Note. — This Chapter was rewritten by Session Laws 1981, c. 937, s. 1, and has been recodified as Chapter 8B.

Chapter 8B.

Interpreters for Deaf Persons.

Sec.
8B-1. Definitions; right to interpreter; determination of competence.
8B-2. Appointment of interpreters in certain judicial, legislative, and administrative proceedings; removal.
8B-3. Waiver of appointed interpreter.
8B-4. Notice of need for interpreter; proof of deafness.
8B-5. Privileged communications.
Sec.
8B-6. List of interpreters; coordination of interpreter services.
8B-7. Oath.
8B-8. Compensation.
8B-9. Responsibility for payment of funds to implement Chapter.
8B-10. North Carolina Training and Licensing Preparation Program fees.

§ 8B-1. Definitions; right to interpreter; determination of competence.

As used in this Chapter:

(1) "Appointing authority" means the presiding judge or clerk of superior court in a judicial proceeding, or a hearing officer, examiner, commissioner, chairman, presiding officer or similar official in a legislative or administrative proceeding.

(2) "Deaf person" means a person whose hearing impairment is so significant that the individual is impaired in processing linguistic information through hearing, with or without amplification.

(3) "Qualified interpreter" means an interpreter licensed under Chapter 90D of the General Statutes. If the appointing authority finds that a licensed interpreter is not available, an unlicensed interpreter may be called and used as a qualified interpreter if the interpreter's actual qualifications have otherwise been determined to be adequate for the present need. In no event will an interpreter be considered qualified if the interpreter is unable to communicate effectively with and simultaneously and accurately interpret for the deaf person.

A deaf person who does not utilize sign language may request an aural/oral interpreter. Before this interpreter is appointed, the appointing authority shall satisfy itself that the aural/oral interpreter is competent to interpret the proceedings to the deaf person and to present the testimony, statements, and any other information tendered by the deaf person. (1981, c. 937, s. 1; 1997-443, s. 11A.118(a); 2002-182, s. 2; 2003-56, s. 3.)

Editor's Note. — This Chapter is former Chapter 8A, as rewritten by Session Laws 1981, c. 937, s. 1, and recodified. Former Chapter 8A consisted of only a single section, G.S. 8A-1.

Adoption of temporary rules by North Carolina Interpreter and Transliterator Licensing Board. — Session Laws 2003-56, s. 4, provides: "Notwithstanding G.S. 150B-21.1(a)(1), the North Carolina Interpreter and Transliterator Licensing Board may adopt temporary rules to implement S.L. 2002-182 until January 1, 2004."

Legal Periodicals. — For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

CASE NOTES

Cited in State v. McLellan, 56 N.C. App. 101, 286 S.E.2d 873 (1982).

§ 8B-2. Appointment of interpreters in certain judicial, legislative, and administrative proceedings; removal.

(a) When a deaf person is a party to or a witness in any civil or criminal proceeding in any superior or district court of the State, including juvenile proceedings, special proceedings, and proceedings before the magistrate, the court shall appoint a qualified interpreter to interpret the proceedings to the deaf person and to interpret the deaf person's testimony, if any.

(b) When a deaf person is a witness before any legislative committee or subcommittee or legislative research or study committee or subcommittee or commission authorized by the General Assembly, the appointing authority conducting the proceeding shall appoint a qualified interpreter to interpret the proceedings to the deaf person and to interpret the deaf person's testimony.

(c) When a deaf person is a party to or a witness in an administrative proceeding before any department, board, commission, agency or licensing authority of the State, or of any county or city of the State, the appointing authority conducting the proceeding shall appoint a qualified interpreter to interpret the proceedings to the deaf person and to interpret the deaf person's testimony, if any.

(d) If a deaf person is arrested for an alleged violation of criminal law of the State, including a local ordinance, the arresting officer shall immediately procure a qualified interpreter from the appropriate court for any interrogation, warning, notification of rights, arraignment, bail hearing or other preliminary proceeding, but no arrestee otherwise eligible for release on bail under Article 26 of Chapter 15A of the General Statutes shall be held in custody pending the arrival of an interpreter. No answer, statement or admission taken from the deaf person without a qualified interpreter present and functioning is admissible in court for any purpose.

(e) Whenever a juvenile whose parent or parents are deaf is brought before a court for any reason whatsoever, the court shall appoint a qualified interpreter to interpret the proceedings and testimony for the deaf parent or parents, and to interpret any statements or testimony the deaf parent or parents may be called upon to give to the court.

(f) A qualified interpreter shall not be appointed until the appointing authority makes a preliminary determination that the interpreter is able to communicate effectively with and to interpret accurately for the deaf person. If no qualified interpreter can be found who can successfully communicate with this person, he may select his own interpreter without regard to whether the interpreter is "qualified" within the meaning set forth under this statute.

(g) The appointing authority may, on its own motion or on the request of the deaf person, remove an interpreter for inability to communicate or because his services have been waived. (1981, c. 937, s. 1.)

§ 8B-3. Waiver of appointed interpreter.

(a) A deaf person entitled to the services of an interpreter under this Chapter may waive these services. The waiver must be approved in writing by the person's attorney. If the person does not have an attorney, approval must be made in writing by the appointing authority.

(b) A deaf person who has waived an interpreter under this section may provide his own interpreter at his own expense, without regard to whether such interpreter is qualified under this Chapter. (1981, c. 937, s. 1.)

§ 8B-4. Notice of need for interpreter; proof of deafness.

A deaf person entitled to an interpreter under this Chapter shall, if practicable, notify the appropriate appointing authority of his need prior to his appearance. A failure to notify or to request an interpreter is not a waiver of the right to an interpreter. Before appointing an interpreter, an appointing authority may require satisfactory proof of the requesting person's deafness if he has reason to believe the person is not hearing impaired. (1981, c. 937, s. 1.)

§ 8B-5. Privileged communications.

If a communication made by the deaf person through an interpreter is privileged, the privilege extends also to the interpreter. (1981, c. 937, s. 1.)

§ 8B-6. List of interpreters; coordination of interpreter services.

The Department of Health and Human Services shall prepare and maintain an up-to-date list of qualified and available interpreters. A copy of the list shall be provided to each clerk of superior court and to the North Carolina Interpreter and Transliterator Licensing Board created in Chapter 90D of the General Statutes. When requested by an appointing authority to provide an interpreter the Division of Services for the Deaf and the Hard of Hearing shall assist in arranging for an interpreter at the time and place needed through its program of community services for the hearing impaired. (1981, c. 937, s. 1; 1989, c. 533, s. 4; 1997-443, s. 11A.118(a); 2002-182, s. 3; 2003-56, s. 3.)

Adoption of temporary rules by North Carolina Interpreter and Transliterator Licensing Board. — Session Laws 2003-56, s. 4, provides: "Notwithstanding G.S. 150B-21.1(a)(1), the North Carolina Interpreter and Transliterator Licensing Board may adopt temporary rules to implement S.L. 2002-182 until January 1, 2004."

§ 8B-7. Oath.

Before acting, an interpreter shall take an oath or affirmation that he will make a true interpretation in an understandable manner of the proceedings to the person for whom he is appointed and that he will convey the statements of the person in the English language to the best of his skill and judgment. (1981, c. 937, s. 1.)

§ 8B-8. Compensation.

(a) An interpreter appointed under this Chapter is entitled to a reasonable fee for services, including waiting time, time reserved by the courts for the assignment, and reimbursement for necessary travel and subsistence expenses. The fee shall be fixed by the appointing authority who shall consider any fee schedule for interpreters established by the Department of Health and Human Services. Reimbursement for necessary travel and subsistence expenses shall be at rates provided by law for State employees generally.

(b) The fees and expenses of interpreters who serve before any superior or district court criminal and juvenile proceeding are payable from funds appropriated to the Administrative Office of the Courts.

(c) The fees and expenses of interpreters who serve in civil cases and special proceedings are also payable from funds appropriated to the Administrative Office of the Courts.

(d) Fees and expenses of interpreters who serve before a legislative body described in this Article are payable from funds appropriated for operating expenses of the General Assembly.

(e) Fees and expenses of interpreters who serve before any State administrative agency are payable by that agency.

(f) Fees and expenses of interpreters who serve before city or county administrative proceedings are payable by the respective city or county.

(g) Repealed by Session Laws 1995, c. 277, s. 1, effective July 1, 1995. (1981, c. 937, s. 1; 1989, c. 533, s. 5; 1995, c. 277, s. 1; 1997-443, s. 11A.118(a).)

§ 8B-9. Responsibility for payment of funds to implement Chapter.

Responsibility for payment of funds to implement this Chapter rests with the particular entity specified in G.S. 8B-8 whose procedure required the service. (1981, c. 937, s. 2.)

§ 8B-10. North Carolina Training and Licensing Preparation Program fees.

The Division of Services for the Deaf and the Hard of Hearing of the Department of Health and Human Services may charge a fee of no more than fifty dollars ($50.00) to individuals who participate in interpreter training or workshops offered by the North Carolina Training and Licensing Preparation Program. The Division may charge a fee of no more than one hundred dollars ($100.00) for a diagnostic evaluation offered under the Program. This fee is for voluntary diagnostic services only. These fees are to cover the cost of administering the Program and are payable when a participant takes part in a planned activity. (1991, c. 465, s. 1; 1997-443, s. 11A.118(a); 2002-182, s. 4; 2003-56, s. 3.)

Adoption of temporary rules by North Carolina Interpreter and Transliterator Licensing Board. — Session Laws 2003-56, s. 4, provides: "Notwithstanding G.S. 150B-21.1(a)(1), the North Carolina Interpreter and Transliterator Licensing Board may adopt temporary rules to implement S.L. 2002-182 until January 1, 2004."

READY REFERENCE INDEX

A

ABUSED, NEGLECTED OR DEPENDENT JUVENILES, §§7B-100 to 7B-1414.
Basic rights, §§7B-600 to 7B-603.
Definitions, §7B-101.
Discovery, §7B-700.
Dispositions, §§7B-900 to 7B-909.
Expunction from responsible individual's list, §§7B-312 to 7B-316.
Guardian ad litem program, §§7B-1200 to 7B-1204.
Hearing procedures, §§7B-800 to 7B-808.
Jurisdiction, §§7B-200, 7B-201.
Modification and enforcement of dispositional orders, appeals, §§7B-1000 to 7B-1004.
North Carolina child fatality prevention system, §§7B-1400 to 7B-1414.
Prevention of abuse and neglect, §§7B-1300 to 7B-1302.
Purposes, §7B-100.
Records and social reports, §§7B-2900 to 7B-2902.
Screening of abuse and neglect complaints, §§7B-300 to 7B-310.
Temporary custody, nonsecure custody, custody hearings, §§7B-500 to 7B-507.
Termination of parental rights, §§7B-1100 to 7B-1113.
Venue, petition, summons, §§7B-400 to 7B-407.

ADOPTION.
Interstate compact on adoption and medical assistance, §§7B-3900 to 7B-3906.

APPEALS.
Abused, neglected or dependent juveniles, §§7B-1001 to 7B-1004.
Juvenile code, §§7A-664 to 7A-669.
Undisciplined and delinquent juveniles, §§7B-2602 to 7B-2606.

C

CHILD FATALITY PREVENTION SYSTEM, §§7B-1400 to 7B-1414.

CHILD PLACEMENT.
Interstate compact on the placement of juveniles, §§7B-3800 to 7B-3806.
Sending juvenile into state or taking out of state for placement.
  Consent of department of health and human services, §§7B-3700 to 7B-3705.

COMMON LAW.
Declared in force, §4-1.

CONTEMPT.
Civil contempt, §§5A-21 to 5A-25.
Criminal contempt, §§5A-1 to 5A-17.

CONTRIBUTION.
Judgment against joint obligors or joint tort-feasors, §1B-7.
Uniform contribution among tort-feasors act, §§1B-1 to 1B-6.

COSTS.
Judicial department.
  General court of justice.
    Uniform costs and fees in trial divisions, §§7A-304 to 7A-320.

COSTS —Cont'd
Liability for court costs.
  Appeals, §6-33.
  Civil actions and proceedings, §§6-18 to 6-32.
  Criminal actions.
    Liability of counties, §6-40.
    Liability of defendant, §§6-47, 6-48.
    Prosecuting witness, §§6-49, 6-50.
    Witness fees, §§6-51 to 6-62.
  Generally, §§6-1 to 6-7.
  State.
    When state liable for costs, §§6-13 to 6-17.1.

D

DAMAGES.
Punitive damages, §§1D-1 to 1D-50.

DEAF PERSONS.
Interpreters, §§8B-1 to 8B-10.

DELINQUENT AND UNDISCIPLINED JUVENILES.
Computation of recidivism rates, §7B-3300.
Records and social reports.
  Confidentiality, §§7B-3000, 7B-3001.
  Disclosure of juvenile information, §§7B-3100 to 7B-3102.
  Expunction, §§7B-3200 to 7B-3202.

DEPOSITIONS AND DISCOVERY.
Abused, neglected and dependent juveniles, §7B-700.
Juvenile code, §§7A-618 to 7A-621.
Undisciplined and delinquent juveniles, §§7B-2300 to 7B-2303.

DOMESTIC VIOLENCE VICTIM ASSISTANCE ACT, §§7A-474.6 to 7A-474.10.

DRUG TREATMENT COURTS, §§7A-790 to 7A-801.

E

EMANCIPATION, §§7B-3500 to 7B-3509.

EMERGENCY SURGICAL OR MEDICAL TREATMENT FOR JUVENILE.
Judicial authorization, §7B-3600.

EVIDENCE.
Calendars, §8-48.
Chain of custody, §8-103.
Depositions, §§8-74 to 8-83.
Federal officers and employees.
  Findings, records and reports, §§8-37.1 to 8-37.3.
Fraud, duress or undue influence, §8-45.5.
Grants, deeds and wills, §§8-6 to 8-33.
Life tables, §§8-46, 8-47.
Mediation negotiations, §8-110.
Perpetuation of testimony, §8-85.
Photographic copies of business and public records, §§8-45.1 to 8-45.4.
Photographs, §8-97.
Privileged communications, §§8-53 to 8-57.1.
Records.
  Findings, records and reports of federal officers and employees, §§8-37.1 to 8-37.3.

EVIDENCE —Cont'd
Records —Cont'd
  Photographic copies of business and public records, §§8-45.1 to 8-45.4.
  Public records, §§8-34 to 8-37.
Statutes, §§8-1 to 8-5.
Witnesses.
  Attendance, §§8-59 to 8-64.
  Competency, §§8-49 to 8-58.1.
Writings, §§8-38 to 8-45.

EXPUNCTION OF JUVENILE RECORDS, §§7B-3200 to 7B-3202.

F

FOREIGN-MONEY CLAIMS ACT, §§1C-1820 to 1C-1835.

FOREIGN MONEY JUDGMENTS RECOGNITION, §§1C-1800 to 1C-1808.

FORENSIC EVIDENCE, ADMISSIBILITY, §8-58.20.

G

GUARDIAN AD LITEM PROGRAM.
Abused, neglected or dependent juveniles, §§7B-1200 to 7B-1203.

H

HEARINGS.
Abused, neglected or dependent juveniles, §§7B-800 to 7B-808.
Undisciplined and delinquent juveniles, §§7B-2400 to 7B-2414.

I

INDIGENT PERSONS.
Judicial department.
  Representation of indigent persons.
    Access to civil justice act, §§7A-474.1 to 7A-474.5.
    Custody and visitation mediation, §§7A-494, 7A-495.
    Entitlement of indigent persons generally, §§7A-450 to 7A-458.
    Guardian ad litem program, §§7A-489 to 7A-493.
    Indigent defense services act, §§7A-498 to 7A-498.8.
    Public defender, §§7A-465 to 7A-471.

INTERPRETERS FOR DEAF PERSONS, §§8B-1 to 8B-10.

INTERSTATE COMPACT FOR JUVENILES, §§7B-4000 to 7B-4002.

INTERSTATE COMPACT ON ADOPTION AND MEDICAL ASSISTANCE, §§7B-3900 to 7B-3906.

INTERSTATE COMPACT ON JUVENILES, §§7B-2800 to 7B-2827.

INTERSTATE COMPACT ON THE PLACEMENT OF JUVENILES, §§7B-3800 to 7B-3806.

J

JUDGMENTS.
Enforcement of judgments.
  Exempt property, §§1C-1601 to 1C-1604.

JUDGMENTS —Cont'd
Enforcement of judgments —Cont'd
  Foreign judgments, §§1C-1701 to 1C-1708.
    Money judgments recognition, §§1C-1800 to 1C-1808.
  Foreign-money claims, §§1C-1820 to 1C-1835.
Joint obligors or joint tort-feasors.
  Judgment against, §1B-7.

JUDICIAL DEPARTMENT, §§7A-1, 7A-2.
Administrative hearings.
  Office of administrative hearings, §§7A-750 to 7A-760.
Administrative office of the courts, §§7A-340 to 7A-348.
Conference of district attorneys, §§7A-410 to 7A-414.
Costs.
  General court of justice.
    Uniform costs and fees in trial divisions, §§7A-304 to 7A-320.
Expenses, §§7A-300 to 7A-303.
General court of justice.
  Appellate division.
    Court of appeals, §§7A-16 to 7A-21.
    Jurisdiction, §§7A-25 to 7A-39.
    Organization, §§7A-5 to 7A-7.
    Retirement of judges and justices, §§7A-39.1 to 7A-39.15.
    Supreme court, §§7A-10 to 7A-14.
  Civil causes.
    Institution, docketing and transferring in trial divisions, §§7A-255 to 7A-260.
    Original civil jurisdiction of trial divisions, §§7A-240 to 7A-253.
  Complex business cases, §§7A-45.3, 7A-45.4.
  Conference of clerks of superior court, §§7A-805 to 7A-808.
  Costs and fees.
    Uniform costs and fees in trial divisions, §§7A-304 to 7A-320.
  Delinquency prevention and youth services, §§7A-289.13 to 7A-289.16.
  District court division.
    Clerical functions, §§7A-180 to 7A-183.
    Creation and organization, §§7A-130 to 7A-135.
    Criminal appeals from district courts.
      Jurisdiction and procedure, §7A-290.
    Judges, §§7A-140 to 7A-149.
    Magistrates, §§7A-170 to 7A-178.
    Powers of judges and magistrates.
      Additional powers, §§7A-291 to 7A-293.
    Practice and procedure, §§7A-190 to 7A-200.
    Small claim actions, §§7A-210 to 7A-232.
  Judges and justices.
    Age limits for service as, §§7A-4.20, 7A-4.21.
  Judicial power and organization, §§7A-3, 7A-4.
  Jurisdiction.
    Criminal actions.
      Jurisdiction of trial divisions, §§7A-270 to 7A-274.
    Criminal appeals from district courts, §7A-290.
    Original civil jurisdiction of trial divisions, §§7A-240 to 7A-253.
  Juvenile services, §§7A-289.1 to 7A-289.6.
  Orders.
    Prohibited orders, §7A-276.1.
  Superior court division.
    Clerk of superior court, §§7A-100 to 7A-113.
    District attorneys and judicial districts, §§7A-60 to 7A-69.

JUDICIAL DEPARTMENT —Cont'd
General court of justice —Cont'd
  Superior court division —Cont'd
    Organization, §§7A-40 to 7A-49.4.
    Retirement of judges, §§7A-50 to 7A-57.
    Special regulations, §§7A-95, 7A-96.
  Termination of parental rights, §§7A-289.22 to 7A-289.34.
Indigent persons.
  Representation of indigent persons.
    Access to civil justice, §§7A-474.1 to 7A-474.5.
    Custody and visitation mediation, §§7A-494, 7A-495.
    Entitlement of indigent persons generally, §§7A-450 to 7A-458.
    Guardian ad litem program, §§7A-489 to 7A-493.
    Indigent defense services act, §§7A-498 to 7A-498.8.
    Public defender, §§7A-465 to 7A-471.
Judicial standards commission, §§7A-374.1 to 7A-378.
Juvenile code, §§7A-516 to 7A-744.
North Carolina courts commission, §§7A-506 to 7A-510.
Sentencing services program, §§7A-770 to 7A-777.
Trial court administrators, §§7A-355, 7A-356.

JUDICIAL STANDARDS COMMISSION, §§7A-374.1 to 7A-378.

JURISDICTION.
Abused, neglected or dependent juveniles, §§7B-200, 7B-201.
Undisciplined and delinquent juveniles, §§7B-1600 to 7B-1604.

JUVENILE CODE.
Abuse, neglect, dependency.
  Basic rights, §§7B-600 to 7B-603.
  Child fatality prevention system, §§7B-1400 to 7B-1414.
  Discovery, §7B-700.
  Dispositions, §§7B-900 to 7B-910.
    Modification and enforcement of dispositional orders, appeals, §§7B-1000 to 7B-1004.
  Expunction from responsible individual's list, §§7B-312 to 7B-316.
  Guardian ad litem program, §§7B-1200 to 7B-1204.
  Hearing procedures, §§7B-800 to 7B-808.
  Jurisdiction, §§7B-200, 7B-201.
  Juvenile records and social reports, §§7B-2900 to 7B-2902.
  Prevention of abuse and neglect, §§7B-1300 to 7B-1302.
  Purposes, definitions, §§7B-100, 7B-101.
  Screening of complaints, §§7B-300 to 7B-311.
  Temporary custody, nonsecure custody, custody hearings, §§7B-500 to 7B-508.
  Termination of parental rights, §§7B-1100 to 7B-1113.
  Venue, petitions, §§7B-400 to 7B-408.
Emancipation, §§7B-3500 to 7B-3509.
Emergency surgical or medical treatment.
  Judicial consent, §7B-3600.
Interstate compact for juveniles, §§7B-4000 to 7B-4002.
Juvenile records and social reports.
  Abuse, neglect, dependency, §§7B-2900 to 7B-2902.
  Disclosure of juvenile information, §§7B-3100, 7B-3101.
  Expunction of juvenile records, §§7B-3200 to 7B-3202.
  Undisciplined and delinquent juveniles, §§7B-3000, 7B-3001.
Parental authority over juveniles, §§7B-3400 to 7B-3404.
Placement of juvenile delinquents or dependents, §§7B-3700 to 7B-3705.
  Interstate compact on adoption and medical assistance, §§7B-3900 to 7B-3906.

JUVENILE CODE —Cont'd
Placement of juvenile delinquents or dependents —Cont'd
  Interstate compact on the placement of children, §§7B-3800 to 7B-3806.
Undisciplined and delinquent juveniles.
  Authority over parents of adjudicated juveniles, §§7B-2700 to 7B-2706.
  Basic rights, §§7B-2000 to 7B-2002.
  Discovery, §§7B-2300 to 7B-2303.
  Dispositions, §§7B-2500 to 7B-2517.
    Modification and enforcement of dispositional orders, appeal, §§7B-2600 to 7B-2606.
  Hearing procedures, §§7B-2400 to 7B-2414.
  Interstate compact on juveniles, §§7B-2800 to 7B-2827.
  Jurisdiction, §§7B-1600 to 7B-1604.
  Juvenile records and social reports, §§7B-3000, 7B-3001.
  Law enforcement proceedings, delinquency proceedings, §§7B-2100 to 7B-2109.
  Probable cause hearing and transfer hearing, §§7B-2200 to 7B-2204.
  Purpose, definitions, §§7B-1500, 7B-1501.
  Screening complaints, §§7B-1700 to 7B-1707.
  Temporary custody, secure and nonsecure custody, custody hearing, §§7B-1900 to 7B-1907.
  Venue, petition, summons, §§7B-1800 to 7B-1808.

JUVENILE RECORDS AND SOCIAL REPORTS, §§7B-2900 to 7B-2902.

M

MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS, §§7A-38.1 to 7A-38.3A.

MEDICAL ASSISTANCE.
Interstate compact on adoption and medical assistance, §§7B-3900 to 7B-3906.

N

NONTESTIMONIAL IDENTIFICATION.
Undisciplined and delinquent juveniles, §§7B-2102 to 7B-2109.

NORTH CAROLINA CHILD FATALITY PREVENTION SYSTEM, §§7B-1400 to 7B-1414.

O

OFFICE OF ADMINISTRATIVE HEARINGS, §§7A-750 to 7A-760.

P

PARENTAL AUTHORITY OVER JUVENILE, §§7B-3400 to 7B-3404.

PETITIONS.
Abused, neglected or dependent juveniles, §§7B-401 to 7B-405.
Undisciplined and delinquent juveniles, §§7B-1802 to 7B-1804.

PLACEMENT OF JUVENILES.
Interstate compact on the placement of juveniles, §§7B-3800 to 7B-3806.
Sending juvenile into state or taking out of state for placement.
  Consent of department of health and human services, §§7B-3700 to 7B-3705.

PUNITIVE DAMAGES, §§1D-1 to 1D-50.

S

SETTLEMENT CONFERENCES.
Mediated conferences in superior court civil actions, §§7A-38.1 to 7A-38.3A.

SUMMONS.
Abused, neglected or dependent juveniles, §§7B-406, 7B-407.
Undisciplined and delinquent juveniles, §§7B-1805, 7B-1806.

T

TERMINATION OF PARENTAL RIGHTS, §§7B-1100 to 7B-1113.

U

UNDISCIPLINED AND DELINQUENT JUVENILES, §§7B-1500 to 7B-2827.
Authority over parents of juveniles adjudicated delinquent or undisciplined, §§7B-2700 to 7B-2706.
Basic rights, §§7B-2000 to 7B-2002.
Definitions, §7B-1501.
Discovery, §§7B-2300 to 7B-2303.
Dispositions, §§7B-2500 to 7B-2516.
Hearing procedures, §§7B-2400 to 7B-2414.
Interstate compact for juveniles, §§7B-4000 to 7B-4002.
Interstate compact on juveniles, §§7B-2800 to 7B-2827.
Jurisdiction, §§7B-1600 to 7B-1604.
Law enforcement procedures in delinquency proceedings, §§7B-2100 to 7B-2109.
Modification and enforcement of dispositional orders, appeals, §§7B-2600 to 7B-2606.
Probable cause hearing and transfer hearing, §§7B-2200 to 7B-2204.
Purpose, §7B-100.
Screening of delinquency and undisciplined complaints, §§7B-1700 to 7B-1707.
Temporary custody, secure and nonsecure custody, §§7B-1900 to 7B-1907.
Venue, petitions, summons, §§7B-1800 to 7B-1808.

V

VENUE.
Abused, neglected or dependent juveniles, §7B-400.
Undisciplined and delinquent juveniles, §7B-1800.

W

WITNESSES.
Fees, §§6-51 to 6-62.

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